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Spectrum Health–Kent Community Campus and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO, and its Local 2600.
Cases 7–CA–50996 and 7–CA–51112

February 26, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On September 4, 2008, Administrative Law Judge David I. Goldman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed an answering brief.

The National Labor Relations Board¹ has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge’s rulings, findings,² and conclusions³ and to adopt the recommended Order.

REMEDY

For the reasons set forth in *Caterair International*, 322 NLRB 64 (1996), we find that an affirmative bargaining order is warranted in this case as a remedy for the Respondent’s unlawful withdrawal of recognition. The Board has held that an affirmative bargaining order is “the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees.” *Id.* at 68.⁴

¹ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board’s powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

² The Respondent states that the judge’s rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge’s decision and the entire record, we are satisfied that the Respondent’s contentions are without merit.

³ In adopting the judge’s decision, we do not rely on his finding that the January 1, 2005 date on the contract’s cover was an inadvertent mistake.

Member Schaumber agrees that the term of the collective-bargaining agreement was ambiguous, and thus consideration of parol evidence was appropriate. Although Member Schaumber does not find the parol evidence conclusive, it is sufficient to meet the General Counsel’s burden in this case.

⁴ Member Schaumber does not agree with the view expressed in *Caterair International* that an affirmative bargaining order is “the traditional, appropriate remedy” for an 8(a)(5) violation. He agrees with the District of Columbia Circuit that a case-by-case analysis is required to

In several cases, however, the U.S. Court of Appeals for the District of Columbia Circuit has required that the Board justify, on the facts of each case, the imposition of such an order. See, e.g., *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Bldg. Material v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); and *Exxel/Atmos v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). Although the judge recommended an affirmative bargaining order to remedy the Respondent’s unlawful withdrawal of recognition, he did not justify imposition of such an order as required by the U.S. Court of Appeals for the District of Columbia Circuit. Thus, for the reasons stated below, we agree with the judge that an affirmative bargaining order is warranted on the facts of this case.

In *Vincent*, *supra*, the court summarized its requirement that an affirmative bargaining order “must be justified by a reasoned analysis that includes an explicit balancing of three considerations: ‘(1) the employees’ Section 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act.’” *Id.* at 738.

Consistent with the court’s requirement, we have examined the particular facts of this case as the court requires and find that a balancing of the three factors warrants an affirmative bargaining order.

(1) An affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining by the Respondent’s withdrawal of recognition and resulting refusal to collectively bargain with the Union. At the same time, an affirmative bargaining order, with its attendant bar to raising a question concerning the Union’s continuing majority status for a reasonable time, does not unduly prejudice the Section 7 rights of employees who may oppose continued union representation, because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violation. Since the Union was never given an opportunity to reach a successor agreement with the Respondent, it is only by restoring the status quo ante and requiring the Respondent to bargain with the Union for a reasonable period of time that the employees will be able to fairly assess for themselves the Union’s effectiveness as a bargaining representative.

(2) An affirmative bargaining order also serves the policies of the Act by fostering meaningful collective

determine if the remedy is appropriate. *Alpha Associates*, 344 NLRB 782, 787 fn. 14 (2005). He recognizes, however, that the view expressed in *Caterair International* represents extant Board law. See *Flying Foods*, 345 NLRB 101, 109 fn. 23 (2005).

bargaining and industrial peace. That is, it removes the Respondent's incentive to delay bargaining in the hope of discouraging support for the Union. It also ensures that the Union will not be pressured by the Respondent's withdrawal of recognition to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and issuance of a cease-and-desist order. Providing this temporary period of insulated bargaining will also afford employees a fair opportunity to assess the Union's performance in an atmosphere free of the Respondent's unlawful conduct.

(3) A cease-and-desist order, alone, would be inadequate to remedy the Respondent's withdrawal of recognition and refusal to bargain with the Union because it would allow another such challenge to the Union's majority status before the taint of the Respondent's previous unlawful withdrawal of recognition dissipated. Allowing another challenge to the Union's majority status without a reasonable period for bargaining would be particularly unfair in light of the fact that the litigation of the Union's charges took several months and, as a result, the Union needs to reestablish its representative status with unit employees. Indeed, permitting a decertification petition to be filed immediately might very well allow the Respondent to profit from its own unlawful conduct. We find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose continued union representation.

For all the foregoing reasons, we find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the violations in this case.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Spectrum Health–Kent Community Campus, Grand Rapids, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. February 26, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

A. Bradley Howell, Esq. (Region 7, NLRB) of Grand Rapids, Michigan, for the General Counsel.

Peter J. Kok, Esq. and Nathan D. Plantinga, Esq. (Miller Johnson) of Grand Rapids, Michigan, for the Respondent.
Georgi-Ann Bargamian, Esq. (UAW Legal Department) of Detroit, Michigan, for the Charging Party.

DECISION

INTRODUCTION

DAVID I. GOLDMAN, Administrative Law Judge. These cases involve an employer that withdrew recognition from its employees' union during the term of a collective-bargaining agreement, repudiated the collective-bargaining agreement, and unilaterally implemented changes to the terms and conditions of employment. The employer took these steps after it received a petition from the majority of its employees declaring that they no longer wanted to be represented by the union.

Under well-settled precedent a union enjoys an irrebuttable presumption of majority support for so much of the term of a labor contract that is a "reasonable length"—for many years interpreted by the Board as up to three years. During the first three years of a contract, evidence of an ebb in employee support for the union does not provide a basis for employer "self help"—i.e., unilateral withdrawal of recognition of the union—any more than a midterm ebb in support for a president or congressman permits their ouster.

The contract in this case was agreed to, ratified, executed, and by its terms "effective" in April 2005. It was scheduled to expire at 12:01 a.m. April 1, 2008. Accordingly, contend the union and the General Counsel, the employer's January 2008 withdrawal of recognition was not permitted under longstanding Board precedent not disputed by the employer.

This would end the matter, however, the employer points to the cover page of the contract. On the cover page, across the bottom, are the words, "Date of Agreement: January 1, 2005 through March 31, 2008." This language, argues the employer, unambiguously shows that the contract had a term that began January 1, 2005, and concluded at the end of March 31, 2008. Accordingly, contends the employer, when confronted with evidence of a lack of majority support for the union in January 2008, the irrebuttable presumption of majority support had lapsed and the employer was free, indeed, required, to withdraw recognition from the union, repudiate the contract, and, thereafter, free to unilaterally alter terms and conditions of employment.

Alternatively, the employer contends that if the cover page renders the contract's term ambiguous and unclear, then the irrebuttable presumption of majority support was ineffective as a matter of law. Looking to principles utilized by the Board in applying its representational contract bar doctrine, the employer argues that ambiguity in the written document precludes reliance on the irrebuttable presumption of majority support to bar the withdrawal of recognition.

STATEMENT OF THE CASE

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), and its Local 2600 (collectively, the Union or UAW) filed an unfair labor practice charge against Spectrum Health–Kent Community Campus (the Hospital or Spectrum) on January 15, 2008,

docketed as Case GR–7–CA–50996. The Union filed an amended charge in the case on March 4, 2008. Based on the charge and amended charge, on March 6, 2008, the Regional Director of Region 7 of the National Labor Relations Board (Board), acting on behalf of the Board’s General Counsel, filed a complaint against the Hospital alleging violations of Section 8(a)(1) and (5) of the Act. The Hospital filed a timely answer to the complaint denying all violations of the Act. On March 10, 2008, the Union filed an additional charge against the Hospital, docketed as GR–7–CA–51112. On April 9, 2008, the Regional Director issued an Order consolidating the two cases and issued a consolidated amended complaint alleging violations of 8(a)(1), (3), and (5) of the Act. The Hospital filed a timely answer to the consolidated complaint denying all violations of the Act.

This dispute was heard in Grand Rapids, Michigan, on June 10, 2008. Counsel for the General Counsel, the Union, and Respondent filed briefs in support of their positions on August 8, 2008. On the entire record, I make the following findings of fact, conclusions of law, and recommendations.

JURISDICTION

The complaint alleges, Spectrum admits, and I find that Spectrum is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act. The complaint alleges, Spectrum admits, and I find that the UAW and Local 2600 are labor organizations within the meaning of Section 2(5) of the Act.

ALLEGED UNFAIR LABOR PRACTICES

Facts

Background

Respondent operates a hospital in Grand Rapids, Michigan, where it provides specialized long term acute care, more general long term care, sub-acute care, and outpatient neurological services.

Since about October 1999, and continuing through January 7, 2008, when Spectrum withdrew recognition, the Union had been the designated exclusive collective-bargaining representative of a bargaining unit of Spectrum’s employees.¹

¹ This bargaining unit consisted of the following:

All full-time and regular part-time employees occupying the classifications of Activity Aide, Administrative Services Tech, Assessment Counselor, BS & MSW Social Worker, Carpenter, Cashier, CNA (Certified Nurses Aide), CNA-Restorative, COTA (Certified Occupational Therapy Assistant), Cook, CSR Technician, Customer Service Representative, Environmental Services Tech I, Environmental Services Tech II, Food Service Team Leader, Food Service Worker, Laundry/Linen Tech, Licensed Practical Nurse, LPN-Restorative, Maintenance Repair Worker, Medical Secretary, Nursing Tech, Occupational Therapist, Primary Counselor, Receptionist, Recreational Technician, Recreational Therapist, Restorative Technician, Shipping/Inventory Worker, Support Counselor, and Unit Support Assistant employed by Respondent at its Kent Community Campus facility; but excluding all executive, supervisory, confidential, professional, irregular, seasonal, and temporary employees, guards, student interns, all employees classified as Registered Nurses, and all other employ-

The 2002 and 2005 Agreements

The parties have entered into successive collective-bargaining agreements covering the bargaining unit, the most recent of which was executed April 15, 2005 (the 2005 Agreement or the Agreement).

The collective-bargaining agreement preceding the 2005 Agreement was effective by its terms from January 1, 2002, through December 31, 2004 (the 2002 Agreement). The 2002 Agreement states at the bottom of the cover page:

“Date Of Agreement: January 1, 2002 Through December 31, 2004”

Consistent with this legend, the initial paragraph of the agreement, under the heading “AGREEMENT,” states,

This is an Agreement by and between SPECTRUM HEALTH – KENT COMMUNITY CAMPUS (“Hospital”) and LOCAL 2600, THE INTERNATIONAL UNION , UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (“Union”), effective January 1, 2002.

Again, consistent with the legend on the cover page, the “Termination” provision of the 2002 Agreement states, in relevant part: “This Agreement shall remain in force until midnight, December 31, 2004 . . .”

The Hospital and the Union began negotiating the successor agreement to the 2002 Agreement on November 3, 2004.

In the process of bargaining for the new agreement, the Hospital and the Union agreed to extend the 2002 Agreement to January 15, 2005. The contract extension expired on January 15, 2005, and the parties did not agree to extend the contract beyond January 15, 2005. Between January 15, 2005, and April 13, 2005—the date that the 2005 Agreement was ratified—there was no collective-bargaining agreement in effect.

On January 14, 2005, The Hospital provided the Union with a draft contract embodying what it referred to as its final proposal, which, with a few new changes, had been submitted to the Union on January 7, 2005. The draft contract had changes from the 2002 Agreement in shaded text, and the draft was referred to as the “blue draft” or “blue paper,” apparently because it was printed on blue paper. This draft contract indicated an effective date of January 1, 2005, and a termination date of 12:01 a.m., November 2, 2007. Consistent with this, the legend across the bottom of the cover page of the draft contract stated: “Date Of Agreement: January 1, 2005 Through November 1, 2007.”

On February 7, 2005, the Union submitted the Hospital’s final offer to its membership for ratification. The membership rejected the proposal. Subsequently, on March 2, 2005, the Hospital proposed changes to its earlier final proposal with regard to overtime, retiree benefits, and one job classification. In all other respects, the Hospital’s amended final offer renewed “its Final Offer as reflected in its January 14, 2005, draft collective-bargaining agreement (blue paper).” Further negotiations followed.

According to the “minutes” of the March 23, 2005 negotia-

ees.

tions session prepared by the Hospital's lead negotiator, Joseph Martin, during that meeting the following exchange occurred:

Noting that the parties' tentative agreement that the collective-bargaining agreement will expire on November 2, 2007, Joe Martin asked whether the parties should consider instead entering into a 3 year agreement which would expire three years after ratification/final approval by the Union. The parties will consider this possibility, but absent agreement to the contrary, the contract would expire as previously agreed (i.e.: November 2, 2007).

On March 31, 2005, the parties had their final bargaining session. Spectrum proposed revised wage and health insurance provisions, including wage increases for current employees that would be retroactive to January 1, 2005, if the agreement was approved within a still-to-be determined date in the near future. The March 31 proposal stated, in part, that wages for current employees would be

[r]etroactive to January 1, 2005, if final contract approval by the Union occurs by _____ (April 7?). Hospital offer of retroactivity automatically expires after that date. [original emphasis]."

Spectrum's March 31 proposal for future hires was different. It provided, inter alia:

Annual increase dates to be as of anniversaries of contract effective date, not "January 1".

In addition, Spectrum's March 31 proposal included health insurance changes, including provisions applying to employee retiring after January 1, 2005, and a capping of premiums at certain levels between January 1 and December 31, 2005.

By the end of the March 31 meeting the parties reached tentative agreement on a new contract, subject to ratification. The tentative agreement included proposals on retroactivity offered by the Hospital. On April 13, 2005, the Union membership voted in favor of approving this tentative agreement. On April 14, 2005, the Hospital's lead negotiator Martin forwarded a draft of the collective-bargaining agreement to the Union. On April 14, 2005, the Hospital and the Union executed the agreement. Upon its implementation, following ratification, negotiated wage increases for "incumbent employees" were made retroactive to January 1.

The initial paragraph of the 2005 Agreement, under the heading "AGREEMENT," states,

This is an Agreement by and between SPECTRUM HEALTH – KENT COMMUNITY CAMPUS ("Hospital") and LOCAL 2600, THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA ("Union"), effective April 13, 2005.

The "Termination" provision of the 2005 Agreement states, in relevant part:

"This Agreement shall remain in force until 12:01 a.m., April 1, 2008 . . ."

Stated across the bottom of the cover page of the 2005 Agreement is the following:

"Date Of Agreement: January 1, 2005 Through March 31, 2008."

The January 2008 Withdrawal of Recognition and Subsequent Events

The Hospital withdrew recognition from the Union on January 7, 2008, during the term of the 2005 Agreement. The Hospital took this step based on its receipt of a petition signed by a majority of the bargaining unit.²

The next day, on January 8, the Hospital mailed a letter to all bargaining unit employees addressed to "Former UAW Staff." The letter was also posted in the facility on January 8. The letter stated in part: "The current UAW contract will no longer be in effect." Attached to that letter was a list of "Frequently Asked Questions" accompanied by answers provided by the Hospital. On the question of dues the attachment stated that dues would no longer be deducted from employee paychecks, effective "immediately." The Hospital did stop deducting dues from employee paychecks on January 8, 2008. Following its withdrawal of recognition, the Hospital denied a grievance filed under the collective-bargaining agreement on the basis that the issue would be handled under its (nonbargained) "fair treatment policy."

The Hospital held meetings for all employees beginning January 8. These meetings took place primarily on January 8 and 9, and were conducted by top Hospital officials. A few additional meetings with employees who were not in attendance on January 8 and 9 were held on January 10–12. The Hospital informed employees at these meetings that it had withdrawn recognition from the Union because it had received a petition signed by a majority of the bargaining unit. Spectrum also stated that it was considering annual spring wage and benefit adjustments.

During the week of February 25, 2008, the Hospital posted in its facility a notice of "Town Hall Meetings" to be held on March 3 and March 7. The notice promised "Exciting News For Former UAW Staff." It stated:

Please, mark your calendar now!

You are invited to attend one of these Town Hall meetings to hear about the exciting changes that will affect you!

On March 3 and 7, the Hospital held the town hall meetings with employees at which it announced that it had implemented (effective March 2) the following changes to the employees' wages and benefits: an across-the-board wage increase of 4.25 percent; an additional 2 percent increase to all employees who scored 3.5 or better on their performance evaluations from the prior year; 1.5 times the base rate for holiday hours worked instead of a 65 cents per hour holiday wage premium; an increase in weekday shift premiums from 65 cents per hour to \$1 per hour for the 3 p.m. to 11 p.m. shift and the 11 p.m. to 7 a.m. shift; an increase in weekend shift premiums from 65 cents per hour to \$1.50 per hour for all shifts worked from 3 p.m. Friday

² Although the petition is not in the record, the General Counsel concedes, and the Union does not dispute, that the petition indicated that the employees did not want to be represented by the Union. The parties disagree on whether the petition was signed by 142 or 143 of the 277 bargaining unit employees.

to 7 a.m. Monday; a reduction from 12 to 6 months in the eligibility waiting period for the Hospital's short term disability plan; and movement of the bargaining unit employees into the established pay ranges that existed for the Hospital's nonunion employees.

At the meetings, Hospital officials also made reference to additional possible wage adjustments in October 2008.

On March 17, the Hospital mailed a "Fact Sheet" to each employee which detailed the changes to the individual's pay and identified his or her new pay rate.

On March 19, the Hospital mailed a letter to all employees addressed to "Former UAW Staff." This letter identified changes in wages and benefits. It also referenced the likelihood of a further pay increase in October 2008. The letter stated:

Finally, please note that all [Spectrum] non-union staff normally receives a pay increase in October. We will also move you to the October pay cycle at which time your compensation and performance will be evaluated. As such, you may expect another compensation adjustment in October.

Legal Analysis

a. The Withdrawal of Recognition

The Supreme Court has recognized that "[t]he object of the National Labor Relations Act is industrial peace and stability, fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes between workers and employers." *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785 (1996). In furtherance of this objective, a core requirement of the Act is that an employer must recognize and bargain with the designated exclusive representative of an appropriate bargaining unit of employees. An employer's failure to do so constitutes a per se violation of Section 8(a)(5) of the Act.

The precondition for a union's service as a bargaining unit's exclusive representative is the existence of majority support for the union within the unit. *Auciello Iron Works*, 517 U.S. at 785–786. This reflects "the Act's clear mandate to give effect to employees' free choice of bargaining representatives." *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 720 (2001). However,

[t]he Board has also recognized that, for employees' choices to be meaningful, collective-bargaining relationships must be given a chance to bear fruit and so must not be subject to constant challenges. Therefore from the earliest days of the Act, the Board has sought to foster industrial peace and stability in collective-bargaining relationships, as well as employee free choice, by presuming that an incumbent union retains its majority status.

Levitz, supra at 720.

The presumption of majority support is usually rebuttable, but in some periods of a collective-bargaining relationship it is conclusive. One such period is during the life of a collective-bargaining agreement up to three years. Thus, it is a "long-established principle that a union enjoys an irrebuttable presumption of majority support during the term of a collective-bargaining agreement, up to 3 years." *Trailmobile Trailer, LLC*, 343 NLRB 95, 97 (2004); *Levitz*, supra at fn. 17 ("a un-

ion's majority status may not be questioned during the life of a collective-bargaining agreement up to 3 years"); *Auciello Iron Works*, 517 U.S. at 791 (rejecting an exception "to the conclusive presumption [of majority support] arising at the moment a collective-bargaining contract offer has been accepted"). See, *Shaw's Supermarkets*, 350 NLRB No. 55 (2007) (employer may rely on evidence of (untainted) actual loss of majority support to withdraw recognition *after* the third year of a contract of longer duration). This presumption works in tandem with and conforms to Section 8(d) of the Act, which provides that when a collective-bargaining agreement is in effect "the duty to bargain collectively shall also mean that no party to such contract shall [unilaterally] terminate or modify such contract." 29 U.S.C. § 158(d).

Here, Respondent offers (R. Br. at 13), correctly, that "[t]he central issue in this case is the term of the Agreement." If the term of the 2005 Agreement began more than three years before the January 7, 2008 withdrawal of recognition, the irrebuttable presumption of majority support had lapsed and would not bar the withdrawal. However, if the term of the Agreement had begun within three years of the withdrawal of recognition, the irrebuttable presumption of majority support rendered the withdrawal of recognition unlawful.

Second, and alternatively, the Hospital contends that if the term of the 2005 Agreement cannot unambiguously be gleaned from the four corners of the agreement, the irrebuttable presumption of majority support cannot be relied upon to bar the withdrawal of recognition.

1. Had the term of the 2005 Agreement run beyond the three year irrebuttable-presumption-of-majority-support period when the employer withdrew recognition in January 2008?

As discussed, the irrebuttable presumption of majority support bars a unilateral employer withdrawal of recognition during the first three years of a collective bargaining agreement. The parties dispute whether the 2005 Agreement was within the three year period when the Hospital withdrew recognition on January 7, 2008.

In determining the term of the Agreement, of importance, of course, is that the 2005 Agreement states that it was "effective" as of April 13, 2005. It became binding and fully accepted upon ratification on that day. These facts are undisputed. Moreover, it is also undisputed that there was no collective-bargaining agreement in effect from January 16, 2005 to April 13, 2005, when the 2005 Agreement became effective. While particular provisions of the 2005 Agreement are expressly designated as being retroactive to January 1, 2005, the effective date of the Agreement is not.

However, there is the question of the import of the cover page of the 2005 Agreement that states, "Date Of Agreement: January 1, 2005 Through March 31, 2008." Respondent contends that *this* (and nothing else in the agreement) unambiguously states the term of the Agreement and is just one more of several provisions of the 2005 Agreement retroactive to January 1, 2005.

Although Respondent's vigorous characterization of the

cover page language crosses from enthusiasm to hyperbole,³ it is true that were the 2005 Agreement silent about its effective date and termination date Respondent's argument would have more force. But the 2005 Agreement is not silent. The opening sentence of the 2005 Agreement states that "[this is an Agreement . . . effective April 13, 2005." The Agreement's "Termination" provision states that "This Agreement shall remain in force until 12:01 a.m., April 1, 2008." These provisions—which are at least as, if not more probative of the Agreement's term than the cover page legend⁴—render untenable the Hospital's claim (R. Br. at 10), that the 2005 Agreement *unambiguously*, and based solely on the cover page legend, was a contract commencing January 1, 2005, and lasting for more than 3 years.

The Hospital attempts to avoid the conclusion that the combination of the cover page dates and the effective/termination clauses render the Agreement's term ambiguous with an exceedingly strained construction of the Agreement. Respondent contends (R. Br. at 21) that while the contract first became "effective" on April 13, the cover page dates evidence the parties' intent to negotiate an Agreement that (retroactively) was intended to begin its term on January 1, 2005, and terminate at the end of March 31, 2008. Thus, Respondent draws a distinction between the effective date and termination date of the Agreement, on the one hand, and the term of the Agreement, on the other. As explained (Tr. 26) by counsel at the hearing:

The agreement of the parties became effective on April 13, 2005, which is what this document says. That date says nothing about the term of the agreement. There is only one place in the four corners of this agreement where the term is spelled out, the beginning and the ending, only one place, and that's right on the front page. That's it.

This argument is extraordinary. As the Board has recognized in the somewhat different circumstances of applying its contract bar doctrine to an election petition: "[t]he term of a contract technically embraces the effective term provided in the instrument." *Ben Franklin Paint & Varnish Co.*, 124 NLRB 54, 55 (1959). As Respondent concedes, the express effective term in this Agreement is April 13, 2005. Respondent's claim is wholly untenable as grounds for claiming the 2005 Agreement *unambiguously* sets the term of the Agreement as January 1, 2005, to March 31, 2008. It relies on a supposed distinction between the effective/termination dates expressly stated in the contract, on the one hand, and the alleged term of the agreement on the other. That such a novel distinction was intended by the parties is anything but unambiguous in the 2005 Agreement. Indeed, given that other retroactive provisions of the 2005 Agreement, such as the retroactive wage provision for

³ Referring to this language, Respondent contends (R. Br. at 13): its clarity is such that it resists further argument. It states what it states. What more can be said? . . . It requires no interpretation, evaluation or scrutiny. It states the term of the Agreement, in plain language, to all interested parties.

⁴ As the General Counsel points out, while the cover page lists the "Date of Agreement" as January 1, 2005, through March 31, 2008, the contract more specifically sets forth the "effective date" of the contract as April 13, 2005, and the "termination" date as April 1, 2008.

incumbent employees, expressly state that they are to be retroactively applied, the apparent conflict between the cover page of this contract and the effective/termination dates of the Agreement presents itself as a discrepancy that cannot be pounded by Respondent into an unambiguous expression of intent.

Accordingly, at best for Respondent's argument, the 2005 Agreement is ambiguous as to its term, which renders untenable the Hospital's contention that the parol evidence rule bars consideration of evidence beyond the four corners of the 2005 Agreement to assist in resolving that ambiguity. *Doubletree Guest Suites Santa Monica*, 347 NLRB No. 72, slip op. at 3 (2006) (parol evidence may not be offered "for the purpose of varying or contradicting the terms of a contract. When a contract's meaning is ambiguous, however, parol evidence is admissible for the purpose of resolving that ambiguity"); *Sansla Inc.*, 323 NLRB 107, 109 (1997). Thus, Board precedent is clear that

[i]n contract interpretation matters like this, the parties' actual intent underlying the contractual language in question is always paramount, and is given controlling weight. To determine the parties' intent, the Board normally looks to both the contract language itself and relevant extrinsic evidence, such as a past practice of the parties in regard to the effectuation or implementation of the contract provision in question, or the bargaining history of the provision itself.

Mining Specialists, 314 NLRB 268, 268–269 (1994) (footnotes omitted).

A review of all the evidence of intent points in one direction only—that the 2005 Agreement was effective April 13, 2005, and its term was not made generally retroactive so that the term of the agreement can be said to have begun January 1, 2005. Certainly, the bargaining history and prior contracts and proposals offer no support for Respondent's conjecture that the 2005 Agreement's term began January 1, 2005.

It is clear that the Hospital's final proposal—the blue draft submitted to the Union on January 14—both on its cover and in the body of the document in the opening provision and the termination clause, set forth the relevant dates for the proposed agreement as January 1, 2005, and November 1, 2007. But things changed through the course of further negotiations. Notes from minutes made by the Hospital's chief negotiator demonstrate that during the March 23 bargaining session the Hospital raised for consideration "whether the parties should consider instead entering into a 3 year agreement which would expire three years after ratification/final approval by the Union." The notes indicate that "[t]he parties will consider this possibility, but absent agreement to the contrary, the contract would expire as previously agreed (i.e.: November 2, 2007)." As Respondent concedes (R. Br. at 16), "it is apparent that [subsequently the] parties reached specific agreement."

That agreement, contained in the document forwarded by the Hospital to the Union for execution, contained the following relevant changes from the blue draft: the effective date of the contract was changed from January 1 to April 13. The termination date was changed from November 1, 2007, to April 1, 2008, at 12:01 a.m. As to the cover page, the initial date on the

cover page legend stating “Date of Agreement” remained January 1, 2005 (as in the blue draft), but the second date was changed to “through March 31, 2005.”

It is notable that three of the four relevant dates were changed in the final agreement. The changed termination dates (both on the cover page and in the body of the agreement in the Termination clause) reflect consistent changes—the cover date of “through March 31” brings us to 12:01 a.m. April 1. The effective date in the contract was also changed, to April 13. For some reason, however, the cover date of “January 1” was not changed.

Why?

Occam’s Razor holds that the simplest of competing theories is preferred over the more complex. By this measure, Respondent’s contention—that the January 1, 2005 cover language kept from earlier draft proposals was the true starting date of the contract, even though the effective date in the contract were changed through negotiation to April 13—is not compelling. It is not just that the express language of the contract states that the “effective date” of the agreement is April 13. In addition, if the contract’s term was intended to begin January 1, one wonders why the contract had to specifically designate those particular provisions that were retroactive to January 1. While Respondent points to the fact that the Agreement’s wage provisions and certain benefit provisions were made retroactive to January 1, 2005, this advances the General Counsel’s, not Respondent’s case. If the term of the Agreement was to begin January 1, then all provisions of the agreement would take effect on that date and a specific reference would be needed in order to provide for the later commencement of a particular provision. But, in fact, it is those provisions retroactive to January 1 that are the designated exceptions, which only underscores that the Agreement’s term generally was not intended to be retroactive to January 1, 2005. Respondent’s argument would fit better on a contract that was wholly retroactive, i.e. deemed effective, on January 1. But that is not this contract.

Somewhat more plausible, and certainly simpler, is the suggestion of the General Counsel on brief (GC Br. at 10) that the January 1 date on the cover “was simply a reflection that certain wage and benefit provisions were made retroactive to January 1, 2005.” That is possible—and to the extent it misled employees as to term of the contract it might serve to undermine the contract’s usefulness as a bar to an election petition filed after January 1, 2008 (see discussion, *infra*).

However, a third explanation for the January 1 date on the cover seems most plausible under the circumstances: no one noticed it at the time because it was an inadvertent mistake overlooked by parties who understood full well that the new contract ran from April 13 to midnight March 31, 2008. This is, I believe, the most likely explanation. The January 1 date on the cover page was a holdover, inadvertently carried over from all previous drafts, including the blue draft. On March 23, these dates were specifically referenced and while there was no agreement that day to change the dates, there was agreement to change them by the time of ratification. Only an agreement to change the effective date and termination of the contract explains the Hospital negotiator’s decision to affirmatively change the contract’s termination and effective date from its

prior drafts to the final language. This explains the conforming change of one of the two dates on the cover page. Inadvertence most reasonably explains the failure to also make the conforming change to the initial date of the cover page.⁵

Respondent contends that “[i]t defies credulity to conclude that the parties specifically negotiated over the term of the Agreement, and then intentionally changed one end of the term while inadvertently overlooking the other.” I do not agree at all. In this case inadvertence explains what is highly implausible or inexplicable if attributed to intentional motive. What defies credulity is that the parties negotiated and changed the termination date (on the cover and in the agreement), and negotiated and changed the effective date of the contract, but then purposely left January 1, on the cover to signal the initial beginning date of the agreement. I do not believe it. I find that it was a mistake, and that the parties entered into an Agreement on April 13, 2005, the term of which was April 13, 2005, to 12:01 a.m. April 1, 2008 at midnight.⁶

Board precedent is clear about the outcome in such circumstances. “[T]he parties’ conduct should be governed by what they agreed to and not by what was mistakenly put in the contract.” *Cook County School Bus, Inc.*, 333 NLRB 647, 653 (2001) (rejecting employer’s right to withdraw recognition based upon employee petition where error in contract provision raised possibility, wrongly, that contract had expired).

Thus, the contract’s “term” began (*Trailmobile Trailer, LLC*, 343 NLRB 95 (2004)), it had “life” (*Levitz*, 333 NLRB 717 (2001)), and was “accepted” (*Auciello Ironworkers, Inc. v. NLRB*, 517 U.S. 781 (1996)) no earlier than April 2005. Given that the 2005 Agreement was in effect only since April 2005, the conclusive presumption of majority support to which a union is entitled during the life of a contract up to three years renders the January 2008 withdrawal of recognition unlawful.

Accordingly, the Hospital was not privileged to withdraw recognition from the Union on January 7, 2008. Respondent’s January 7, 2008 withdrawal of recognition from the Union, and refusal to recognize and bargain with the Union at all times

⁵ Those familiar with collective bargaining will acknowledge that such errors are commonplace given the mass of paperwork and time pressure involved. Indeed, review of the 2005 Agreement reveals at least one other, surely inadvertent, example of holdover language from the 2002 Agreement. Section 3 on page 2 of the 2005 Agreement provides that dues deductions shall be made from paychecks “effective the first pay period beginning in 2002.”

⁶ Respondent contends that the General Counsel’s failure to call a union bargainer to explain the January 1 date warrants an adverse inference in Respondent’s favor. I decline to make such an adverse inference, just as I do not make one based on Respondent’s failure to call any witnesses from its negotiating committee to explain the January 1 date. While Respondent’s sole witness testified that no one on the Hospital negotiating committee (including the outside counsel who was the chief negotiator) was still employed by the Hospital, there was no suggestion that all (or any) of these people were unavailable to testify. Although after-the-fact negotiator testimony about “what the parties intended” is fraught with opportunity for self-serving testimony, I agree that it might have been helpful to have testimony from negotiators regarding the development of the controverted language. However, such testimony is not required. The record is more than adequate to make a ruling on the term of the 2005 Agreement.

since, violates Section 8(a)(5) of the Act. In addition, these violations are, derivatively, violations of Section 8(a)(1) of the Act, "the rationale therefore being that an employer's refusal to bargain with the representative of his employees necessarily discourages and otherwise impedes the employees in their effort to bargain through their representative." *Tennessee Coach Co.*, 115 NLRB 677, 679 (1956), *enfd.* 237 F.2d 907 (6th Cir. 1956). See, *ABF Freight System*, 325 NLRB 546 fn. 3 (1998).

2. The Hospital's alternative contention: the irrebuttable presumption of majority support does not apply if the term of the Agreement cannot unambiguously be gleaned from the written contract

Respondent also contends (R. Br. at 20–23) that if the duration of the 2005 Agreement is ambiguous—based on the inconsistency between the cover page date and the effective date in the contract—then the complaint must be dismissed because "General Counsel cannot carry his burden if the term of the Agreement is ambiguous." (R. Br. at 21).

Essentially, Respondent contends that if the Agreement is ambiguous as to the term, as a matter of law (or, more accurately, Board policy), the irrebuttable presumption of majority support cannot bar a withdrawal of recognition that is based on employee sentiment.

For this argument, Respondent looks to the Board contract bar doctrine in representation cases.⁷ Specifically, it invokes the settled policy that "in order for a contract to constitute a bar, it must be sufficient on its face, without having to resort to parol evidence and that the term of the agreement, as stated in the agreement, should be such that employees and outside unions may determine the appropriate time for filing representation petitions."⁸

Respondent contends that if the 2005 Agreement is insufficient on its face to bar an election petition, the "same policy reasons underlie the analogous doctrine of conclusive presumption of majority support. For the contract to stand in the way of employees' Section 7 rights, it has to be clear—i.e., sufficient on its face." (R. Br. at 22).

Respondent's contention is wrong, even assuming, arguing, that the 2005 Agreement would not have barred the

filing of a representation petition in January 2008. Contrary to Respondent's contentions, the facial clarity the Board requires for invocation of the contract as a bar to an election petition—filed by employees or a rival union—is not germane to the determination of whether the employer—a contracting party—is barred by *its own* agreement from unilaterally withdrawing recognition from the union during the initial 3 years of the contract. The irrebuttable presumption of majority support bars an employer's withdrawal of recognition based on lack of employee support for the union for the first three years of a contract, regardless of whether the contract's written provisions are clear or ambiguous. See, *Cook County School Bus, Inc.*, 333 NLRB 647, 653 (2001). Indeed, the irrebuttable presumption of majority support is effective to bar withdrawal of recognition even when a contract is oral and unexecuted. *Young Women's Christian Association (YWCA)*, 349 NLRB No. 78 (2007).

This difference reflects the "crucial distinction between employees challenging a union's representational status by asking the Board to hold an election and an employer withdrawing recognition from a union unilaterally." *YWCA*, *supra*, slip op. at 2. As the Board in *YWCA* explained:

[t]he Board, with court approval, has repeatedly stated that the decertification election process, with the safeguards it provides for Section 7 rights, is the preferred method of resolving questions regarding the employees' support for an incumbent union. See *Levitz*, *supra* at 723, 727. Employer self-help, by contrast, has always been judged by different standards. *Id.* As the judge pointed out, the distinction that the Board makes between the effect of an unwritten, unsigned agreement concerning, on the one hand, the processing of a decertification election petition, and, on the other, an employer's withdrawal of recognition, is fully consistent with the Board's duty to balance stability in collective-bargaining relationships against the effectuation of employees' representational desires. Here, as explained, the Respondent was bound by the contract it had reached with the Union . . . When parties have reached a final agreement on contract terms, each is appropriately held to the bargain made. It would be profoundly destabilizing to the collective-bargaining process to allow one party unilaterally to back out of its agreement, based on events that took place after the fact.

YWCA, 349 NLRB No. 78, slip op. at 2 (footnote omitted).

Indeed, holding the parties to the "bargain made" is not just settled Board precedent but a statutory command expressed in Section 8(d)'s definition of the duty to collectively bargain. 29 U.S.C. § 158(d) (when a collective-bargaining agreement is in effect "the duty to bargain collectively shall also mean that no party to such contract shall [unilaterally] terminate or modify such contract"). With its holding in *Shaw's Supermarkets*, the Board cabined the policy of holding employers and unions to their bargain, limiting it to three years in the face of an actual showing of a union's loss of majority support. At the same time, *Shaw's Supermarkets* reaffirmed the aspect of the policy relevant here: that of holding employers and unions to their bargain during the initial three years of a contract, notwithstanding a union's loss of majority support during that time. That the contract's written form may be inadequate to bar the

⁷ The Board's contract bar doctrine is an administrative device adopted by the Board that provides generally that only a written and signed labor agreement bars the processing of an election petition. *Appalachian Shale Products, Co.* 121 NLRB 1160 (1958). Although motivated by some of the same concerns, the Board's contract bar rule is *not* the same thing as nor applied identically to the irrebuttable presumption of majority support during the term of a contract. *Auciello*, *supra* at 367 fn. 26; *Young Women's Christian Association (YWCA)*, 349 NLRB No. 78 (2007).

⁸ *Cooper Tire & Rubber Co.*, 181 NLRB 509 (1970); *South Mountain Healthcare*, 344 NLRB 375, 375–376 (2005) ("Given the conflict among the various effective dates, we find that the [contract] does not serve as a bar to the petition because third-parties cannot discern the appropriate time for filing a representation petition"). See also, *Coca-Cola Enterprises, Inc.*, 352 NLRB No. 123, slip op. at 2 (2008) ("It is well-settled Board law that without clear effective or expiration dates, the [agreement] cannot serve as a bar to the petition because third-parties would be unable to determine the appropriate time for filing a petition").

filing of a decertification petition is not relevant. As explained in *YWCA*, “the distinction that the Board makes between the effect of an unwritten, unsigned agreement concerning, on the one hand, the processing of a decertification election petition, and, on the other, an employer’s withdrawal of recognition, is fully consistent with the Board’s duty to balance stability in collective-bargaining relationships against the effectuation of employees’ representational desires.”

In any event, the rationale for the Board’s requirement that a contract be written, signed, and its duration unambiguous on its face in order for the contract to bar an election petition is wholly inapplicable to the irrebuttable presumption of majority support that precludes an employer from withdrawing recognition from a union during the life (up to three years) of the contract. As reflected in *Bob’s Big Boy Family Restaurants*, 235 NLRB 1227, 1228 (1978), and *Union Fish*, 156 NLRB 187 (1965), two contract bar cases highlighted by Respondent, the rationale for refusing to find that an ambiguous contract bars petitions filed by employees or outside unions, turns on the fact that—as nonparties to the agreement—employees and outside unions that might want to file an election petition must rely on the written contract to determine the appropriate time to file.⁹ This rationale does not apply to withdrawals of recognition during the term of the agreement by a contracting party. The latter implicates the policies of Section 8(d). Indeed, in *Tinton Falls Conva Center*, 301 NLRB 937, 939 (1991), distinguishing the policies of Section 8(d) from the policies of the representational contract bar doctrine, the Board rejected a claim such as that advanced by Respondent here:

Section 8(d) provides that when a collective-bargaining agreement is in effect, “the duty to bargain collectively shall also mean that no party to such contract shall [unilaterally] terminate or modify such contract.” . . .

The Respondent’s contention fails to take account of the different purposes served by the contract-bar rule and the policies of Section 8(d). As the Board explained in *Union Fish*, supra, 156 NLRB at 191, its contract-bar rule is designed to accommodate two objectives—giving the parties to a contract a “reasonable period” of “industrial stability free from petitions seeking to change the bargaining relationship,” while, at the same time providing “employees the opportunity to select bargaining representatives at reasonable and predictable intervals.” The second objective cannot easily be achieved if petitioning employees must go beyond the face of a collective-bargaining agreement to determine whether it is in effect and for what

period. Ibid. The policy of Section 8(d), made clear by its express terms, is simply to require parties to abide by collective-bargaining agreements to which they have mutually agreed. This policy would be disserved if a party could clearly agree to a contract and then escape abiding by its commitment on the ground that the evidence of its agreement consisted, in part, of parol evidence.

Spectrum cannot escape abiding by its commitment to the contract it entered into on grounds that the evidence of its agreement consists in part of parol evidence. As one of two parties negotiating the contract, and as one of two parties creating the ambiguity, Spectrum has no grounds for relying upon a facial ambiguity to claim it misunderstood the term of this Agreement, and therefore should be allowed to unilaterally withdraw recognition and back away from the deal it struck with the union during the first three years of the contract.¹⁰

I would add that Respondent’s fulminations about employee free choice being thwarted by the presumption of majority support are not so much wrong, as one sided, and unavailing. The Board’s concern with employee free choice has already been factored into its rules governing unilateral employer withdrawal of recognition and the rules governing employee election petitions. For a host of reasons, the latter “with the safeguards it provides for Section 7 rights, is the preferred method of resolving questions regarding the employees’ support for an incumbent union. Employer self-help, by contrast, has always been judged by different standards.” *YWCA*, 349 NLRB No. 78, slip op. at 2. Thus, it is no surprise that employee free choice may be expressed through election petitions filed with the Board at times when unilateral employer withdrawal of recognition is not a permissible method of vindicating employee free choice. The Board is concerned with employee free choice. But employee free choice is not the only goal of the Act. Another fundamental goal of the Act is the stability of labor relations. The Act’s primary aim of fostering industrial peace and stability is buttressed by the balancing of these twin goals of employee free choice and the stability of labor relations. The irrebuttable presumption of majority support enjoyed by a union for the life of a contract (up to three years) represents the Board’s balancing of these goals of the Act. *Shaw’s Supermarkets*, supra, slip op. at 3 (“policy goals of stability in labor relations and employee freedom of choice . . . can best be satisfied and reconciled . . . by permitting the Respondent, which was in possession of untainted evidence of the Union’s actual loss of majority support, to withdraw recognition from the Union after the third year of a contract of longer duration”).

Thus, application of the irrebuttable presumption of majority support to bar employer withdrawal of recognition is not limited by doctrines that might call into question whether the 2005

⁹ In *Bob’s Big Boy*, the Board’s holding turned on the likelihood that “employees as well as outside unions . . . would rely on the dates contained on the cover of the contract.” *Bob’s Big Boy*, supra at 1228. In *Union Fish*, 156 NLRB at 191–192, the Board explained that it looks to the contract’s fixed term or duration, because it is this term on the face of the contract to which employees and outside unions look to predict the appropriate time for filing of a representation petition. . . . It was only this date to which the employees and other interested parties could predict with certainty the appropriate time for the filing of a petition, and indeed, the Employee Petitioner did in fact rely on this date in filing the decertification petition herein.

¹⁰ Actually, Spectrum makes just such an argument. Contending (R. Br. at 22–23), that “[a]ll parties in labor relations deserve and require clarity,” it points out that “in this case, those responsible for determining the term of the Agreement and complying with the requirements of the Act were not at the bargaining table.” Spectrum’s effort to present itself as a third-party to its own agreement is not compelling. Spectrum, not its former agents, is the contracting party and bound by the 2005 Agreement.

Agreement could constitute a bar to a representation petition. The identification of an ambiguity in the written contract's beginning date does not mean that the employer is free to unilaterally withdraw recognition during the first three years of the contract.¹¹

b. Repudiation of the 2005 Agreement

It is not seriously disputed that beginning January 8, 2008, Respondent announced and implemented a repudiation of the 2005 Agreement. For instance, on January 8, the day after the withdrawal of recognition, the Hospital announced to employees that “[t]he current UAW contract will no longer be in effect.” Immediately after the withdrawal of recognition, the Hospital stopped deducting dues from employee paychecks, and announced that instead of the utilizing the collectively-bargained grievance procedure, “[m]oving forward, you will now be covered by the KCC Fair Treatment Policy, which gives you the right to appeal disciplinary action.” Subsequently, the Hospital denied a grievance filed under the 2005 Agreement, taking the position that the dispute would be handled under its nonbargained fair treatment policy.

This represents a basic repudiation of the collective-bargaining relationship and constitutes a repudiation of the 2005 Agreement under Board precedent. *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063, 1064 (1973), *enfd. mem.* 505 F.2d 1302 (5th Cir. 1974). Such conduct violates Section 8(a)(5) and, derivatively, Section 8(a)(1).

c. Unilateral changes in terms and conditions of employment

1. 8(a)(5) violations

In accordance with its view that the Union no longer needed to be recognized as the employees' bargaining representative, and that the 2005 Agreement no longer needed to be followed, subsequent to the repudiation and withdrawal of recognition the

¹¹ I note that it is far from clear that the 2005 Agreement would not stand as a bar to the filing of an employee representation petition with the Board. Although it is true that, under the Board's contract bar rules, the existence of the contract, and its term, must clearly be discernible from the four corners of the contract, inadvertent errors do not serve to undermine the contract bar. See, *The Youngstown Osteopathic Hospital Ass'n*, 216 NLRB 766 (1975) (it is clear when the current contract is considered in the context of bargaining history that the final agreement is for a fixed term of 3 years, notwithstanding the final booklet prepared by employer stated that the contract continued for 8-1/2 years); *Consolidated Brick Co.*, 127 NLRB 914 (1960) (“[parties’] failure to delete the March 31, 1959, termination date set forth in the 1957 contract, in our opinion, was an inadvertence which did not serve to convert the new agreement into one of indefinite duration, as urged by the Petitioner”). To the extent the Agreement's cover page date of January 1, 2005, is considered an inadvertent error, and I have found that it was—the effective/termination dates in the contract clearly provide the term of the Agreement and a contract bar would be effective. However, I need not resolve the question of whether the 2005 Agreement would have barred a representation petition. Regardless of the answer to that question, the Hospital's withdrawal of recognition was unlawful because—notwithstanding any ambiguity on the face of the 2005 Agreement—the withdrawal, in fact, occurred during the first three years of the contract's term, a period in which the Union enjoyed an irrebuttable presumption of majority support.

Hospital announced and implemented a series of unilateral changes in terms and conditions of employment. These changes, involving changes to wage rates, the wage structure, and changes to the eligibility waiting period for short term disability benefits, were all subjects admitted by Respondent to be mandatory subjects of bargaining, admittedly implemented without bargaining with the Union and without the Union's consent. These unilateral changes occurred during the term of the 2005 Agreement, and, not surprisingly, are subjects expressly covered by the 2005 Agreement. The changes in wages, pay structure, and eligibility for disability benefits are in conflict with and derogation of express terms set forth in the 2005 Agreement. Certainly, Respondent, offers no contractual defense for the unilateral changes. Accordingly, the Hospital's unilateral changes are straightforward violations of duties prescribed by Section 8(d) of the Act, which requires that, absent mutual consent, “where there is in effect a collective-bargaining contract . . . no party to such contract shall terminate or modify such contract.” Section 8(d) defines the 8(a)(5) duty to bargain, and therefore a violation of 8(d) constitutes an unfair labor practice under Section 8(a)(5), and, derivatively, under Section 8(a)(1).

2. 8(a)(3) violations

The General Counsel alleges that the unilateral changes implemented by Respondent in March 2008 were motivated by the employees' union and concerted activities and intended to discourage the same. The complaint maintains that these changes constituted antiunion discrimination violative of Section 8(a)(3) of the Act.

It is difficult to miss the alacrity and enthusiasm with which Respondent moved after withdrawing recognition to solidify the antiunion majority in the bargaining unit. However, having found that the unilateral changes were violative of Section 8(a)(5), I find it unnecessary to pass on whether this conduct also violated Section 8(a)(3) because this additional finding would not materially affect the remedy. *Goya Foods of Florida*, 350 NLRB No. 74, slip op 1. fn. 3 (2007).

d. Independent 8(a)(1) violations

The General Counsel alleges that the Hospital's post-withdrawal-of-recognition communications with employees regarding its withdrawal of recognition, its current and anticipated changes in terms and conditions of employment, and its repudiation of the 2005 Agreement, constituted independent violations of Section 8(a)(1) of the Act. I agree.

The day after withdrawing recognition Spectrum wrote to each bargaining unit employee, referring to them as “Former UAW Staff” and explaining the new nonunion situation. Spectrum held meetings for all employees beginning January 8, where, in addition to explaining the withdrawal of recognition it stated that wage and benefit changes were in the offing. It advertised “Town Hall Meetings” at which “Former UAW Staff” could “hear about the exciting changes that will affect you!” At these meetings Respondent announced significant unilateral wage and benefit improvements, and raised the possibility of future wage adjustments in October 2008. On March 19, Respondent mailed a letter to “All Former UAW Staff”

reviewing the recent pay raises and reminding employees “that all [Spectrum] non-union staff normally receives a pay increase in October,” and promising to “also move you to the October pay cycle. . . . As such, you may expect another compensation adjustment in October.”

The gist of this extensive campaign was to publicize and demonstrate to employees the new nonunion status of the facility. As the Board explained in *Windsor Convalescent Center of North Long Beach*, 351 NLRB No. 44, slip op. at 13–14 (2007), a case involving a successor employer that unlawfully refused to recognize the union: “to tell employees that there was no union when, in fact, there was, undermined the Union’s representative role” and, therefore, constituted an independent violation of Section 8(a)(1). The analysis is unchanged even if we assume that Spectrum believed it was acting legally when it announced and implemented the facility’s nonunion status. *Windsor Convalescent Center*, supra.

In this case, the 8(a)(1) violation includes the announcement of anticipated further wage increases in October. The General Counsel alleges that the promise of a future wage increase was implicitly premised on employees being and remaining nonunion. However, the tie to nonunion status was explicit. The wage increase was explicitly linked to the “Former UAW Staff” being moved to the “non-union staff” pay cycle. This also violates Section 8(a)(1).

CONCLUSIONS OF LAW

1. Respondent Spectrum Health-Kent Community Campus is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Charging Parties, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO, and its Local 2600 (collectively Union) are labor organizations within the meaning of Section 2(5) of the Act.

3. At all times since about October 1999 and continuing through January 7, 2008, when Respondent unlawfully withdrew recognition from the Union, the Union has been the designated exclusive collective-bargaining representative of the following bargaining unit of Respondent’s employees:

All full-time and regular part-time employees occupying the classifications of Activity Aide, Administrative Services Tech, Assessment Counselor, BS & MSW Social Worker, Carpenter, Cashier, CNA (Certified Nurses Aide), CNA-Restorative, COTA (Certified Occupational Therapy Assistant), Cook, CSR Technician, Customer Service Representative, Environmental Services Tech I, Environmental Services Tech II, Food Service Team Leader, Food Service Worker, Laundry/Linen Tech, Licensed Practical Nurse, LPN-Restorative, Maintenance Repair Worker, Medical Secretary, Nursing Tech, Occupational Therapist, Primary Counselor, Receptionist, Recreational Technician, Recreational Therapist, Restorative Technician, Shipping/Inventory Worker, Support Counselor, and Unit Support Assistant employed by Respondent at its Kent Community Campus facility; but excluding all executive, supervisory, confidential, professional, irregular, seasonal, and temporary employees, guards, student interns, all employees classified as Registered Nurses, and all other employees.

4. Respondent and the Union entered into a collective-bargaining agreement effective by its terms April 13, 2005, and terminating no earlier than 12:01 a.m. April 1, 2008.

5. Respondent violated Section 8(a)(1) and (5) by withdrawing recognition from the Union as the collective bargaining representative of the bargaining unit of employees described above, as of January 7, 2008.

6. Respondent violated Section 8(a)(1) and (5) of the Act by refusing to adhere to and repudiating its collective-bargaining agreement with the Union, including the grievance procedure and the dues-checkoff provisions of the collective-bargaining agreement, as of January 8, 2008.

7. Respondent violated Section 8(a)(1) and (5) and 8(d) of the Act, by implementing unilateral changes in terms and conditions of employment covered by the parties’ 2005 Agreement during the term of the agreement without the Union’s consent, including changes to wage rates, the wage structure, and changes to the eligibility waiting period for short term disability benefits.

8. Respondent violated Section 8(a)(1) of the Act by informing employees that the facility was nonunion and by promising employees that it will increase wages in the future if they remain nonunion employees.

9. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Respondent must recognize the Union as the bargaining representative of the bargaining unit of employees described above. Respondent must, upon request of the Union, adhere to the 2005 Agreement, restoring and giving effect to its terms retroactive to April 13, 2005, and continuing those terms and conditions in effect unless and until changed through collective bargaining with the Union. If no such request is made by the Union, Respondent must bargain upon request with the Union as the exclusive collective-bargaining representative of employees in the appropriate bargaining unit and embody any understanding reached in a signed agreement. Respondent must, upon request of the Union, rescind the unilateral change in terms and conditions of employment implemented after repudiation of the 2005 Agreement.

Respondent shall make whole its employees for losses in earnings and other benefits which they may have suffered as a result of Respondent’s repudiation of and refusal to adhere to the collective-bargaining agreement, and its unlawful unilateral changes, with such losses to be calculated in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971). Interest on all such sums shall be computed as prescribed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Respondent shall reimburse the Union, with interest, for any dues it was required to withhold and transmit under the collective-bargaining agreement, such sums calculated in the manner set forth in *Ogle Protection Service*, supra. Interest on all such

sums shall be computed as prescribed in accordance with *New Horizons for the Retarded*, supra.

Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in Respondent's facility or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. When the notice is issued to Respondent, it shall sign it or otherwise notify Region 7 of the Board what action it will take with respect to this decision. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since January 7, 2008.

Respondent shall, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹²

ORDER

Respondent Spectrum Health – Kent Community Campus, Grand Rapids, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

a. Failing and refusing to adhere to the collective-bargaining agreement reached with the Union and effective by its terms April 13, 2005.

b. Failing and refusing to recognize and bargain with the Union as the exclusive bargaining representative for the following bargaining unit of its employees:

All full-time and regular part-time employees occupying the classifications of Activity Aide, Administrative Services Tech, Assessment Counselor, BS & MSW Social Worker, Carpenter, Cashier, CNA (Certified Nurses Aide), CNA-Restorative, COTA (Certified Occupational Therapy Assistant), Cook, CSR Technician, Customer Service Representative, Environmental Services Tech I, Environmental Services Tech II, Food Service Team Leader, Food Service Worker, Laundry/Linen Tech, Licensed Practical Nurse, LPN-Restorative, Maintenance Repair Worker, Medical Secretary, Nursing Tech, Occupational Therapist, Primary Counselor, Receptionist, Recreational Technician, Recreational Therapist, Restorative Technician, Shipping/Inventory Worker, Support Counselor, and Unit Support Assistant employed by Respondent at its Kent Community Campus facility; but ex-

cluding all executive, supervisory, confidential, professional, irregular, seasonal, and temporary employees, guards, student interns, all employees classified as Registered Nurses, and all other employees.

c. Failing and refusing to bargain with the Union as the representative of its employees in an appropriate bargaining unit by making unilateral changes in their terms and conditions of employment without the consent of the Union during the term of a collective-bargaining agreement.

d. Informing employees that the facility was nonunion and that it will increase wages in the future as long as they remain nonunion employees.

e. In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act:

a. Recognize the Union as the exclusive collective-bargaining representative of the bargaining unit employees described above.

b. Upon request of the Union, adhere to the collective-bargaining agreement reached with the Union, restoring and giving effect to its terms retroactive to April 13, 2005, or as otherwise required by the terms of the collective-bargaining agreement, and continuing those terms and conditions in effect unless and until changed through collective bargaining with the Union. If no such request is made by the Union, bargain upon request with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit described above and embody any understanding reached in a signed agreement.

c. Upon request of the Union, rescind the unilateral changes to unit employees' wages, pay structure, and disability eligibility waiting period.

d. In the absence of a collective-bargaining agreement, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following above-described bargaining unit.

e. Make all affected employees whole, with interest, in the manner set forth in the remedy section of this Decision and Order, for any loss of earnings and other benefits suffered as a result of Respondent's repudiation of and refusal to adhere to the collective-bargaining agreement, and its unilateral changes after repudiation of the collective-bargaining agreement.

f. Reimburse the Union, with interest, in the manner set forth in the remedy section of this Decision and Order, for any dues it was required to withhold and transmit under the collective-bargaining agreement.

g. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, make available at a reasonable place designated by the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary

¹² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

to analyze the amount of backpay due under the terms of this Order.

h. Within 14 days after service by the Region, post at its facility in Grand Rapids, Michigan, copies of the attached notice marked “Appendix.”¹³ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent’s authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at that facility at any time since January 7, 2008.

i. Within 21 days after service by the Region, file with the Regional Director of Region 7 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply with the provisions of this Order.

Dated, Washington, D.C., September 4, 2008

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT refuse to recognize and bargain with the Union as the collective-bargaining representative of the bargaining unit employees.

WE WILL NOT repudiate or refuse to adhere to the collective-bargaining agreement entered into with the Union on April 13, 2005.

WE WILL NOT make unilateral changes to employees’ terms and conditions of employment during the term of a collective-bargaining agreement without the consent of the Union.

WE WILL NOT inform employees that this facility is nonunion and WE WILL NOT promise employees that we will increase

wages in the future as long as they remain nonunion employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Federal law.

WE WILL, upon request by the Union, adhere to the collective-bargaining agreement effective April 13, 2005, giving effect to its terms retroactive to April 13, 2005, and continuing those terms and conditions in effect unless and until changed through collective bargaining with the Union. If no such request is made by the Union, we will, upon request, bargain with the Union and embody any understanding reached in a signed agreement.

WE WILL, upon request of the Union, rescind any unilateral changes to employees’ terms and conditions made without consent of the Union during the term of the collective-bargaining agreement when such terms and conditions were subjects covered by collective-bargaining agreement.

WE WILL, recognize the Union as the collective-bargaining representative of the bargaining unit employees.

WE WILL make all affected employees whole, with interest, for any loss of earnings and other benefits suffered as a result of our repudiation of and refusal to adhere to the collective-bargaining agreement reached with the Union April 13, 2005. WE WILL reimburse the Union, with interest, for any dues under the collective-bargaining agreement we were required but failed to withhold and transmit.

SPECTRUM HEALTH – KENT COMMUNITY CAMPUS

¹³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”