

Charlie's Oil Company and Teamsters Local No. 526, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America. Case 1-CA-19595

26 August 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On 13 September 1982 Administrative Law Judge Phil W. Saunders issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

DECISION

STATEMENT OF THE CASE

PHIL W. SAUNDERS, Administrative Law Judge: Based on a charge filed on February 23, 1982, and an amended charge on April 2, 1982, by Teamsters Local No. 526, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein the Union, Local 526, or the Charging Party, a complaint was issued on April 9, 1982, against Charlie's Oil Company, herein Respondent or the Company, alleging violation of Section 8(a)(1), (3), and (5) of the Act. Respondent filed an answer to the complaint denying it had engaged in the alleged matter. Both the General Counsel and Respondent filed briefs in this matter.

Upon the entire record in the case, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a Massachusetts corporation and at all times herein has maintained its principal office and place

of business in Fall River, Massachusetts, where it is engaged in the retail sale and distribution of fuel oil and related services. Respondent's annual gross volume of business exceeds \$500,000, and Respondent annually receives goods and materials valued in excess of \$5,000 directly from points located outside the Commonwealth of Massachusetts.

Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

It is alleged in the complaint that on or about October 6, 1981, the Union requested Respondent to bargain; that during the period of November 2, 1981, through March 9, 1982, Respondent failed and refused to schedule meetings with the Union at reasonable times for the purpose of engaging in collective bargaining; and that on or about November 2, 1981, and on or about December 28, 1981, Respondent insisted on the deletion of the no-subcontracting clause, the inclusion of a clause permitting management to perform unit work, and the limitation of an offered wage raise to that part of the bargaining unit (servicemen) which it subsequently sought to and did eliminate. It is further alleged that on or about February 1, 1982, certain employees ceased work concertedly and engaged in a strike; that on some date between February 1 and March 10, 1982, Respondent subcontracted to outside contractors its service work formerly performed by its servicemen; and that on a date between February 1 and March 10, 1982, Respondent discharged James Flanagan, Antone Velozo, Henry Velozo, and Ronald Cubico.¹

The Union has represented Respondent's truckdrivers, combination mechanic/truckdrivers, servicemen and servicemen apprentices for collective-bargaining purposes since about 1965, and these employees have been covered by a series of collective-bargaining contracts and the last of which expired on October 31, 1981.² The expired contract contained an article providing, in part, as follows:

The Employer shall not at anytime subcontract any bargaining unit work.

Harold Huff, the Union's secretary-treasurer, testified that, at the time this last contract was executed, Charles Velozo, Respondent's president and owner, told him that he did not like the idea of signing this contract; he would do it at this time but, when negotiations came up again, he would do it in the right manner and would get out of the Union.

It appears that on October 6, 1981, Huff wrote Charles Velozo a letter requesting bargaining and forwarding

¹ All are servicemen with the exception of Henry Velozo, who is a driver.

² G.C. Exh. 2.

certain proposals he had drafted.³ It also appears that about this same time, early in October 1981, Charles Veloza sought legal assistance since he felt he was not confident or capable of representing himself in these matters.

On October 27, 1981, the parties met at the offices of the Company and at this time the Union learned for the first time that Respondent was to be represented by an attorney. The Company's initial bargaining position was to extend the existing collective-bargaining agreement for 1 year, but this was rejected by the Union when Huff explained that the employees' costs were continually going up. The company attorney then presented to Huff, the union spokesman, a list of company proposals.⁴ Some time was then spent in this meeting while the company attorney went through his proposals and explained why management desired each of them, and in so doing the company attorney, David Sweeney, presented examples showing the need for amending certain parts of the contract, such as the discipline provision, the need for terminating drivers who became uninsurable, the desire to substitute Federal Mediation and Conciliation in place of a state agency, a provision that emergency calls during nonregular hours could be performed by management people, and the need to delete the reference to seasonal employees, to renegotiate eligibility for vacations, and to improve sick leave. In its presentation for a new 1-year contract, Respondent also offered to servicemen a wage increase of 25 cents an hour immediately and 15 cents in 6 months, and wanted to delete the prohibition against subcontracting contained in the old contract. Respondent's attorney also testified that at this meeting he informed the Union's spokesman that the existing contract (about to expire) was "too rich," and that if Respondent were going to stay in business and compete with non-union companies, and if its employees were going to have jobs, then it would be necessary for the Company to compete with others. Attorney Sweeney testified that at this first meeting the Union was also advised that under the present contract, even without improvements, it was costing Respondent something in excess of \$11 per hour to put a driver on the road.⁵

It appears that on October 29, 1981, the employees here involved met with Huff and voted to reject Respondent's proposals and, on a separate ballot, voted unanimously to strike. Huff testified that, when he advised Charles Veloza of these votes, Veloza asked that any strike action be postponed until he had a chance to talk with his attorney.

The next meeting was held on October 30, 1981, with the same parties being present—Charles Veloza and his attorney along with Huff and the local union steward Jim Flanagan—but contrary to Huff's testimony the Federal Mediation Conciliator, Austin Skinner, was not

³ See G.C. Exh. 3.

⁴ See G.C. Exh. 4.

⁵ Harold Huff acted as spokesman for the Union throughout the negotiations, and David Sweeney, Respondent's attorney, acted as its spokesman throughout negotiations.

present at this meeting. Attorney Sweeney testified that Huff arrived approximately 30 minutes late.⁶

At this second meeting the only change in the position of the Union was to reduce its wage demand from \$1.50 per hour in each of the succeeding 3 years to 75 cents per hour in each of the succeeding 3 years. At this meeting there was also a discussion regarding the subcontracting proposal of the Company and wherein Huff stated that if the Company proposal were adopted his men would lose their overtime and could be out of jobs.⁷ Sweeney then asked if it would still be rejected "if we could provide a means to protect present employees," (emphasis supplied), but the proposal was still rejected by the Union without any counteroffer. The Company increased its wage proposal to a total of 50 cents from its initial offer of 40 cents per hour. Attorney Sweeney also explained at this meeting why the Union's proposal on successor employers was not acceptable; informed the Union that there was no intention by management to sell the business; and informed it that there was again some discussion on the insurability of drivers. At this meeting Huff advised the Company that his men would not strike. This appears to be contrary to his original notice that a strike vote had been taken and his men would strike if there was no contract. A third meeting was then set for November 2 at which time the Union advised that it intended to invite Austin Skinner of the Federal Mediation Service to be present.⁸

The reliable evidence in this record shows that the next meeting did take place on November 2 and with Austin Skinner in attendance. Sweeney testified that at this third meeting the Union rejected all of the company proposals and the only change of position was the Union's indication that under some possibilities they might change their position on their demand regarding successors and assigns, but the meeting was very short and that there were no discussions regarding the issue of subcontracting. Sweeney stated that the parties broke off negotiations subject to Austin Skinner calling the parties back at some indefinite time in the future, and also testified that in a later conversation he had with Skinner it was determined "to let things cool for awhile," and then bring the parties back together again.⁹

⁶ It is argued by Respondent that the repeated delays in arriving at negotiations were tactics of Huff to increase costs to the greatest extent possible to discourage the Company from using outside negotiators.

⁷ Huff testified that the Company wanted an "open-door" subcontracting clause where management would have a right at any time to subcontract the work, and that such a clause would take away all of the overtime. However, later on in his testimony Huff agreed that the Company had stated that the use of subcontractors would be limited to weekends and evenings, but that the Union was still confused about "the power" of the subcontractors.

⁸ According to Huff, Austin Skinner (the Federal Mediator) notified him of the cancellation of the scheduled November 2 meeting because of Sweeney's unavailability, and stated that the next meeting was held on November 10, and wherein Respondent maintained its position that any wage increase be given only to the servicemen and insisted upon the inclusion of the clause giving it the unfettered right to subcontract unit work and stated that it would not sign a contract unless that type of language and clause was included. In addition, Respondent maintained its position that the wage increase offered be given only to servicemen.

⁹ Huff testified that the next meeting was scheduled for November 20, but it was not held due to the illness of Charles Veloza. Huff also ventured that this meeting was not held because Sweeney could not be there, but then admitted that he may have had the dates confused.

The next meeting was held on December 28, 1981. At this time Huff mentioned that the Company had failed to pay health, welfare, and pension obligations for November 1981, and upon this reminder Sweeney advised the Company to do so. It appears that the parties then restated their positions on each item. Sweeney advised that there would be no retroactivity on any pay, but restated his wage offer—the 30 cents now and 20 cents in 6 months. Huff then advised the Company that he had changed his position regarding cause for termination, and, although he had formerly been prepared to accept it, he now rejected the company position. Sweeney testified as to the numerous other subjects covered at this meeting, but stated that Huff rejected each and every proposal made by the Company except for substituting the Federal Mediation Service in the arbitration clause, but the Union made no counteroffers on any of the company proposals and rejected modifications by the Company wherein office space was offered to Huff for union visits rather than his simply entering the plant, and the Company's pay proposal was also rejected as was a 1-year contract, and that there was no separate discussion regarding subcontracting at this meeting.

Huff testified that at this December 28 meeting the Company insisted on having specific language spelled out regarding subcontracting because by so operating the Company could save money, but the Union took the position that the Company's language was an "open-door" proposal that would permit management to subcontract out all its work and lay off all its employees, and the Company would not sign a contract unless it had such language. Huff further testified that at this meeting Respondent maintained its proposal that management personnel be used in case of an emergency rather than unit employees, and also maintained its proposal that any wage increase be given only to servicemen with no wage increase for the drivers. Huff testified that no progress in the negotiations were made at this meeting as there were many proposals for "retracting and taking away benefits," and several beyond what the Union could agree to.

Huff testified that on the evening of December 28 he had a meeting with the employees here involved in and the Company's position on subcontracting was discussed. He stated that the employees then again voted unanimously to strike, and that, on December 29, he advised Charles Veloza of the strike vote, but Veloza again asked him to delay any strike action and he would have a discussion with Sweeney and try to set up another meeting. Huff testified that Veloza never got back to him on this matter, and as a result he called Federal Mediator Skinner to set up another bargaining session. It appears that the meeting scheduled for January 8, 1982, was canceled because of the unavailability of the parties,¹⁰ and the meeting scheduled for January 29, 1982, was cancelled because Veloza was ill and had to go home.

Huff testified that, after the cancellation of the latter meetings, he again met with the employees and recom-

¹⁰ Counsel for Respondent maintains that both he and Veloza were available for this meeting, and that this meeting was not canceled "because of Sweeney's unavailability"—this meeting was canceled by Austin Skinner on the representation that Huff had other negotiations and could not meet on that date.

mended they strike and that a picket line be set up in view of Respondent's cancellation of the meetings and its overall "stall tactics" in the negotiations.¹¹

The strike here in question began on February 1, 1982, and a picket line was set up. As of that date there were six employees in the bargaining unit, but two did not participate in the strike and crossed the picket line. The four employees who participated in the strike were Henry Veloza, a truckdriver, and Tony Veloza, Ronald Cabucio, and James Flanagan, servicemen.¹² It appears that Charles Veloza learned of the strike on the Friday or Saturday preceding February 1, and on Sunday night he and his sons picked up the company trucks from the employees.

Huff testified that, right after the picket line was set up, he contacted Federal Mediator Skinner, informed him of the picket line, and asked that he set up a meeting to negotiate, and that on or about February 24, 1982, he also visited Charles Veloza at his office and asked him if a meeting could be set up so the parties could discuss their differences and end the strike—that Veloza's response was that Huff should talk to his attorney. Huff said he then reminded Veloza that his attorney worked for him and if Veloza agreed to meet his attorney would then have to meet, but Veloza's response was that he would contact his attorney and get back to him, but that Veloza never did so.

The next negotiation meeting, arranged by Federal Mediator Skinner, took place on March 10, 1982. As the meeting began, Sweeney advised Huff that Charles Veloza had determined he would go out of the service business, that Veloza had decided, from an economically standpoint, that it made no sense to keep four servicemen on the road together with trucks and equipment, when he could subcontract at a substantially lower price. Sweeney said that at this point he presented Huff with a sheet of paper demonstrating that it cost approximately \$16 per hour to keep a serviceman on the road without counting overtime or other fringe benefits, and economically it made no sense for Veloza to remain in the service business. Sweeney testified that Huff then stated, "We were prepared to accept your last offer before you said that. Where does that leave us now?" Sweeney said that it was never determined what the "last offer" was that Huff was willing to accept.

Sweeney further testified that at this meeting on March 10 there was also a discussion that the Company was willing to retain the four servicemen on a basis similar to commercial catering employers, and that under such arrangements the Union would continue to represent these drivers. Further, that the Company would also make arrangements for the drivers to purchase the neces-

¹¹ Shop steward James Flanagan had a conversation with Charles Veloza on January 15, 1982, and informed him that the employees here involved would work with no wage increase and give up their 10 days' sick leave, if he would sign a 1-year contract. It appears that this same offer was also made to Veloza by Flanagan on January 22, 1982, but on this occasion all the employees were present. Both times Veloza advised that the offer be put in writing and he would then give it to his attorney.

¹² Drivers deliver home heating oil to customers operating oil tank trucks. Servicemen drive small vans performing service and maintenance work on customers' oil burners.

sary vehicles. Huff then requested that this position of the Company be presented to him in writing, and this was done through a letter which has been admitted as General Counsel Exhibit 5.

Huff testified that at the March 10 meeting he was informed by Sweeney that the Company had sold its service trucks and was going into the subcontracting business, but Respondent's employees here in question could purchase trucks and do service calls at the rate of \$15 per call. Huff further testified that, after he rejected this proposal, Sweeney then told him that Respondent was no longer in the service department business, and that near the end of this meeting he (Huff) requested that the above proposal by the Company be put in writing.¹³

Further sequence of events shows that, in March 1982, the striking employees received statements of earnings from Respondent for wages earned in 1982 (see G.C. Exhs. 7, 8, and 11); these statements were obtained from the computer employer who makes up Respondent's payroll based on information given it by Respondent as these employees were taken off the payroll due to the fact that they were striking.

On March 11, 1982, Huff notified Respondent by letter that the picket line was being removed, but his intent was to continue to attempt to negotiate the parties' differences (G.C. Exh. 6). By letter dated April 13, 1982, Huff contacted Charles Veloza directly and suggested that a time and place be set up in order to continue the negotiations, and a meeting for May 5, 1982, was then arranged.

Sweeney testified that at this meeting on May 5, 1982, Huff was about 35 minutes late, but after his arrival the Company then went over all the items still on the table—mentioning subcontracting, emergency calls by management people, the discipline proposal (which Sweeney believed there was a tentative agreement on), management's rights (and which would be withdrawn if the rest of the contract was acceptable and the same was true for the Company proposals on seasonal employees and vacations). Sweeney stated that the sick leave proposal was left on the table, and that the proposal regarding union entry to the premises would be amended.

Sweeney testified that Huff then indicated the Union would agree to the right to subcontract, to a 30-cent wage increase now and 20 cents later, to the emergency use of management people, and to a 1-year contract without retroactivity. There was then a discussion regarding an increase in health and welfare payments resulting from an 18-percent insurance increase. Sweeney said that, on inquiry as to whether this was a new proposal, Huff would not respond as to whether this was a new position by the Union, and that he then asked Huff specifically what would it take to resolve the contract, but Huff refused to state the union position. Sweeney testified that Huff was advised at the outset of the May 5 meeting that all company employers, including service

personnel, had jobs and were free to return to work immediately although the following Monday would make more sense than the Wednesday negotiations. Moreover, Huff was advised on this occasion that the Company did not wish to litigate the issue as to whether employees had been terminated, but informed him "that if the men come back we'll find jobs for them."

Sweeney testified that it was at this meeting that Huff clarified what he had meant when he stated earlier that the Union had been prepared to accept the Company's "last proposal"—that Huff had advised management on May 5 that at the previous meeting in March the Union "had accepted the Company proposals regarding subcontracting, money, continuation of the old contract for drivers, a 1-year contract and emergency use of management personnel," but he refused to state at the May 5 meeting whether anything else was still open preventing the execution of a contract, and this became important since he had made reference to the increased costs of health and welfare.

Huff testified that, at the meeting on May 5, he stated that the Union agreed to Respondent's proposal to allow it to use management personnel for emergency service calls after normal working hours, agreed to a 1-year contract with raises for the servicemen, but the Union did not accept Respondent's subcontracting proposal and wanted to negotiate further on the subcontracting question. Moreover, at this meeting Respondent maintained its position that the servicemen could return to work if they wanted to return as subcontractors and wanted to go into the service business.

Charles Veloza testified that, when the strike started on February 1, he immediately got on the telephone and called every available oil company and servicemen he could locate in order to subcontract with them in his efforts to keep his business going, and to somehow service his customers as they had no heat. Veloza stated that, by the end of February or the beginning of March, he then decided to go into subcontracting and get out of the service business. Moreover, he had received a schedule setting forth the typical cost of a serviceman¹⁴ from his accountant in the beginning of February, showing an hourly cost of a serviceman to be \$15.82, but not including overtime. Veloza also testified that later on he went to his accountant again with wages he had paid to his employees in 1981.¹⁵

In addition to the above, Veloza testified that since February 1, 1982, he had sold two of his service trucks (extras), but that he still had four trucks left. Moreover, that a former serviceman-employee of the Company, Alverino Santos, was a subcontractor for the Company starting in early February.

The General Counsel points out and argues that the striking employees received their statement of earnings forms in mid-March 1982 due to the fact that they were removed from the payroll and because they were on strike, and such factors show that these four individuals here involved were discharged because they engaged in

¹³ The General Counsel points out that the first time the Union was notified that Respondent had decided to subcontract its service work, had sold its trucks, hired subcontractors, and had effectuated its decision was at the March 10, 1982, meeting and that the decision to subcontract was made in February, and subcontracting of the service work began as early as February 4, 1982, and continued as of the time of the hearing.

¹⁴ See Resp. Exh. 1.

¹⁵ See Resp. Exh. 7—schedules to illustrate the cost of doing business with employee servicemen and outside contractors dated May 20, 1982.

the strike. Moreover, in deciding to subcontract the service work by the utilization of subcontractors to perform its service work starting shortly after the commencement of the strike, and then conditioning striking employees' return to work on their agreement to purchase trucks and going into business for themselves, Respondent discharged the servicemen as employees.

Additionally, argues the General Counsel, the facts also establish that the decision to subcontract the service work was made after the commencement of the strike, and the trucks which were disposed of were not sold until after the commencement of the strike. Furthermore, the financial data which Respondent relied on as economic justification for subcontracting its service work was not received by it until May 20, 1982 (Resp. Exh. 7), and was prepared specifically for the hearing, and these facts clearly establish that the decision to subcontract the service work was made in retaliation for, and as a result of, the employees having gone out on strike on February 1, 1982.

The General Counsel further points out that the Union was not notified until March 10, 1982, that Respondent subcontracted its service work, sold certain of its service trucks, and put the remaining trucks up for sale, and such happenings reveal that the Union was not notified about the decision to subcontract until after it was made and after the decision had already been effectuated and, therefore, it was done unilaterally (*a fait accompli*) without affording the Union the opportunity to bargain about the decision and citing *Olinkraft, Inc.*, 252 NLRB 1329 (1980); and *Westinghouse Electric Corp.*, 150 NLRB 1574 (1965).

The General Counsel also contends that Respondent failed to schedule meetings at reasonable times between November 2, 1981, and March 9, 1982, that the parties met only twice during this period and several meetings were canceled because of Veloza's or Sweeney's unavailability. Further, that Veloza failed to respond to Huff's request made on February 24 to set up another meeting, and by these dilatory tactics Respondent committed a further violation of Section 8(a)(1) and (5) of the Act. Moreover, that the conduct of Respondent at the November 10 and December 28 meetings of insisting upon the deletion of the prohibition against subcontracting, and the inclusion of a clause permitting management personnel to perform unit work, and offering a raise to only part of the bargaining unit (which it subsequently eliminated by subcontracting the work) constituted additional instances of dilatory and bad-faith bargaining in violation of the Act. In concluding his argument the General Counsel also maintains that the strike was caused by Respondent's unfair labor practices of failing to meet at reasonable times and insisting upon the inclusion of those provisions just mentioned, and that the strike was prolonged by the Respondent's unilaterally subcontracting its service work without notifying the Union and affording it the opportunity to bargain about the decision, thus eliminating a substantial part of the bargaining unit.

Before my final summary and conclusions, it should be noted at this time that all facts found herein are based on the record as a whole upon my observation of the witnesses. The credibility resolutions herein have been de-

rived from a review of the entire testimonial record and exhibits with due regard for the logic and probability, the demeanor of the witnesses, and the teaching of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404 (1962). As to those witnesses testifying in contradiction of the findings herein, their testimony has been discredited, either as having been in conflict with the testimony of reliable witnesses or because it was in and of itself incredible and unworthy of belief. *All testimony has been reviewed and weighed in the light of the entire record.* Furthermore, it should be especially noted that, in several instances, I have not credited the circumstances and events as recalled by Huff in that his testimony, in areas where there was conflict, revealed considerable discrepancies and was also inconsistent at times, and was not as convincing and straightforward as the witnesses of Respondent who stated otherwise.

It appears from this record that Huff was surprised and probably somewhat disappointed when he found out that Charles Veloza was represented by an attorney, and his repeated attempts to deal directly with Veloza instead of the designated company spokesman, David Sweeney, is an example of this. Huff called Veloza to advise him of the strike vote. In April 1982, he wrote directly to Veloza seeking a meeting to continue negotiations although all recent meetings had been set up by the Federal mediator, nor did he respond to Sweeney's letter of April 22, 1982, seeking bargaining dates.

On January 15, 1982, James Flanagan and another worker, Ronald Cabucio, went directly to Veloza and advised him that if he would renew the contract for another year they would work for him with no wage increase, as aforesaid. This approach was made without the knowledge of Huff and is some indication that the employees had probably lost confidence in Huff's conduct of negotiations. Flanagan's approach placed Veloza in a position of violating the Act if he acknowledged negotiating with his employees other than through the recognized negotiators. But what is most important is that on January 15, 1982, shop steward Flanagan and one other employee were prepared to accept Respondent's initial bargaining position of extending the old contract for a period of 1 year.

Huff's difficulty and inability on occasions to answer questions on cross-examination are also demonstrated throughout his testimony. In his affidavit of March 24, he stated that at the negotiation sessions he had received no economic information regarding subcontracting, but when shown Respondent's Exhibit 1, Huff then acknowledged that he had received such information on March 10.

Huff initially denied that there had been any attempt to negotiate a new relationship between the servicemen and the Company whereby the servicemen would own their own trucks, be represented or recognized by the Union, but still be employees of Respondent similar to industrial catering companies. However, he subsequently admitted that the reference to industrial caterers had come up during negotiations and that it was in the context of a new relationship for the servicemen. In his March affidavit Huff also stated that it was not until De-

ember 28, 1981, that "Sweeney offered to pay servicemen 30 cents and 20 cents after six months," but that this offer had been made on October 30. Sweeney credibly denied that he ever made any statement to the effect that he would never sign a contract without subcontracting language in it.

Concluding Findings

Section 8(a)(5) of the Act establishes a duty "to enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement." *NLRB v. Herman Sausage Co.*, 275 F.2d 299, 231 (5th Cir. 1960). As the Supreme Court stated in *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 485 (1960):

Collective bargaining, then, is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of "take it or leave it"; it presupposes a desire to reach ultimate agreement, to enter into a collective-bargaining contract.

This obligation does not compel either party to agree to a proposal or make a concession. *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952); specifically, it does not compel agreement on particular contractual terms, no matter how strongly desired by a union, *NLRB v. H. K. Porter*, 397 U.S. 99 (1970). However, the Board may, and does, examine the contents of the proposals put forth, for, "if the Board is not to be blinded by empty talk and by the mere surface motions of collective bargaining, it must take some cognizance of the reasonableness of the position taken by an employer in the course of bargaining negotiations." *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134 (1st Cir. 1953), cert. denied 346 U.S. 887. Specifically, as stated by the First Circuit at page 139 of its opinion, insistence upon proposals which do not have "the slightest chance of acceptance by a self-respecting union" is viewed by the Board and the court as an indication that an employer is attempting to bargain without intention to reach agreement in violation of Section 8(a)(5).

The standard for assessing whether or not a particular course of bargaining meets the test of "good faith" was well stated by Administrative Judge Arthur Leff, which the Board adopted in "*M*" *System, Inc.*, 129 NLRB 527 (1960), where it is said (at 547):

Good faith, or the want of it, is concerned essentially with a state of mind. There is no shortcut to a determination of whether an employer has bargained with the requisite good faith the statute commands. That determination must be based upon reasonable inference drawn from the *totality* of conduct evidencing the state of mind with which the employer entered into and participated in the bargaining process. The employer's statement of mind is to be gleaned not only from his conduct at the bargaining table, but also from his conduct away from it—for example, conduct reflecting a rejection of the principles of collective bargaining or an underlying purpose to bypass or undermine the union

manifests the absence of a genuine desire to compose differences and to reach agreement in the manner the Act commands. All aspects of the Respondent's bargaining and related conduct must be considered in unity, not as separate fragments each to be assessed in isolation.

At the first negotiating meeting on October 27, 1981, the Company offered to enter into a new agreement extending the existing contract for a period of 1 year. When his offer was refused, Sweeney then went through the proposals of the Company explaining the necessity and desirability, from his point of view, of each and every proposal, and I am in agreement that it cannot be successfully argued that these proposals by the Company were unreasonable or calculated to require a refusal from the Union. Certainly, the removal of a driver who loses his insurability does not appear to be unreasonable, nor does the right to terminate an employee upon an act of insubordination appear to be unreasonable, and the substitution of the Federal Mediation Service for the Massachusetts State Labor Board is certainly not an unreasonable proposal. As further pointed out, neither are the economic proposals by the Company so unreasonable as to raise the suggestion that the employer did not desire a contract. Moreover, the Company wanted to improve its economic position insofar as its numerous competitors were concerned, and figures were presented demonstrating that the Company had sold considerably less gallons of fuel oil in November 1981 than it had in November 1980 (see G.C. Exh. 12). The initial proposal by the Company that part-time employees would not accumulate the same fringe benefits and vacations as full-time employees is also a reasonable proposal even though the Union might consider it otherwise. At this first meeting the Union was also advised that under the expiring contract the Company was paying its drivers in excess of \$11 per hour without calculation of fringe benefits and overtime, and that the old contract, when compared with competing oil companies in the area, was simply "too rich."

In addition to the above, the Company also made two other proposals—first, that the old contract prohibition against subcontracting be deleted, and, secondly, that management (Veloza's sons) be permitted to make emergency calls during nonbusiness hours.¹⁶ The Company also made an initial wage offer of an immediate 25 cents an hour and in 6 months an additional 15 cents an hour for servicemen, but drivers were to remain at the old contract wage.

¹⁶ It is clear that the primary moving factor behind the Company's proposals in this regard was to reduce overtime—that the purpose for the provision permitting the use of management personnel to cover calls outside business hours was to avoid recalling a driver or serviceman for perhaps a 20- or 30-minute job, but then having to pay him a minimum of 4 hours' overtime and Sweeney so explained this at the first meeting. The purpose for the deletion of the subcontracting clause was to permit the Company to use independent servicemen on weekends and during nonbusiness hours to perform service calls that could not be handled by Veloza's sons, but would again require the recall of a serviceman at premium wages for what might be a 20-minute job, and Huff was also aware of this, as aforesaid.

Significantly, on the evening of October 29, Huff presented to his members at a union meeting the company proposal as an entirety, but whereupon it was rejected and a strike vote was taken. At this point, of course, no negotiating in the usual sense had taken place. Counsel for Respondent points out that Huff's description to the employees on the evening of October 29 that the "employer does not recognize the proposals we had submitted" exemplifies the intransigent position of the Union, and clearly demonstrates which party did not recognize its obligations to bargain in good faith.

The next meeting was held on October 30, and at this meeting Huff reduced the union demand from \$1.50 an hour in each of 3 years to 75 cents per hour, but the other union proposals remained the same. Huff then informed management that if the subcontracting proposal by the Company were adopted the employees would lose their overtime, but in response Huff was advised by Sweeney that their proposal to delete the subcontracting prohibition could be amended "to protect the present employees." However, Respondent's efforts to enter into a dialogue on this suggested amendment was totally rejected by the Union. As indicated, it appears that had negotiations taken place which would have "grandfather" in the present employees, such an arrangement would have met management's desire to substantially reduce overtime and should have met the Union's professed fears that its people would lose their jobs or all their overtime.

Very little was accomplished at the meeting on November 2 and December 28, as aforesaid, and the details of what transpired at the meetings on March 10 and May 5 have been previously set forth herein.

The Company is accused of failing and refusing to bargain in good faith with the Union. I have concluded and find otherwise. In the first instance this record shows that the Company had initially offered to extend the old contract for a year in order to review the overall economic situation. The Company had increased its wage offer before the expiration of the contract. The Company has explained in detail the desirability of certain of its proposals and the economic need for others. Moreover, through March 10, other than a reduction in wage demands, the Union had not changed its position on a single proposal, and it had not accepted a single management proposal nor had the Union made any counterproposals, and as a result it was difficult for Respondent to make any headway in the negotiations. It certainly could not negotiate with itself.

It is alleged that Respondent engaged in dilatory tactics by failing to schedule meetings at reasonable times. As indicated, the first meetings on October 27 and October 30 were set by the Union, and again on November 2 the parties met for negotiations. However, at this point the intervention of the Federal Mediation Service was called upon in the person of Austin Skinner, and all future meetings were scheduled through his offices. When the November 2, 1981, meeting ended, it was subject to Austin Skinner bringing the parties back together, but there was also a suggestion that a period of time should go by to allow matters to cool, as aforesaid, and

no further meeting was held until December 28, 1981.¹⁷ The reliable and credited testimony in this record reveals that the only negotiating meeting canceled by Respondent was the January 29, 1982, meeting when Charles Veloza became ill, and it appears that a previous meeting on January 8, 1982, was canceled, but for reasons other than the unavailability of company negotiators. The Union chose to conduct negotiations through the Federal Mediation Service and cannot now complain that it was encumbent on management to initiate negotiations through some other mechanism.

The Company has also been charged with insisting on the deletion of the no-subcontracting clause, and unilaterally subcontracting its service work.

The evidence in this record demonstrates that the Company, as early as October 27, 1981, had notified the Union it wished to negotiate on the issue of subcontracting, and at the meeting on March 10, 1982, also attempted to negotiate a relationship with its service employees similar to commercial catering employees, but was rebuffed by the Union. At least by March 10, as detailed earlier herein, Huff was also presented with cost campaign figures demonstrating the difference between keeping an employee-serviceman on the road and hiring independent contractors (Resp. Exh. 1), and these figures were based on the expired contract and indicated that the hourly cost of a serviceman was \$15.82. The Company, of course, recognized that it had an obligation to bargain with the Union as to the effect on its servicemen in relationship to subcontracting, and it attempted to do so at the first meeting, again on October 30, again on March 10, again by the letter of attorney Sweeney to Huff on April 22, 1982 (Resp. Exh. 3), and once again on May 5, but the Union had refused to consider the question of subcontracting from the time it was first presented on October 27, 1981, and also expressed no interest in protecting the present employees through a suggested grandfather clause, as previously detailed herein.

It has also been fully demonstrated in this record that subcontracting represents an economic benefit to the Company. Charles Veloza testified that he had kept all four of his servicemen throughout the previous summer, but as of May 25, 1982, Veloza was only using two outside contractors as compared to the past practice of maintaining four drivers and trucks. As pointed out, it was much cheaper for Respondent to use a single subcontractor at \$15 per call than to put employees on the road at a much higher average cost. (See Resp. Exh. 7.)

In essence, the Company attempted to negotiate the issue of subcontracting from October 27, 1981, through the last date the parties met. It presented comparative cost figures to the Union, and attempted to enter into a dialogue with the Union to continue a relationship with its employees and even suggested at least two alternatives. Moreover, the Company still had four service trucks available for use by its servicemen and/or contractors.

¹⁷ On two occasions during the hearing Respondent offered to join in a request to have Austin Skinner testify as to his efforts to schedule meetings and most importantly the availability of management spokesmen, but this offer was never accepted.

The General Counsel argues that the Union was not notified about the decision to subcontract until after this decision had already been effectuated and, therefore, the Union was denied the right of meaningful discussions, but I have rejected this contention for the reasons noted herein, and also on the basis that it is incumbent upon a union, which has notice of an employer's proposed change in terms and conditions of employment, to bargain on such changes in order to preserve its protected rights. The Union cannot be content with merely protesting the proposal or filing an unfair labor practice charge over the matter. In *American Buslines*, 164 NLRB 1055 (1967), the Board held that a union which receives timely notice or change in conditions of employment must take advantage of that notice if it is to preserve its bargaining rights, and cannot be content in merely protesting an employer's contemplated action. Such lack of diligence by a union amounts to a waiver of its right to bargain.¹⁸ In the instant case it should also be noted, in the final analysis, that the proposal by the Company to subcontract was essentially an indication of future contemplation on this matter and was not the final decision. While Sweeney informed Huff at the meeting on March 10 that the Company was no longer in the business of servicing house calls, he also told him, and admittedly so, that the Company "will be farming out all the service work." Moreover, the subsequent exchanges between the parties, as aforesaid, further reveals that Respondent's position on subcontracting was still open even as late as May 5 as in that negotiating session the Company offered to take the striking employees back and without any special arrangements as to their duties.

Respondent is also charged by the General Counsel with unlawfully discharging its striking employees. However, it is the position of Respondent that the striking employees here involved have not been terminated. I am in agreement with Respondent and have concluded that there is insufficient evidence in this record to substantiate the General Counsel's position. In fact, the only evidence of such termination was the mailing, by an independent data processing employer, of W-2 tax forms to the employees here involved, but this was not done at the direction of the Company and is merely an automatic procedure followed by the employer providing payroll services, and there is no evidence or testimony in this record to the contrary. It should also be emphasized at this point that the offer on May 5 by the Company to all employees to return to work was unqualified, and that no conditions were set by the Company on its offer.

It is also argued by the General Counsel that the strike here in question was caused and prolonged by Respondent's unfair labor practices. I have concluded and found that the Company was bargaining in good faith and, therefore, committed no unlawful acts which caused or prolonged the strike. After the strike started on February 1, 1982, the Company did, in fact, begin to "farm out" its service work in efforts to keep its operations going and

¹⁸ See also *Clarkwood Corp.*, 233 NLRB 1172 (1977); *Austin-Berryhill*, 246 NLRB 1139 (1979); and *City Hospital of East Liverpool*, 234 NLRB 58 (1978).

to meet customer demands. However, there is no suggestion by the General Counsel that the Company did not have the right to use other servicemen and independent contractors in the area in order to service its customers and run its business while its own employees were on strike. Veloza's initial decision in early February to subcontract was to meet the emergency demands of his customers, as previously detailed herein, but as the economics of the situation became clearer as time went on, and as this record indicates, he then more than ever realized that it made no economic sense for him to remain in the service business when he would effect a savings by using subcontractors, and as a result he then again attempted to meet and negotiate such findings with the Union on March 10 and again on May 5.

In the final analysis, Huff admitted that by the meeting on May 5, 1982, the Union had essentially agreed to all of Respondent's main proposals and the others would "fall in place," but stated that the subcontracting issue was still outstanding. However, Sweeney credibly testified that at this last meeting even the subcontracting proposal had at least a tentative agreement from Huff, or he had indicated such, but the parties then differed as to an increase in health and welfare payments, and this issue received no response from Huff and was the issue that actually broke down the final efforts for a contract. It seems to me that such events and circumstances reveal a strong showing that the Company did present reasonable proposals and also offered acceptable explanations in good faith for the same during the negotiating meetings, or otherwise the Union would not have substantially agreed on May 5 to all Respondent's main proposals, as indicated above.

Based on the *totality* of the conduct by Respondent, and the reasonable inferences drawn therefrom, I have concluded that the Company entered into and participated in the bargaining process, and possessed a genuine desire to conciliate differences and to reach an agreement in the manner which the Act commands.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent has not engaged in any of the unfair labor practices alleged in the complaint.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER¹⁹

The complaint is dismissed in its entirety.

¹⁹ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.