

Western Newspaper Publishing Co., Inc. and Printing and Graphic Communications Union No. 17, International Printing and Graphic Communications Union, AFL-CIO. Cases 25-CA-13309 and 25-CA-13621

26 March 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS

On 14 September 1982 Administrative Law Judge Thomas A. Ricci issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions, a supporting brief, and an answering brief to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions only to the extent consistent with this Decision and Order.

The Dismissed 8(a)(5) Allegations

We agree generally with the judge's finding that, when the Respondent proposed changes in the "Jurisdiction" clause of the next collective-bargaining agreement, it was not bargaining about the scope of the unit but rather about employees' work assignments. Therefore, we agree with the judge's conclusion that there is no merit in the complaint allegation that the Respondent violated Section 8(a)(5) of the Act by insisting on bargaining about the scope of the unit, a permissive subject of bargaining. In adopting this conclusion, however, we do not rely on the judge's gratuitous observations regarding the merits of a previous charge which was withdrawn by the Union, the attitude of Union President Clements during negotiations as evidence of impasse, and the determination of jurisdictional disputes under Section 10(k) of the Act, because these comments have no bearing on our decision in this case.²

¹ The General Counsel and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We also note that, in par. 6 of "The Jurisdictional Dispute" section of his decision, the judge stated, "However this aspect of the case be viewed—unit or justification . . ." when he apparently intended to state, "However this aspect of the case be viewed—unit or jurisdiction . . ." We therefore correct this inadvertent error.

Furthermore, we find that, by proposing to delete bindery work from the classifications listed in article 43 of the contract, the Respondent was not bargaining about the scope of the unit, because the record clearly establishes that at the time this proposal was initially made in the fall of 1980 no bindery work had been done at the Respondent's facility of several years. While the written proposal which the Respondent presented in March 1981 continued to request the deletion of bindery work from article 43 of the contract even though the Respondent had purchased and installed some bindery equipment in January 1981, the Respondent asserts that this was merely an oversight. We credit the Respondent's assertion, noting especially that in February 1981 the Respondent began assigning some of the bindery work to unit employees on a regular basis; that, at a grievance meeting in March 1981 about the Respondent's assignment of bindery work to nonunit employees, Respondent President Gard assured the Union it would continue to assign bindery work to unit employees; and that thereafter the Respondent did continue to assign bindery work to unit employees on a regular basis.

We also agree with the judge's finding that as of January 1981 the parties had reached an impasse in their bargaining for a new contract. Contrary to the judge, however, we do not find that employee work assignments or "Jurisdiction" was one of the subjects on which they had reached impasse at that time, because it is undisputed that during the 12 January 1981 bargaining session Respondent's President Gard specifically informed the Union that jurisdiction was one of the subjects on which he was still willing to trade.

It is well settled that, after bargaining to an impasse, an employer does not violate Section 8(a)(5) of the Act by making unilateral changes, as long as the changes are reasonably encompassed by the employer's pre-impasse proposals.³ Furthermore, after an impasse has been reached on one or more subjects of bargaining, an employer may implement any of its pre-impasse proposals, even if no impasse has occurred as to those particular proposals which are put into effect.⁴ Although we agree with the judge's ultimate conclusion that, after impasse had been reached, the Respondent was entitled to make the unilateral changes alleged as violations in this case, we note that in reaching this conclusion the judge neglected to make the necessary findings that the particular unilateral changes made by the Re-

³ *NLRB v. Katz*, 369 U.S. 736, 745 (1962); *NLRB v. Crompton-Highland Mills*, 337 U.S. 217, 224 (1949).

⁴ *Taylor-Winfield Corp.*, 225 NLRB 457 (1976); *Taft Broadcasting Co.*, 163 NLRB 475 (1967), *enfd.* sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

spondent were consistent with its pre-impasse proposals. Therefore, we must set forth our findings on this point.

The Unilateral Changes

By letter dated 26 January 1981, the Respondent notified the Union that it would no longer make any payments on behalf of its employees into three of the Union's fringe benefit funds, the Supplemental Unemployment Benefit Fund, the Prepaid Legal Service Fund, and the Education Fund. The Respondent actually stopped making payments to these three funds in March 1981. It is undisputed that, beginning with its first written proposal, the Respondent had consistently proposed deleting the articles in the contract regarding its participation in these three fringe benefit funds.⁵ Thus, in stopping payments to these three funds, the Respondent was clearly implementing the same proposal it had offered to the Union before impasse.

In the 26 January 1981 letter, the Respondent also notified the Union that it would no longer be liable for portability of vacations under the expired contract.⁶ On 15 April 1981 the Respondent posted a notice to employees about the summer vacation schedule, which stated that portability of vacations for unit employees was no longer recognized and listed the number of vacation weeks each employee was entitled to take, listing certain unit employees as entitled to only 2 weeks of vacation rather than to the 4 or 5 weeks they would have received under the expired contract. Again, it is undisputed that from its very first written proposal the Respondent had consistently proposed to exclude portability of vacations from the new contract, to reduce the maximum number of vacation weeks from 5 weeks to 3 weeks, and to increase the years of employment required to earn vacation weeks from 5 years to 15 years.⁷ By ending its recogni-

tion of vacation portability, the Respondent was clearly implementing the same proposal it had offered to the Union before impasse. As to the reduction in the number of vacation weeks to which particular employees were entitled, the record evidence indicates that the Respondent's posted vacation notice was consistent with its pre-impasse proposal. The General Counsel points out that two unit employees with more than 5 years of service had their vacation reduced to 2 weeks from the 5 weeks they would have been entitled to under the expired contract even without considering portability; but, it is clear that neither of these employees had the 15 years of service required to earn 3 weeks of vacation under the Respondent's pre-impasse proposal.

The General Counsel argues further that, even if this reduction in vacation time was consistent with the Respondent's pre-impasse proposal, the Respondent was still not entitled to reduce unit employees' accrued vacation time retroactively. It is undisputed that vacations scheduled for the summer of 1981 had been earned during the year beginning 1 June 1980 and ending 30 May 1981, and that, therefore, unit employees had probably accrued some portion of their total yearly vacation time before the contract expired on 31 October 1980 and before the bargaining impasse was reached in January 1981. However, the General Counsel has presented no evidence concerning the Respondent's past practice as to accrual and use of prorated vacation time, and the contract is unclear on this point.⁸ In the absence of evidence establishing that in the past the Respondent had permitted unit employees to accrue less than a full year's worth of vacation time and use it during the same year, the General Counsel has not established a prima facie case that the Respondent unilaterally reduced any unit employee's accrued vacation time.

While the Respondent had consistently proposed during the bargaining to replace the Union's Health and Welfare Fund with its own private health insurance plan, it did not implement this proposal after impasse. Rather, the Respondent continued to pay the same monthly premium to the Union's

⁵ We note that the Respondent's adamant insistence on ending its participation in these three funds was one of the principal factors relied on by the judge in finding that the parties had reached impasse.

⁶ The expired contract provided that, after 3 years of employment with the Respondent, an employee who had worked for another employer having a contract with the Union would get credit for his years of service with the other employer when computing his vacation time with the Respondent.

⁷ We note that the Respondent's adamant insistence on ending its liability for vacation portability was another factor on which the judge relied in finding that impasse had occurred. We also note that the parties had not reached impasse in January 1981 on the rest of the vacation issues. Thus, Respondent President Gard specifically informed the Union during the 12 January 1981 session that he was still willing to negotiate about amounts of vacation earned for different lengths of service even though he was not willing to move on portability. However, as previously stated, the fact that the parties had not reached impasse on these particular issues does not by itself render the Respondent's implementation of these proposals illegal, where the parties had bargained to an impasse on other issues.

⁸ While the expired contract provided that employees with less than a full year of employment would receive vacation pay on a prorata basis, it also stated that "Vacation entitlement is the anniversary date." This does not answer the question whether employees had been permitted to use any prorated vacation time during the same year it had been accrued, before their anniversary dates, or whether they had to wait until the year following their anniversary dates to use any prorated vacation. Rather, it seems to indicate that employees were only entitled to receive prorated vacation pay instead of using prorated vacation time and that at the earliest they would only be entitled to this prorated vacation pay as of their particular anniversary dates instead of during the summer vacation schedule.

Health and Welfare Fund from the time impasse was reached in January 1981 until the unit employees went on strike in October 1981. However, on 1 March 1981 the trustees of the Union's Health and Welfare Fund increased the premium due from the Respondent, and the Respondent failed to pay the increased amount when it was first due in April 1981. Inasmuch as the Respondent was not notified of this increase until June 1981, it clearly fulfilled its duty to maintain the status quo by continuing to make its regular payments until that time. But, contrary to the judge's finding, it is undisputed that the Respondent did not pay the increased premium even after it received the notice in June 1981. The Respondent states that it did not pay the increased amount because of the suspicious circumstances surrounding its delayed receipt of the notice about the increase, more than 3 months after the date on the notice and only 2 days before the Union filed its second unfair labor practice charge in this case alleging that the Respondent's failure to pay the increased premium after 1 March 1981 was illegal. The Respondent also notes that shortly after it received this notice it resumed bargaining with the Union, both about a new contract and about settling the pending unfair labor practice charges, and that in September 1981 it offered to pay the increased amounts due to the Union's Health and Welfare Fund retroactively. Under the unique circumstances of this case, we conclude that the Respondent's failure to pay the increased premiums between June and October 1981 was not an unlawful unilateral change, because the Respondent was entitled to a reasonable period of time in which to investigate its doubts about the authenticity and the timing of the notice.

As noted above, after the parties had reached impasse, the Respondent purchased some bindery equipment and began performing bindery work again, for the first time in several years. The Respondent assigned some of this bindery work to unit employees on a regular basis, but also assigned part of this bindery work to nonunit employees on occasion. It is undisputed that, from the very beginning of the bargaining, the Respondent had consistently proposed deleting any reference to bindery work from the classifications listed in article 43 and referred to in the "Jurisdiction" clause of the contract, which governed employees' work assignments. We agree with the judge's finding that, by proposing changes in the "Jurisdiction" clause, the Respondent wanted to gain more flexibility in making temporary work assignments to nonunit employees, as needed. Thus, the Respondent's occasional assignment of bindery work to nonunit

employees was encompassed by its pre-impasse proposals.

The General Counsel contends that in November 1980, before any impasse in bargaining, the Respondent unilaterally changed working conditions by assigning only one unit employee to run the 45-inch press, instead of two employees as required by the contract. While it is undisputed that the Union filed a grievance in November 1980 protesting the Respondent's assignment of one employee to run this press, there is insufficient evidence to indicate that this was a change from the Respondent's past practice. Rather, Respondent President Gard testified that for the past several years the 45-inch press had occasionally been run by one employee as the need arose, and this testimony was not rebutted. Therefore, we conclude the General Counsel has not made out a prima facie case that the Respondent unlawfully changed working conditions.

The 8(a)(1) Violation

Finally, the judge found that, in October 1980 when the parties were in the early stages of bargaining, Respondent President Gard told employee Claude Wood, "if anybody should strike this company they would never work for him again." This finding was based on the testimony of Wood, which the judge credited, relying in part on the fact that Wood had returned to work for the Respondent by the time he testified in July 1982. However, it is undisputed that Wood never returned to work after the strike began on 5 October 1981. Therefore, we do not rely on this factor in adopting the judge's finding. Nevertheless, we adopt the judge's crediting of Wood's testimony over that of Gard, inasmuch as the judge relied on other independent factors in resolving this credibility issue. The Respondent contends that this threat did not violate the Act because Wood was a statutory supervisor at the time it was made. While the record establishes that Wood was a foreman when Gard made this statement, his supervisory status was not litigated and there is insufficient evidence to indicate whether he actually possessed or exercised any supervisory authority as a foreman.

The judge concluded that this isolated threat did not warrant an unfair labor practice finding, because its effect on the employees must have been largely dissipated by the time of the hearing and because Gard had in effect withdrawn the threat by taking Wood back after the strike. As noted above, the judge erred in finding that Gard took Wood back after the strike; rather, the record establishes that Gard refused to rehire Wood when he made an unconditional offer to return to work, because he had been permanently replaced. More-

over, we do not agree with the judge that the timing of the threat so long before the hearing is relevant to our finding of a violation. Thus, contrary to the judge, we find that the Respondent violated Section 8(a)(1) of the Act when Gard threatened to fire any employee who went on strike.

THE REMEDY

Having found that the Respondent violated Section 8(a)(1), we shall order the Respondent to cease and desist and to post an appropriate notice. The General Counsel argues that the Respondent's unfair labor practices caused the unit employees to go on strike in October 1981; however, the record evidence clearly establishes that the unlawful threat made in October 1980 played no part in the employees' decision to go on strike a year later. Rather, the employees testified that they were concerned about losing their coverage under the Union's Health and Welfare Fund, about the decrease in their vacation time, and about the Respondent's failure to make payments to the other fringe benefit funds. Since we have found that the Respondent's unilateral changes did not violate the Act, we find that the Respondent did not commit any unfair labor practice which caused the strike. Accordingly, we find that the unit employees were engaged in an economic strike, and we shall not require the Respondent to offer immediate reinstatement with full backpay to the strikers, all of whom were permanently replaced.⁹

ORDER

The National Labor Relations Board orders that the Respondent, Western Newspaper Publishing Co., Inc., Indianapolis, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to discharge its employees if they engage in a strike.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes of the Act.

(a) Post at its place of business in Indianapolis, Indiana, copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided

⁹ The rights of economic strikers are governed by the Board's decision in *Laidlaw Corp.*, 171 NLRB 1366 (1968), *enfd.* 414 F.2d 99 (7th Cir. 1969), *cert. denied* 397 U.S. 920 (1970). There is no allegation in this case that the Respondent has failed to fulfill its obligation to the economic strikers under *Laidlaw*.

¹⁰ 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 Na-

by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt 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 the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER HUNTER, concurring.

I agree with my colleagues' findings that impasse had been reached here and that the Respondent's implementation of changes after impasse was substantially consistent with its pre-impasse proposals. In so doing I do not find it necessary to adopt my colleagues' discussion of these points in its entirety. In addition, I agree with my colleagues for the reasons given by them that the Respondent violated Section 8(a)(1) of the Act by threatening to fire any employee who went on strike.

ional 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."

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten to discharge our employees if they engage in a strike.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WESTERN NEWSPAPER PUBLISHING

DECISION

STATEMENT OF THE CASE

THOMAS A. RICCI, Administrative Law Judge. A hearing in this proceeding was held on January 4 and 5, and on July 6, 7, 8, and 9, 1982, at Indianapolis, Indiana, on separate complaints by the General Counsel against Western Newspaper Publishing Co., Inc., here called the Respondent or the Company. The complaints were

issued on charges filed by Printing and Graphic Communications Union No. 17, affiliated with International Printing and Graphic Communications Union, AFL-CIO, here called the Union. The issues presented involve essentially alleged violations of Section 8(a)(5) by the Respondent, in making unilateral changes in conditions of employment without proper bargaining with the Union, the established exclusive majority representative of its employees. Briefs were filed after the close of the hearing by the General Counsel and the Respondent.

On the entire record and from my observation of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, an Indiana corporation, has its principal place of business in Indianapolis, Indiana, where it is engaged in the manufacture, sale, and distribution of printed materials and related products. During the 12-month period preceding issuance of the complaints, a representative period, in the course of its business the Respondent purchased goods and materials valued in excess of \$50,000 received directly from out-of-state sources. In the course of its business it also sold annually goods and materials valued in excess of \$50,000 directly to out-of-state locations. I find that the Respondent is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

I find that Printing and Graphic Communications Union No. 17, International Printing and Graphic Communications Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Question Presented*

The record in this case reflects a confusion in terms that tends to obscure the issues. This fault appears in the wording of the charges, in the language of the complaints, and in the contentions articulated during the hearing by both the General Counsel and the principal witness in support of the complaints. It is necessary, therefore, at the outset to state plainly and exactly the questions to be decided.

The complaint says this Company is engaged in the "manufacture, sale and distribution of printed materials." With the Respondent's answer admitting this allegation, there is no other exact explanation of exactly what kind of work goes on in this plant and just what the Company's business is. There are words without end, by the various witnesses, about this and that process, one method of work and another, classifications of employees without end, etc. But this much is clear: At the time of the events, the second half of 1980, the Company had 28 employees, 7 represented under contract by Local 17 of the International Printing and Graphic Communications Union (previously known as the Pressmen's Union), the Charging Party here, 4 represented by the International Typographical Union (ITU), which did not participate in

the hearing, 12 shop workers not represented by any union, 2 office clericals, and 1 janitor.

The last of a number of contracts between the Respondent and Local 17, a 3-year agreement, was due to expire on October 31, 1980, and by letter dated 4 months before the end of the contract term, the Company advised the Union it would not thereafter be bound by its terms. After an exchange of letters, and after the Company had put in the hands of the union president, Robert Clements, a comprehensive proposal for revising a great many of the substantive terms of the old contract, the parties met in successive bargaining sessions. Meetings were held on July 18, October 13 and 20, November 7 and 20, 1980, and January 12, and March 4, 1981. No agreement was reached. About January 26, 1981, the Company discontinued payments for a number of fringe benefits into certain union funds which the employees had enjoyed under the old contract. It had discussed each of these many items with the union representatives, each time insisting it no longer was willing to pay that money. The Union never yielded on its insistence that all those fringe benefits must be provided for in any agreement reached. On March 17, 1981, the Union filed a charge here being considered (Case 25-CA-13309), accusing the Company of bypassing the Union by such discontinuance of the fringe benefits. Based on that charge the first complaint was issued on June 19, 1981, alleging that by unilaterally discontinuing the fringe benefits the Respondent violated Section 8(a)(5) of the Act.

In defense the Respondent contends that by January 1981, after seven bargaining sessions, and after the Union's unyielding adamancy, an impasse had been reached, and it therefore had a right to take such action in its economic interests. That issue, precise and easily understandable, presents no problem as to coherence, at least. Was there an impasse, after all the meetings, such as to permit the employer to put in effect the conditions of employment it had been unable to persuade the Union to accept? If in fact the Respondent had by that time discharged its statutory duty to bargain, there was nothing wrong in running its business as it saw fit.

After issuance of the first complaint, the Union filed an amendment to its first charge, plus a second charge (Case 25-CA-13621). The idea injected into the case by the Union by these later documents is that the Respondent "insisted to impasse on a substantial modification of the unit jurisdiction contract provision." This last act is rephrased in the second complaint issued on July 29, which, in point, reads, "The Respondent has demanded, as a condition of consummating any collective-bargaining agreement, that the Union agree to a provision that would alter the scope of the appropriate bargaining unit . . ." It is these two phrases—"unit jurisdiction" and "scope of the appropriate bargaining unit"—on which the General Counsel, and the witnesses, expanded continuously into incoherent jargon and double-talk which eludes clear comprehension on the transcript.

But the fact as to precisely what the Company wanted to do, what it had already done once or twice, and what the Union said it would never agree to, do emerge. George Gard, the company president, wanted occasion-

ally to put one of the office girls, or even a janitor, to do some work on a press, or on a folding machine, or on a stamping of envelopes operation, when the needs and work was better served that way. He even wanted the Union to agree the Company could hire a part-timer, or a moonlighter, to come in once in a while to run a more efficient shop, even cheaper, although there is no direct evidence about precisely economic benefits. But a more important, and very relevant fact, is that neither with respect to any past use of persons other than the Local 17 members, nor in connection with the proposed use of others, is there any assertion that any of the seven men represented by Local 17 ever lost a moment's pay, or had reason to believe they would ever be in danger of suffering economic loss were the Company to run a more efficient and more economical operation.

If the 7 people represented by Local 17 never stopped work, how does use of some of the 12 unrepresented employees, or 1 of the 4 represented by the ITU (which was also involved!), alter the bargaining unit? When work is ended for the day, the seven Local 17 members have left after completing their regular hours, and it is realized some work of importance remains to be done, is it an unfair labor practice for Mrs. Gard, half owner of the business and in charge of the whole operation with her husband, to go to a camera, or a stripper trimmer, and work a few hours to keep the orders flowing? This was a contention of the Union at the hearing! How does union jurisdiction—its self-proclaimed rights (territorial? occupational?) in certain kinds of commercial operations—relate to the composition of a bargaining unit in a particular factory, which is also the position taken by the General Counsel in this case? A document received in evidence is a letter signed by Clements, president of Local 13, and Francis Biggs, president of the ITU, showing agreement between those two men as to how work is to be divided between their respective union memberships in this plant of the Respondent. How does an agreement between two unions become binding on an employer who wants to run his business as he thinks best? For the moment the following quotation will do:

. . . unless transfers are specifically prohibited by the bargaining agreement, an employer is free to transfer work out of the bargaining unit if: "(1) the employer complies with *Fibreboard Paper Products v. N.L.R.B.*, 375 U.S. 203 . . . by bargaining in good faith to impasse; and (2) the employer is not motivated by antiunion animus . . ." *University of Chicago v. NLRB*, 89 LRRM 2117.

In a certain, limited sense, this question of the Respondent wanting to use some of its other employees to help do the work of the seven represented by Local 17 stands apart from the unilateral discontinuance of fringe benefits payable only to the benefit of the seven. But in reality, considering the consolidated case as a whole, there is a very significant connection between the two. If there is one thing clear on this record it is that Clements, for Local 17, was determined never, but never, to yield on what he called his union's jurisdictional rights. As will be shown, the record proves a sufficient impasse on

the Company's demands to stop paying into the various union funds. But even if the Respondent had agreed to withdraw those demands, there can be no doubt the parties would still now be at a standstill on this question of the Company's right to shift employees about as the needs of the plant require. The Union's unyielding stance on its so-called jurisdictional rights not only supports, but in truth is the most persuasive proof of, an absolute and total impasse between the parties.

Although belabored into infinitesimal detail by Clements at the hearing, the facts as to the continuing discussions back and forth are not disputed. No need to restate every job and title here. But one last preliminary comment is now in order. A number of times the General Counsel stated on the record that there is no contention the Respondent, at any stage of the negotiations, failed to bargain in good faith. This is a very meaningful truth here. Repeatedly in his recital Clements portrayed Gard, who did most of the talking for the Company, as an unpleasant, antagonistic, vengeful person. The inference he sought to raise, albeit not directly spoken, was that the company president was opposed to Local 17 as such, and wanted to weaken the strength of that union among his employees. That the two men, throughout the meetings that took place, warred against each other is true. But whatever the conflict, Clements' attitude was no less antagonistic towards the Respondent. In fact, in August 1980, after only one bargaining session had taken place, and after he had studied the Company's initial written demands substantially emasculating the old contract, the Local 17 president filed NLRB charges against the Respondent accusing it of bargaining in bad faith. He thought better of it (after the Board's investigation showed no merit in the charge?) and withdrew the charge, in order to renew the bargaining sessions. All this means is that the objective facts—economic demands made and refused again and again—must govern decision here.

That Clements was determined, throughout the entire period not only from July 1, 1980, to January 1981, but even into October of 1981—never to yield on what he called the jurisdictional dispute with the Company, is the clearest thing on this record. After the Company discontinued paying into the various union funds, and the charges and complaints in this proceeding had come to light, the parties tried again to reach agreement on a new contract, this time each side with its lawyer assisting. In September 1981, the Company offered to make retroactive payments into the union funds, the contributions it had discontinued in January, hoping this would bring about accord. And still Clements insisted on what he wanted in terms of jurisdictional prerogatives, clearly re-emphasizing his absolutely fixed determination. He called a strike in October 1981, and never mind the fact the Company was now willing to pay a substantial amount of fringe benefits retroactively.

In the attempt to portray himself a reasonable man, willing compromiser, in contrast to the destructive attitude he attributed to Gard, Clements said it was the seven employees he represented who decided to strike, not he. But then he admitted he had asked for strike ap-

proval from his International Union before talking to the employees about strike, and even that where Local 17 is concerned, there can be no strike without the approval of the Union. This farce by a professional Pressmen unioner completely destroys every effort Clements made, during more than 2 days on the witness stand, to protest his continuing willingness to be receptive to the opposing contract proposals.

In the light of his immediate reaction to the Company's written proposals after the first bargaining session in July 1980—filing a worthless refusal-to-bargain charge with the Labor Board—and the successive meetings extending over 7 months with not an iota of yielding on his part as to the critical question of "union jurisdiction," it may well be that hopeless impasse, in this case, was reached before July 29 dawned. But I do not rest decision on that. The parties did meet and talk six more times after that day. Nothing came of it. All I say is that Clements' own clearly revealed attitude toward the Company's demands, which were perfectly lawful in every respect, proves impasse in this case without question.

B. The Jurisdictional Dispute

Shorn of the conclusionary language used in the pleadings and by the prosecution's side of the case, what Gard was asking of Local 17 is very simply stated. He wanted to be free to use any employee in the plant, even an extra part-time he might on occasion need, to do any kind of work that the seven Local 17 men could not alone accomplish. He never suggested that any of the seven lose any time, or work less than their regular full-time shifts as they always enjoyed. And he explained his demand as required by the needs of efficiency and economy. Because he insisted on that right, the complaint calls his action illegal by characterizing it as a change in the bargaining unit.

In adamantly refusing to give an inch to the Company's requests, Clements kept talking about jurisdiction. Repeatedly he referred to the existing contract's article 4, entitled "Jurisdiction." This is the one the General Counsel says describes the bargaining unit. In pertinent part, the article reads as follows:

It is understood that the jurisdiction of this contract extends over all printing presses, including but not limited to, gravure, offset, letter press, letter set, and flexographic and associated devices, including sizes of cuts, make ready known as overlay (either mechanical or hand), interlay, color matching, making or running of color proofs, pre-press proofing and film processors proofing color separations and all work in connection with offset, this includes but not limited to, all operations involving film or offset (offset preprep), also all work in connection with plate making including but not limited to camera operation involving paper of film, all dark-room work, stripping, layout after the camera, opaquing, plate making and flexographic plate mounting.

In fact, instead, the bargaining unit is explicitly set out in the contract preamble, and reads:

The Employer hereby recognizes the Union as the collective bargaining representative for all employees working in classifications covered by this agreement.

Some of the functions listed under jurisdiction did not exist in the plant at all, some had not been performed for several years. Clement held firm against changing a single word in that contract language. What he was really saying throughout the extended negotiations, although he did not put it in so many words, was that if Gard wanted anyone else—i.e., other than the seven Local 17 men then, on the job—to perform any of the work so meticulously detailed, he either had to call somebody from the Union's office or hire an outsider, who would then, of course, have to become a Local 17 member. This is another way of saying that the "work" belongs to the Union, *this* Union. This is what the word "jurisdiction" means when used in this union contract.¹

But what even more clearly reveals Clements' true objective of wanting the work to go to members of his Union, now, and always, is something he did not do when Gard, even before as well as after the old contract expired, in fact assigned small portions of the so-called unit jurisdiction work to ITU members or his nonunion employees. Clements never protested that temporary assignments were paid for at rates below the contract wages. If Gard had hired people off the street to do the extra work, no one could have questioned his right to do that. That he would have had to pay such outsiders the going wages is clear, but that is not what this case is about. More, Clements never asked that the nonunion employees, or the ITU men used in this way, join Local 17 when so assigned. Under the old contract he had a right to do that. But all this means that the question was not about the appropriate bargaining unit at all. It was instead an unyielding demand by Local 17 that it had a legal right to dictate the Company's choice of employees. I think this is an indefensible position.²

¹ In dismissing another complaint where the employer insisted to impasse upon freedom to assign work to available employees of various kinds, the Board's language in appraising the true objective of the union there fits exactly the position advanced by Clements here.

With respect to the Company's proposal to combine the use of prerecording with the elimination of categories and its proposal to continue broadcasting by employees removed from the bargaining unit, the Union stated that "such anti-union weapons we cannot place in the hands of the Company." . . . The Respondent wanted certain changes in working conditions which would give it greater flexibility in the assignment of its personnel. As viewed by the Union, this meant serious loss to its members. [Taft Broadcasting Co., 163 NLRB 475, 477, 478 (1967).]

The word "members" does not mean unit. Indeed, to refer to union membership in defining the bargaining unit in any Board proceeding would do violence to Sec. 8(a)(3) of the Act.

² From Clements' testimony:

Q. . . what did you say on other occasions concerning jurisdiction and scope of your bargaining unit?

A. I do not recall. I could say I believe that we said that you are attempting to take away our jurisdiction, and I do not recall other terminology that I had used on different occasions.

Continued

I also do not think two unions have a right, under this statute, to allocate any employer's work between themselves without regard to the Company's financial interests, so long as he honors the agreed-upon wage scales set up in a contract. Clements' position on that very important point, again disregarding his continuing double-talk, is very clear. In 1977 he made a deal with the ITU—unilaterally, i.e., bypassing the employer!—whereby ITU members could do camera work in this plant. When arguing in support of his insistence that in 1980 and 1981 this Respondent must stop using ITU men there, as it had several times done between 1977 and 1980, Clements justified his position on the ground his private deal with the ITU was no longer in effect. In the field of the social sciences, much has been written on the subject of "Who Governs?" In a plant, owned, of course, by the employer, who governs—the union?³

However this aspect of the case be viewed—unit or justification—it was an economic demand the Respondent made for modification of the expired contract, and completely proper. Cf. *Taft Broadcasting Co.*, supra. Clements' recital of the lengthy talks that went on during seven bargaining sessions extends over 400 pages of testimony. He was argumentative, quarrelsome, evasive, and completely lacking in direct and responsive talk. Gard also, as a witness, interspersed his versions of the talks with much explanatory and legal phraseology. Both there witnesses were emotionally aroused during the negotiations and into the hearing, and naturally they did more arguing than plain speaking. But Clements was always accompanied by an assistant, who listened and talked little. Apparently Frank Stankovich is not an expert in the jargon of unionism in the printing industry, for he spoke plainly and to the point. The following are excerpts from his testimony:

Q. Now, did Mr. Gard ever propose with respect to Article 4 Jurisdiction, that the employee represented by Local 17, who had operated the camera, would cease doing so?

A. No.

Q. . . . It was clear wasn't it that what he [Gard] was talking was having the right also to assign other people to do the work when your people were busy. Isn't that really what was being discussed?

A. He said that he wished to do that, yes.

Q. Yes. And almost every time the subject of the camera came up under Article 4 jurisdiction, Mr. Gard referred to this agreement for split jurisdiction or joint jurisdiction with the ITU, did he not?

Q. Did you ever tell Mr. Gard that you were not legally required to negotiate the scope of your bargaining unit, or the definition of your bargaining unit?

A. I don't recall that phraseology.

³ An interesting, and I think relevant phrase, appears in a Board decision where a real insistence unilaterally on altering a bargaining unit was held to be unlawful. *Newspaper Printing Corp.*, 232 NLRB 291 (1977). There the Board said: "The Board does not certify as appropriate a unit where one party has unilateral control over unit scope." This is precisely what Clements claimed as his right via his agreement with the ITU, and never mind the employer's position.

A. Yes.

Well, they didn't want the jurisdiction in there about the camera. They felt that the—I'm not sure it was all during this session. . . . They felt that if they wanted someone else to operate the camera, they should be able to; and that plate making was easy and shouldn't be—shouldn't have to be done with just journeymen; and that stripping was kindergarten stuff and they could—they should be able to have it done by anybody that they needed. If our people were busy, they felt they could just move somebody in there and they could do it themselves and get the work done. They didn't feel that they should be made to work the people overtime.

Q. And was there any discussion of mailing, that you recall?

A. He [Gard] discussed that he didn't do any mailing anymore and that he wasn't going to pay these rates for a journeyman to do the mailing when he had just put stamps on postage. He didn't feel that was right.

Q. Do you recall Mr. Gard offering any reason for wanting to delete that section?

A. He said that he had—he could—he felt that he could use other people, other than persons under the jurisdiction of the contract, doing some of the work.

Q. Did he say which other people he was referring to?

A. Himself or his wife.

Mr. Gard said that he didn't want the camera operation to be covered. And that he felt that it wasn't needed in the contract, that it wasn't done just by our people No. 17.

Mr. Gard said that he could not agree upon a supervisor—foreman, a working foreman doing—not doing any production work in a reduced workweek. That he—he didn't want him just standing there, he wanted him to work.

There is a parallel between this case and the common jurisdictional dispute proceedings which the Board conducts under Section 10(k) of the Act.⁴ When two unions

⁴ Sec. 10(k) reads as follows in pertinent part:

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph 4(d) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within the ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

fight between themselves as to whether particular work in an employer's place of business should be assigned to "employees" in a particular labor organization, the Board holds a hearing and decides which of the two unions is entitled to the work. While in the case at bar the major dispute was between Local 17 and the employer, as to which employees should perform certain work, in fact a part of the dispute truly was between two unions—Local 17 and the ITU, the classic situation under Section 10(k) of the Act. The evidence is direct—and it need not be repeated here—that Gard, of the Company, wanted, when it served the Company's economic interests, to have some of the work performed by ITU members, but Local 17 would have none of that. The ITU did not come to the hearing. Its last contract for the four men it still represents in this plant expired in 1977 and has not renewed. Why? It is highly unlikely that the ITU would permit its members to work for 5 years without a written contract in effect. The reason for such an unusual arrangement is strongly indicated here. In 1977 its president and President Clements of Local 17 signed an agreement between themselves, that they would enjoy "joint jurisdiction of a graphic arts camera at Western Newspaper Publishing Company."

The trouble with this is that where Section 10(k) of the Act speaks of "voluntary adjustment of the dispute," it does not mean agreement between the two unions. It means instead voluntary adjustment between the employer and the union which feels its work is being given to the wrong union. But if the statute itself, in very pointed language, is aimed at encouraging those two parties—employer and claiming union—to adjust their differences voluntarily, how can this Respondent be faulted for trying to sell its proposed arrangement to the pressmen's union across the bargaining table?

All things considered, I find that by proposing to alter article 4—entitled jurisdiction, and by holding firm to its suggestion just as Local 17 never moved from its fixed opposition, the Respondent did not violate the Act.

And maybe all this discussion here about jurisdiction, repeating the jargon and double-talk used by the pressmen's representative throughout the hearing, was not necessary at all. He resisted to the last any suggestion of any of the work being taken away from those seven people he had in the shop. He called it jurisdiction and the General Counsel kept calling it appropriate unit. Appropriate unit does not mean Joe, Sam, and Harry who happen to be working at any given moment. They could quit, be fired, retire, die, and the unit would remain the same. It is the work, the jobs, however described, that defines the bargaining unit. The owner of the company wanted to use Mary, the office girl, of his wife, or somebody else, to do some of the work. All Clements had to do was tell him he would have to pay the same wages to those others, and if they stayed on the job long enough, maybe even have to join the Union, if the contract so required. He did neither. Instead he wanted nothing less than that Joe, Sam, and Harry must do the work and nobody else. He was not concerned with bargaining unit at all.

Suppose Gard had told the Union, at the start of negotiations, that he wanted the Union to agree that he could

contract away to an outside company half of the work necessary. In that event he would not be using Mary, Mrs. Gard, or some moonlighter, but he would have been proposing that three, or four, of the seven men then on the job and represented by the Union, be sent home. And his reason would have been to pay less to have part of the work done. This was his reason for what he in fact proposed to Clements. If in the hypothetical the parties then stood at loggerheads after 6 months of hard bargaining, a real impasse, as here, would the Respondent have been free, under Board law, to go ahead and contract away half the work? The answer is yes. *Fibreboard Corp.*, 138 NLRB 550 (1962), 375 U.S. 203 (1964). This is substantially what this case is about.

I find that by the month of January 1981 the parties had reached an impasse in their bargaining, whatever that word means in Board law. There is nothing subjective about this conclusion, for it is based on undisputed objective facts. The parties discussed many items—over 60—in the old contract. The Company wanted to change more than 40 of them. There was agreement on very few, the more minor ones. By the time January arrived, there was still disagreement on maybe 40 items, and these involved each of the major money-costing old provisions which the Company wanted to discontinue, payments into various union-controlled funds. All this, besides the jurisdictional dispute already discussed above. I do not think a useful purpose would be served by repeating here how often, just when, each side summed up their notes to record what was still in dispute, just when they kept exchanging summaries of their proposals and counterproposals, what words were used at this meeting or that when the many constantly disputed items were debated back and forth. In fact the parties do not disagree on the reality that, as to each of the benefits precisely called for and which the Company wanted to discontinue, neither party ever waived.

Among the substantive contract costs which the Respondent wanted to discontinue were payment to the Union to operate what was called supplemental unemployment benefit fund, prepared legal service fund, and education fund. In each of its formal summaries of position, on July 23 and again on December 3, the Company proposed abolition of these obligations. The testimony explaining the economic basis for the position is perfectly convincing. In turn, in each of its three written summaries of position which the Union gave the Respondent before March 1981, it repeated its refusal to go along. At one meeting after another the parties kept restating the reasons which underlay their conflicting positions, repeating the same story again and again.

Another benefit which the employees enjoyed under the old contract was called vacation "portability." This meant that any employee who had previously worked for some other company which had a contract with Local 17 was entitled to vacation time credit for whatever periods of time he had worked for the other company. President Gard of the Respondent wanted no more of that. This item too was discussed a number of times, with neither party yielding at all. This running disagreement on changes proposed by the Company ran on with-

out end; the sheer number of deadlocked issues helps prove the fact of real impasse.

Fixed determination not to yield on major items is enough to call an impasse. It is not a prerequisite of the right of an employer to move unilaterally that there be disagreement on all that is discussed. "[A] deadlock is still a deadlock whether produced by one or a number of significant and unresolved differences in positions." *Taft Broadcasting*, supra. Were seven bargaining sessions enough before the Company could declare an impasse? In her brief the General Counsel says that was not enough, there should have been as many more—over another 6-month period perhaps, or a year maybe? The coin has two faces. The Company wanted to stop paying fringe benefits it said it could not afford. The longer it kept talking the longer it went on paying. If talking went on and on, the Union benefited in a case like this. What Clements wanted was for the payments to continue in a new contract. If law permits him to keep talking indefinitely, he obliquely achieves his objective—effective renewal of the same old contract—by the technique of talking throughout the next year or two. I do not think the law was so intended.

Clements, for the Union, instead of coming out with a straight no, often said at the bargaining session, "the Union will respond," "put a hold on it," "take it under advisement," "defer," etc. If such words were used once, or even twice, they could indicate hesitancy. But when used as a studied device for the negative they cannot serve to wash away repeated and absolutely consistent negatives.

The General Counsel makes much of the fact that there was agreement on some points. She is right, but the fact is that, compared to the disputed items, those matters were of very little substance, of very minor significance. She also argues that because the parties never reached subjects like wage rates, what is often referred to as straight economics, it cannot be known but that if the Respondent had been willing to talk a little longer—instead of acting unilaterally—the Company and the Union might have agreed on everything, and signed a contract. In the light of the clearest evidence that Clements was determined not to yield on the proposed discontinuance of payments to his union's fund and especially to any suggestion his "jurisdiction" be curtailed, that argument carries little weight here. In any event, agreement here and there on very small matters, and even the fact wages were never reached, is not reason enough for holding there can be no impasse.

On January 26, 1981, the Respondent informed the Union that it was ceasing contribution to the supplement unemployment benefit fund, to the prepaid legal service fund, and to the education fund. It also that day announced that thereafter the employees would no longer enjoy the benefit of "portability" for their vacations. It had every right to take such action.

Another major issue in dispute throughout the bargaining sessions was the Respondent's proposal to replace the Union's health and welfare plan, a fund run by the Union, with a private company plan for such insurance of its own, with Massachusetts Mutual Insurance Company. Like the other payments listed above, this too met

with adamant refusal by the Union. There came a time when the Company discontinued paying into the Union's plan, although there is a blur in the record as to exactly when that came about. But it was, apparently, something during 1981. I find nothing wrong in that unilateral action.

A more pinpointed allegation is that, while making payments into the Union's health and welfare plan, the Company ignored its contract obligation to increase the monthly contributions as raised by the trustees of that plan. Gard testified he never learned of the increase in premiums until sometime in June, and that when he was so advised, he did raise the amounts he was still paying at the time. The General Counsel placed in evidence a letter addressed to "All Employers" dated February 1981, giving notice of the trustees' action raising the premium. Gard said he never received that notice and there is no evidence at all it was ever sent to his company. I believe him. The system was that if any employer failed to pay, or paid less than the required amount, he would be sent a reminder the very next month, and even a demand for interest or penalty on the unpaid amount due. There is no proof, or claim, that such reminders were sent to Gard between February and June. Could it be that Clements, having trouble enough with Gard's complaint that the Union was exacting too much money from him, chose to hold off on that added cost until he succeeded in bringing Gard to his knees? I find no merit in that particular allegation of the complaint.

Another item of alleged unilateral action is said to be proved by a vacation schedule form the Respondent posted on April 15, 1981. It asks each employee listed on the sheets to write down his choice of time when he wished to go on vacation during the vacation period. Next to each man's name is indicated the number of weeks "to which you are entitled"—ranging from 1 to 3 weeks. As explained above, during the bargaining that preceded that posting there developed an impasse on the question of vacation portability, the Union always insisting the employees continue to enjoy vacation benefits for work performed for other companies in the past. It is the contention of the General Counsel that by the posting of that notice the Respondent took away from some employees vacations which they had earned, not by virtue of the portability provision in the expired contract, but by virtue of their actual employment with this Company. In effect she is saying it was a discrimination in employment, a deliberate departure from a contract clause which was not disputed. She expressly disavowed any contention that the form is proof of withdrawal of portability benefits.

The problem with this issue is that I cannot tell, from the total record, either just how much vacation time the seven men had coming based solely on the work performed for the Respondent, or whether the men in fact were deprived of any vacation benefits they had coming even absent portability. One man, Claude Wood, testified he had more vacation time coming "because I had gotten five weeks the year before." But the year before included vacation earned under the portability principle. I cannot know that his earlier 5 weeks were independent

of that portability. And on May 11, when President Clements wrote to the Company to protest that vacation schedule, he did not say it lessened the nonportability vacation benefits. Instead he called it "unilateral abolition of vacation time that the employees working in the jurisdiction of this union are entitled to." But this language impliedly referred to their employment—including Woods?—with other companies! Gard offered the explanation that the notice referred only to summer vacation, and not to any other time the men might have had coming which they were free to arrange separately with their supervisors. While that statement by him did not appear very convincing, it is still a fact the record does not show that any of the men claimed additional time, or were refused when they asked. In sum, the evidence simply does not prove affirmatively that the Respondent in fact deprived any of the people of vacation time properly coming to them. Unfair labor practices must be established by convincing affirmative evidence on the record as a whole.

A final item of alleged unilateral action is the Company's failure to pay health and welfare benefits for an employee named Miller, who was hired here late in September 1980. He came from another company covered by the same contract in effect between the Respondent and Local 17. The Respondent first started making payments on Miller's behalf in February 1981. Its failure to pay during the intervening 4 months is called an unfair labor practice. Gard's explanation for the delay is that in its health and welfare provision the contract provides, "The employer shall contribute monthly costs for any employee who is laid off up to maximum of four (4) months." He said he assumed the other company was doing that. It is a fact no one, not even Miller, told him otherwise in the interval. Mrs Gard testified that sometime in February Cook, the Local 17 steward on the job, told her "it was time for me to be making contributions for George Miller's health and welfare and I told him I would." Cook put it differently. He said: "I was notified by the union that George Miller's insurance hadn't been paid and I told Mr. Gard . . . and he said that he thought he had and he asked Mrs. Gard and they said they would check into it and if it hadn't been paid they'd take care of it." However informed, the Company then paid it right away.

On its face, the story gives a perfectly plausible explanation for the delay in that one payment. The contract provided somebody else was paying, this record shows the fund's practice of complaining to delinquents yet nobody complained about this nonpayment, and the Respondent quickly paid when correctly informed. I do not think the fact Miller was discharged, when the other company went out of business, instead of being "laid off," makes any substantial difference. I make no finding of unfair labor practice under the circumstances.

C. Section 8(a)(1)

As already explained, all of this story involves no more than technical violations of the statute, if in fact they had occurred. None of it is even alleged to have been motivated by union animus or any intent to coerce the employees in their union attachment. There is, however, one item of alleged restraint and coercion said to have violated Section 8(a)(1). Wood, an employee at the time of the events, who went on strike with the rest in October 1981 but has since been returned to work, testified that Gard one day said to him "that if anybody should strike this company they would never work for him again." Mrs. Gard, who, according to Wood was present then, in her testimony made no reference to that alleged remark by her husband. And Gard said only that he never said anything like that to anyone. Given the tensions that had been building up by that time, Gard's understandable irritation with Clements for refusing to go along with what he viewed as proper economic considerations, and the fact Wood is now one of his employees, I credit the employee in this instance.

However irritated at that moment Gard should not have made that statement. But in the light of the total case I do not believe this isolated instance of a violation of the statute warrants an unfair labor practice finding and the formality of a Board order. Moreover, whatever intimidating effect the words may have had on the employees must by this time have been largely dissipated. By taking Wood back on the job Gard in effect himself withdrew his threat. If Wood passed the word to his fellow employees, as he probably did, he has certainly let them know he is back on the job again. It remains too small a matter to justify further consideration.

[Recommended Order for dismissal omitted from publication.]