

J. Hofert Co. and International Woodworkers of America, Local 3-38, AFL-CIO. Case 19-CA-14825

28 March 1984

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS**

On 14 October 1983 Administrative Law Judge Jerrold H. Shapiro issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed cross-exceptions and a brief in support of its cross-exceptions and in opposition to the Respondent's exceptions.¹

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, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to sign a written contract embodying the terms of an oral agreement reached with the Union on 14 April 1982. We find merit in the Respondent's exceptions to this finding.

The facts, as more fully set forth by the judge, are as follows. Since 1969 the Respondent and the Union have been parties to successive collective-bargaining agreements, the most recent of which expired on 30 June 1981. Negotiations for a successor agreement began in May 1981 and continued through September 1981. At the end of the 13th session on 28 September, after rapid changes of positions on both sides, the Union believed that complete agreement had been reached and the Respondent expressed optimism and volunteered to draft a document. The next day, the Respondent hand delivered a proposed contract to the Union with a cover letter by Scott, Respondent's general manager, which stated, *inter alia*:

¹ The General Counsel filed a motion to strike an attachment to the Respondent's brief, namely, an affidavit submitted by the Respondent's attorney, Lemly, in explanation of certain discrepancies in the Respondent's 8 June 1982 contract proposal. The Charging Party joined in the General Counsel's motion. The Respondent filed a response to the motion and subsequently filed a motion to reopen the record for the purpose of admitting the affidavit. The Charging Party thereafter filed a response to the Respondent's motion. After considering all of the motions and the responses thereto, we have decided to grant the General Counsel's motion to strike and to deny the Respondent's motion to reopen because the Respondent's posthearing evidence constitutes neither newly discovered nor previously unavailable evidence. We further note that in any event the proffered evidence would not affect the results of our decision.

... enclosed please find my revised final offer. This proposal will be open through Wednesday [7 October 1981] *after which date it will be withdrawn if it has not been accepted.* [Emphasis added.]

On 1 October Union President Lowery² telephoned Scott and pointed out certain discrepancies between the Respondent's proposal and what the Union believed had been agreed to on 28 September. Scott agreed to make some, but not all, of the revisions requested by the Union and on 2 October mailed Lowery a revised draft. Scott's cover letter specified three revisions and ended by stating, "I hope that this document will represent a basis for agreement." The Union received the revised proposal on 6 October. On 7 October Lowery wrote a letter to Scott acknowledging the revisions of 2 October, but asserting that the Respondent's proposal still contained six changes from what was agreed to on 28 September. Lowery enclosed a draft reflecting the Union's version of the alleged agreement for the Respondent's signature.

By letter dated 16 October, Scott reminded Lowery that Scott's 29 September cover letter specified that the Respondent's final offer was open through 7 October, but the Union had rejected that offer on 7 October and had submitted a new proposal. Scott asserted that the parties were at impasse with five issues remaining unresolved and that, as a result, the Respondent intended to implement its final offer as of 25 October, with retroactivity on wages only. On 25 October the Respondent did implement the wage and benefit provisions of its final offer.

In subsequent correspondence, the Union continued to press the Respondent to sign the Union's draft of the agreement allegedly reached on 28 September. On 29 October the Union filed an unfair labor practice charge alleging, *inter alia*, that the Respondent violated Section 8(a)(5) by refusing to sign a written contract reflecting an oral agreement reached by the parties on 28 September. On 2 November Scott wrote a letter to Lowery explaining the Respondent's position that the parties had not reached full agreement on 28 September, reiterating that the process had reached impasse, and stating, "You have my final proposal and I have yours."

On 24 February 1982 the Union was notified that its appeal from the dismissal of its unfair labor practice charge was denied on the grounds that the parties had not reached full agreement on 28 Sep-

² Lowery served as president through June 1982 and was succeeded by Johnston, the vice president, who also attended the contract negotiations.

tember 1981. The Union then discussed the situation with unit employees at its next monthly meeting, at which time the employees voted to accept the Respondent's 29 September proposal, as revised on 2 October. Thereafter, on 14 April 1982, the Union wrote Scott that "it appears that after 13 meetings and much confusion we have finally reached agreement" and therefore requested the Respondent "to sign several copies." The Union also wrote another letter to Scott proposing to "reopen negotiations for the purpose of negotiating amendments to the Rate Schedule." Scott's 11 May response included the following:

I must, at this time, remind you that my offer of [29 September 1981] was only open for consideration through [7 October 1981]. For this reason, along with some significant changes in circumstances which have rendered that proposal inappropriate, the [29 September 1981] proposal is no longer on the bargaining table.

Please be assured, however, that we would be happy to resume negotiations on contract and wage issues at some mutually agreeable time. Please contact me as soon as possible, so that we can arrange for a meeting place.

On 8 June the parties met face-to-face for the first time since 28 September 1981. Respondent presented the Union with a new contract proposal which included changes in three areas: (1) Union's right of access to the jobsites; (2) payment for employee travel to distant jobsites; and (3) Union's right to information about subcontracting of unit work. After Scott responded to Lowery's request for the reasons underlying the changes, Lowery said that he would review the proposal and get back to Scott. The parties then discussed what to do about increased medical insurance premiums that had been imposed by the carrier, and the Union presented its proposal for an 8-percent wage increase for the contract year beginning July 1982.

The parties next met on 12 July. Johnston, who by then had become the Union's president, opened the meeting by requesting Scott to sign the Respondent's 29 September proposal, as revised. Scott responded that the time limit on that proposal had expired long ago. Johnston then stated that the Union only wanted to negotiate concerning wages, but Scott responded that he did not want to talk about wages until the contract issue was resolved. About 10 days later, the Union filed the instant unfair labor practice charge. The parties had held no further meetings as of the time of the hearing.

The judge found that the Respondent intended its 29 September 1981 proposal to remain on the bargaining table even though the Union failed to

accept it by 7 October 1981. The judge relied on the following conduct by the Respondent: its failure to replace its 29 September proposal with another one between 7 October 1981 and 8 June 1982; its 2 November statement to the Union, "You have my final proposal and I have yours"; and its announcement on 16 October that it intended to implement the terms of its final proposal. He therefore concluded that the Respondent's proposal had not been withdrawn when the Union notified the Respondent of its acceptance of the proposal in April 1982. The judge also rejected the Respondent's argument that the 29 September proposal had terminated prior to the Union's acceptance due to the lapse of time between the date of the offer and the date of the acceptance. Considering that the Union's delay in acceptance was caused by its pursuit of an unfair labor practice charge, the judge found that the Union's acceptance was made within a reasonable period of time. Finally, the judge rejected the Respondent's argument that changed circumstances, e.g., its increased bargaining strength in the spring following its heavy production schedule of the fall, justified its refusal to sign the 29 September proposal the following May. Based on all of the above, the judge concluded that the Respondent's 29 September 1981 proposal remained viable when the Union accepted it on 14 April 1982.

We disagree with the judge's conclusions, particularly his conclusion that the Respondent's 29 September proposal was not withdrawn when the Union failed to accept it by 7 October. As the judge himself concedes, the 7 October deadline established in the Respondent's 29 September cover letter was explicit and unequivocal. Moreover, the judge found, and we agree, that the Respondent's 2 October cover letter merely indicated revisions to the 29 September proposal without affecting the 7 October deadline. Thus, when the Union put forth its own proposal on 7 October in lieu of accepting the Respondent's 29 September proposal, the condition precedent for withdrawal came into effect. We therefore conclude, contrary to the judge, that the Respondent's 29 September proposal was withdrawn on 7 October under the explicit terms of that offer.

Moreover, we do not agree that the Respondent's conduct after 7 October establishes that its 29 September proposal was still on the bargaining table in April 1982. We find no support for the judge's proposition of law that a party cannot withdraw a bargaining proposal and fail to replace it with a new proposal without violating Section 8(a)(5). Here, it is clear that the parties had reached impasse by 7 October on a number of significant

and unresolved issues. Thus, because the parties' duty to bargain during impasse is suspended pending a change in circumstances,³ the Respondent was under no legal obligation to put forth a new proposal when its final proposal was rejected by the Union, regardless of whether the final proposal was explicitly withdrawn. Similarly, because the existence of impasse permits an employer to make unilateral changes in working conditions consistent with its rejected offer,⁴ we find that no inference that the 29 September proposal remained on the bargaining table can be drawn from the Respondent's partial implementation of its final offer. Finally, with regard to the judge's reliance on the Respondent's statement in its 2 November letter, "You have my final proposal and I have yours," we find that this statement, when read in the context of the letter as a whole, is at best ambiguous in terms of implying a continued existence to the 29 September proposal. We further find that this statement by the Respondent, standing alone, does not establish that the 29 September proposal had not been withdrawn on 7 October.

Based on the foregoing, we find that the Respondent's 29 September proposal as revised on 2 October was explicitly withdrawn on 7 October and that the Respondent's later conduct did not indicate any contrary intention. We therefore conclude that the Respondent did not violate Section 8(a)(5) when it refused the Union's 14 April 1982 request to execute a collective-bargaining agreement based on the Respondent's 29 September proposal.⁵ Accordingly, we shall dismiss the complaint in its entirety.

ORDER

The complaint is dismissed.

³ See, e.g., *Hi-Way Billboards*, 206 NLRB 22, 23 (1973); *Transport Co.*, 175 NLRB 763, 767 (1969), *enfd.* 438 F.2d 258 (5th Cir. 1971).

⁴ See, e.g., *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *enfd.* 395 F.2d 622 (D.C. Cir. 1968); *Bi-Rite Foods*, 147 NLRB 59, 64-65 (1964).

⁵ In view of this conclusion, we find it unnecessary to reach the judge's additional findings that the Respondent's offer did not terminate due to the lapse of time between the date of the offer and the date of the acceptance or due to any changed circumstances since the time of the offer.

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge. This proceeding in which a hearing was held on March 15, 1983, is based on an unfair labor practice charge filed on July 22, 1982, by International Woodworkers of America, Local 3-38, AFL-CIO, herein called the Union, and on a complaint issued on September 9, 1982, by the General Counsel of the National Labor Relations

Board alleging that J. Hofert Co., herein called the Respondent, is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act, herein called the Act, by refusing to sign a collective-bargaining agreement reached with the Union. The Respondent filed an answer to the complaint denying the commission of the alleged unfair labor practices.¹

On the entire record,² from my observation of the demeanor of the witnesses, and having considered the posthearing briefs, I make the following

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Evidence*

The Respondent grows and sells Christmas trees in the State of Washington. It has facilities in Olympia and Shelton, Washington. Since 1969 the Union has represented the production and maintenance employees employed by the Respondent at these two facilities. The Respondent and the Union have been parties to successive collective-bargaining contracts covering these employees. The most recent contract terminated on June 30, 1981. In May 1981 the parties commenced negotiations for a successor agreement, but as of September 28, 1981, had not been able to reach an agreement. The September 28 bargaining session ended with the union negotiators believing that the parties had reached agreement on all of the terms of a new contract, and that the Respondent would reduce the agreement into writing so that the Union could submit it to its membership for ratification. On September 29, 1981, the Respondent's general manager, Scott Scott, who was its principle negotiator hand delivered to the Union a proposed contract accompanied by a transmittal letter signed by Scott which reads as follows:

As I promised yesterday, enclosed please find my revised final offer. This proposal will be open through Wednesday, Oct. 7, 1981, after which date it will be withdrawn if it has not been accepted.

In an effort to bring these negotiations to a successful conclusion I have addressed myself to some of your concerns expressed in our last meeting. You will note changes in the following paragraphs and schedules: 1.1, 1.2, 12.6, and wages. I think that it is important that you realize that I have no more room to move, and as such I do not intend to meet with you again on these issues. After thirteen meetings and countless proposals and counter-proposals, I think that we have definitely reached an impasse.

If you have questions regarding this proposal, please do not hesitate to contact me.

¹ The Respondent admits it is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act and meets the National Labor Relations Board's applicable discretionary jurisdictional standard. Also the Respondent admits that the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

² The motions of the Charging Party and the Respondent to correct the transcript are granted.

On receipt of the Respondent's September 29, 1981 contract proposal, the Union's president, James Lowery, its principle negotiator, discovered that as far as the Union was concerned that Scott in drafting the September 29 contract proposal had in several respects misconstrued what the parties had agreed upon at the September 28 bargaining session. On October 1 Lowery telephoned Scott and told him that the Respondent's September 29 contract proposal failed to embody the agreement reached by the parties at the September 28 bargaining session in several respects, which Lowery enumerated. Scott agreed to revise the September 29 proposal in three of these respects, but in all other respects refused to change the proposal as requested by Lowery, and refused to meet with Lowery to discuss the items still in dispute because, as Scott explained to Lowery, he felt that further discussion would not be fruitful as the parties were at an impasse. On October 2, 1981, Scott wrote a letter to Lowery acknowledging this conversation and enclosed a copy of the September 29 contract proposal with the revisions which Scott had agreed to make. Scott's October 2 letter to Lowery reads as follows:

Pursuant to our phone conversation of yesterday afternoon, I have revised the following areas of my Sept. 29, 1981 proposal:

1. I have added our choose and cut agreement as number 16 in our list of past practices.
2. I have added the no strike/no lockout waiver to the wage reopener clause.
3. I have reinserted the word "terms" in the Management Rights Clause.

I hope that this new document will represent a basis for agreement.

Since this letter with the enclosed revised contract proposal was sent by mail, it was not received by the Union until October 6.

On October 7, 1981 Lowery wrote Scott as follows:

We accept the items you mention as changes in your letter of October 2, 1981, but remind you that other items were discovered and agreed to at our meeting of September 28, 1981. We therefore agree your contract draft should be amended as you propose in your October 2, 1981 letter, however, the other items I brought to your attention in our phone conversation on October 1, 1981, constitute changes from the agreement reached on September 28, 1981, specifically the changes I pointed out are as follows:

[Lists six alleged changes made by the Respondent.]

When we left the bargaining table on September 28, 1981 we had an agreement. We demand that you execute a written contract conforming to that agreement.

I have enclosed a proposed draft of the contract we agreed to in that meeting for your signature. Once we receive a signed copy we will take that proposal to the membership for a ratification vote.

If we have not received a signed agreement within a week from October 9, 1981, we will file an unfair labor practice charge.

On October 16, 1981, Scott in reply wrote Lowery as follows:

As you know, I forwarded my final proposal to you on Sept. 29, 1981, including, at that time, a cover letter which advised you that the proposal would be open through October 7, 1981. Subsequently, we discussed that proposal and, as a result, I corrected three inadvertent omissions and sent you a revised copy on October 2, 1981. Unfortunately, you have, with your letter of October 7, 1981, rejected my final offer and presented a new proposal with which we cannot agree.

It is, therefore, apparent that we are at impasse and that the following issues still separate us:

- 1.1
- 3.3
- Article XIII
- Article XIV
- 16.3

Please bear in mind that these issues, particularly 1.1, 12.6, Article XIII, and Article XIV have, despite our best efforts to resolve them, remained at the heart of our disagreement throughout this process; a process which has now involved 13 meetings and five months.

As a result of this impasse, we intend to implement our final offer as of October 25, 1981. This implementation will include full retroactivity to July 1, 1981, on wages only, for all regular employees as of October 25, 1981.

If you have any questions regarding this plan, please do not hesitate to ask.

On October 25, 1981, as indicated in Scott's letter to Lowery of October 16, 1982, the Respondent did in fact implement all of the economic provisions contained in its "final offer," i.e., wages, vacations, holidays, medical insurance, etc.

During the latter part of October 1981, Lowery wrote to Scott reiterating the Union's contention that the parties had reached agreement on September 28, 1981, on all of the terms of a collective-bargaining agreement, which terms were embodied in the contract mailed by Lowery to Scott on October 7. Lowery also repeated his earlier threat to file unfair labor practice charges with the Board if Scott failed to sign this contract. On October 29, 1981, Lowery, on behalf of the Union, filed an unfair labor practice charge against the Respondent in Case 19-CA-14027, alleging that the Respondent violated Section 8(a)(1) and (5) and Section 8(d) of the Act by, among other things, failing and refusing to sign a written collective-bargaining agreement to which it had orally agreed on September 28, 1981.

On November 2, 1981, Scott wrote Lowery. Scott's letter, after explaining in detail why no agreement was reached by the parties during the September 28 bargaining session, concluded with the following statements:

Once again, then, I must state that after 13 meetings spanning five months and incorporating at least 10 written proposals, this negotiating process has reached impasse. You have my final proposal and I have yours.

If you have any questions or comments, please do not hesitate to contact me.

During the period of time that the Union's unfair labor practice charge was pending before the Board's General Counsel there were no collective-bargaining negotiations. The Union made no attempt to arrange for further negotiation meetings inasmuch as it took the position that it already had negotiated a collective-bargaining agreement at the September 28 negotiation meeting and it was pressing this contention using the Board's processes.

During the end of February or the first day of March 1981 the Union and the Respondent were notified by letter from the General Counsel's Office of Appeals that the Union's unfair labor practice charge was without merit.³ With respect to the Union's contention that the parties on September 28 had reached agreement on all of the terms of a collective-bargaining agreement, the General Counsel concluded that "the evidence developed during the investigation disclosed that there were mutual mistakes with regard to the language of a number of contract proposals as of September 28, 1981."

When it learned that the Board's General Counsel had rejected its contention that the parties had reached a complete agreement during the September 28 negotiating session, the Union notified the unit employees at the next regularly scheduled union meeting and at the same time the unit employees voted to accept the Respondent's last contract proposal, namely, the proposal of September 29, 1981, as modified by the three revisions of October 2, 1981, herein for the sake of convenience called the September 29, 1981 contract proposal.

On April 14, 1982, union business agent Gib Johnston wrote Scott that "it appears that after 13 meetings and much confusion we have finally reached agreement. If you would be so kind as to sign several copies (we need three) and send them over, we will sign and return whatever copies you might need." By letter dated April 22, 1982, Scott informed Johnston that he had no idea what Johnston was talking about in his April 14 letter and asked Johnston "to be more explicit so that I know how to respond." In response Johnston on April 26, 1982, wrote Scott as follows: "I would direct you to your proposed Employment Agreement by and between [the Respondent and the Union] dated September 29, 1981 comprised of 14 pages plus attached exhibits A, B, and C; and included changes made in your cover letter of October 2, 1981."

On April 28, 1982, Johnston wrote Scott stating that "as provided in Exhibit A of the Working Agreement we are proposing that we reopen negotiations for the

³ The General Counsel's Regional Office for Region 19 had previously dismissed the Union's charge and, as was its right under the Board's Rules and Regulations, the Union appealed the dismissal to the General Counsel's Office of Appeals.

purpose of negotiating amendments to the Rate Schedule."⁴

On May 11, 1982, Scott, by letter, replied to Johnston's April 26 and 28 letters, as follows:

Thank you for your letter of April 26, 1982 in which you have clarified your earlier correspondence. Based on the information contained in those two letters, I now understand that you are willing to accept the proposal which I advanced on Sept. 29, 1981 including the corrections made on October 2, 1981.

I must, at this time, remind you that my offer of Sept. 29, 1981 was only open for consideration through Oct. 7, 1981. For this reason, along with some significant changes in circumstances which have rendered that proposal inappropriate, the Sept. 29, 1981 proposal is no longer on the bargaining table.

Please be assured, however, that we would be happy to resume negotiations on contract and wage issues at some mutually agreeable time. Please contact me as soon as possible, so that we can arrange for a meeting date.

On May 26, 1982, Scott wrote Johnston as follows:

We have recently been advised by our medical insurance provider, Blue Cross, that their premium rates will be hiked as of June 1, 1982. The increase for a single employee will be from the present monthly premium of \$35.60 to \$48.60.

In accordance with section 10.1 of our working agreement⁵ we at J. Hofert Co. are bound to pay \$35.60 per month toward the cost of the insurance for each regular employee. As of June 1, 1982 we will begin deducting any premium amounts above \$35.60 from each employee.

We would certainly be willing to discuss this issue along with the other contract and wage issues mentioned in my letter of May 11, 1982, at some mutually agreeable time. Please contact me as soon as possible, so that we can arrange for a meeting date.

By his letter of May 29, 1982, Johnston responded to Scott's letters of May 11 and 26, 1982, as follows:

⁴ The portion of the Respondent's September 29 contract proposal dealing with wages, which was implemented by the Respondent in October 1982, provides in pertinent part that "no earlier than 90 days, and no later than 60 days prior to the anniversary date of this agreement (July 1) during 1982 and/or 1983, the Union may send a written request to the Employer to reopen negotiations for the purpose, and only for the purpose, of negotiating amendments to the above rate schedule [referring to employees' rates of pay] only."

⁵ Art. 10.1 of the Respondent's September 29 contract proposal which deals with "medical insurance benefits," and which was implemented in October 1981 by the Respondent, provides in pertinent part that the Respondent shall pay \$35.60 a month toward the cost of each employee's insurance coverage but that "if the carrier increases its premium charges for such medical insurance above the current rate of \$35.60 a month, the Employer and the Union shall enter into immediate collective-bargaining negotiations for the purpose, and solely for the purpose, of allocating the costs of such coverage among the parties."

Re: your letters of May 11, and May 26, 1982.

I would suggest Tues., June 8 at 2 PM as a date we could meet. Let me know as soon as possible if this would fit your schedule so that I can inform my committee.

In regards to the medical premium rate increase from Blue Cross:

Since we had not been notified of any rate increase in time to meet with you and determine how these increased costs should be allocated and there has been no authorization to deduct these costs from the employees' pay checks, it is our position that the employer should pay the increased cost until such time as we can meet and determine how these allocations should be made.

On June 1, 1982, Scott by letter notified Johnston "that June 8 at 2 p.m. will be a good time to meet and discuss wages, contract issues and medical insurance."

On June 8, 1982, the parties met as scheduled. The meetings started with Scott presenting to the Union's negotiators a new contract proposal, instead of the Company's September 29, 1981 proposal. Scott, the Company's spokesperson, told Lowery, the Union's spokesperson, that there were three significant changes in this new proposal when compared to the September 29 proposal. He pointed out these changes, as follows: the September 29 proposal provides, as did the recently terminated agreement, that employees' pay "will start when timecards are punched at the employees' normal workplace . . . and pay will end when timecards are punched at the end of the shift," whereas, the June 8 proposal provides that "pay will start . . . when the employee reaches a designated worksite and will end when the employee is released at the end of the day." The September 29 proposal provides, as does the recently terminated contract, that "union representatives will be allowed access to the employees on the job with prior notice to the employer," whereas, the June 8 proposal provides that for the purposes of access to the employees on the job that the union representatives shall "first notify the general manager or a designee at least 3 days in advance of the proposed visit and secure written approval for that visit." The September 29 proposal as well as the recently terminated contract contain no limitation on the Union's right to information about the Respondent's subcontracting of bargaining unit work, whereas, the June 8 proposal provides that "the employer shall have no obligation to provide the Union any information whatsoever regarding such subcontractors, including copies of subcontract documents, bids submitted, correspondence or other documents covering the terms of such subcontracts, but that upon request the Respondent will provide the Union with a list of subcontracts, the date each such subcontract was posted and the names of any regular unit employees who applied for the subcontract."

Lowery asked Scott to explain why the Respondent had made the above three changes in its September 29 contract proposal. Scott explained that as a result of two instances which had occurred in 1981 that he felt justified in including the 3 days' notice requirement for union access to the jobsites. With respect to his reason for now

proposing that employees' wages be computed from the time they arrived and left a jobsite, rather than from the time they punched their timecards at the Company's facilities, Scott explained that the Company had acquired land located at Mossyrock, Washington, which required employees to travel as much as 2 hours each way. And, regarding the proposed limitation on furnishing information to the Union about subcontracting of bargaining unit work, Scott stated that the Respondent felt that its dealings with subcontractors was none of the Union's business.

When Scott finished giving his explanation for the above three differences between the Company's September 29 proposal and its June 8 proposal, he indicated to the union representatives that the remainder of the June 8 proposal was the same as the September 29 proposal. Union Representative Lowery at this point stated: "We'll review that and get back to you."

On June 11, 1982, Scott wrote Lowery and informed him that the Respondent had decided to increase its share of the cost of the employees' medical insurance to \$48.60 which would cover the entire increase, and explained the Respondent's reason for doing this, but also noted that "since this additional contribution amounts to a 1.5% increase against the base rate of \$5.06 per hour, whatever small pay raise we could have contemplated before has been made less likely." Scott ended this letter by indicating he was enclosing some of the information about the alternative medical insurance plans requested by the Union and asked the Union to contact him to arrange for the next meeting.

On July 12, 1982, the parties held their next meeting which started with Union Representative Johnston asking Scott to sign the Respondent's September 29 contract proposal. Scott replied by stating that the time limit on that proposal had expired a long time ago and that the parties should sit down and negotiate the terms of a collective-bargaining agreement. Johnston, who indicated that the Union was accepting the Respondent's offer to pick up the entire increase in the employees' medical insurance, stated that the only thing left to discuss was wages and indicated that the Union wanted to negotiate about wages. Scott refused to negotiate about the employees' wages, explaining to the Union that he would only negotiate about wages when the Union indicated that it was prepared to negotiate for a new collective-bargaining agreement. During the meeting Union Business Representative Johnston pointed out to Scott that the Respondent's June 8 contract proposal was different from the September 29 proposal in many more ways than the three pointed out by Scott at the last meeting. Scott replied by stating, "that that was not intentional, it must have been an error of some type."⁶

⁶ In addition to the three differences between the Respondent's September 29 proposal and its June 8 proposal mentioned by Scott at the June 8 meeting there were 13 or 14 additional differences between these two proposals, some of which were significant, which Scott failed to mention. Scott testified that the only differences between the September 29 and the June 8 proposal were the three he mentioned to the Union on June 8. Later Scott testified that it was not his intent to make the June 8 proposal any different from the September 29 proposal other than in the

Continued

On July 13, 1982, Scott wrote Johnston expressing surprise and dismay about the Union's bargaining position, stating that the Union had known "long and well" that the Respondent's September 28, 1981 contract proposal had been withdrawn on October 7, 1981, and argued that the Union's willingness to negotiate at the meeting of June 8, 1982, was proof of that, and further stated that he had given the Union a proposal to consider and wanted to meet with the Union to discuss "contract issues and wages."

On July 22, 1982, the Union filed the unfair labor practice charges in this case.

There have been no further meetings between the parties or correspondence pertinent to this case.

I shall now set out the evidence pertaining to the three differences between the Respondent's September 29 and June 8 contract proposals which Scott told the union representative about.

B. The Limitation on the Union's Access to Visit the Employees

A description of the two instances which Scott told the Union compelled him to propose the 3-day notice requirement before a union representative would be allowed access to the Respondent's facilities follows.

In August 1981 Business Representative Johnston received a telephone call from employees at the Company's Shelton facility saying that they were very upset and asked him to come to that facility which he did. Johnston was informed by the employees that they were being harassed and pressured by supervision while working in one of the Company's fields and that they had left one of their coworkers, a female employee, at the worksite crying. Johnston asked Supervisor Buzzard for permission to visit the jobsite for the purpose of determining whether the lady who had been left crying was alright, because, Johnston explained to Buzzard, since the employee was using a machete that if she was very upset that she could be a safety hazard to both herself and the other employees on the job. Buzzard, after initially refusing Johnston permission to visit the jobsite, acquiesced and personally showed him where the jobsite was located. Upon arriving at the site Johnston stayed in his automobile which was parked on the roadway, and after observing that the employees all seemed to be alright, left without even speaking to any of the employees or going onto the jobsite.

Early in November 1981 Union Representatives Johnston and Lowery received a phone call from employees at the Company's Shelton facility, stating that the Respondent was assigning nonunit workers to do their work and asked Johnston and Lowery to meet with the

three ways he mentioned at the June 8 meeting and testified that all of the other changes in the June 8 proposals were "inadvertent." In presenting this testimony Scott in terms of his testimonial demeanor did not impress me as a truthful witness. Moreover, it is inherently implausible that Scott could have inadvertently made the approximately 13 or 14 additional changes, some of which were substantial, and others even though they were not substantial consisted of the addition or deletion of one or more words. I also note that when Johnston on July 12 mentioned these additional changes to Scott that Scott did not offer to delete them, as he presumably would have done if in fact he had inserted them into the June 8 proposal inadvertently.

employees during their lunch period. Johnston and Lowery immediately went to the Shelton facility. They observed that the production line where the union steward was working was shut down for repairs and that the steward was not working. They walked into the yard and asked the union steward for the time of the employees' lunch period and immediately returned to their automobile to wait for the lunch hour. While waiting in their automobile they were approached by Supervisor Buzzard who asked why they were there. They told him they just wanted to meet with the crew. Buzzard told them that they were supposed to notify him before coming onto company property to speak to the crew. Johnston and Lowery informed Buzzard that they had just asked the union steward for the time of the employees' lunch break. Buzzard informed them that this was interfering with production and they had no business engaging in such conduct. Thereafter Johnston and Lowery met with the employees on company property during their lunch break, without objection.

C. The Requirement That Employees Not Be Paid for Traveling to and From Their Worksites

Regarding the Company's acquisition of land situated in Mossyrock, Washington, to grow Christmas trees, which Scott told the Union was his reason for proposing that employees not be paid for the time they spent traveling between their worksites to and from the Respondent's facilities, the record reveals that due to urbanization the Respondent has been finding it extremely difficult to acquire land to grow trees which is situated near either of its two facilities and that since employees clock in and out of the Company's facilities that they are being paid for a significant amount of nonproductive time traveling to and from the worksites. The record establishes that at the time the Respondent offered its September 29, 1981 proposal that employees had already been working for the Respondent in the Mossyrock fields for 2 to 3 months and in the Onalaska, Washington field, which is another field located a substantial distance from the Respondent's facilities, for 1 to 2 months.

D. The Limitation on the Union's Right to Subcontracting Information

Regarding the Respondent's proposal limiting its obligation to furnish subcontracting information to the Union, the record reveals that in August 1980 the Union asked the Respondent to furnish it with copies of all of its contracts with independent contractors to do unit work within the past 2 years; list of all tools, vehicles, and equipment provided by the Respondent to each such contractor and the terms on which provided; and a list of all bids submitted by the subcontractors for each parcel of land or type of work, and the terms of each bid. In May 1981 this information was eventually furnished to the Union. There have been no other requests by the Union for subcontracting information.

E. The Question Presented

The question presented for decision in this case is whether an agreement on a collective-bargaining agree-

ment was reached on April 14, 1982, when the Union notified the Respondent of its acceptance of the Respondent's September 29, 1981 contract proposal. If so, then, as alleged in the complaint, the Respondent violated Sec. 8(a)(5) and (1) of the Act by refusing since May 11, 1982, to sign the agreement.⁷

F. The Applicable Legal Principles

The statutory duty to bargain in good faith, as defined in Section 8(a)(5) and Section 8(d) of the Act, imposes the obligation to execute, on request, a "written contract incorporating any agreement," thus, where an employer and union have orally agreed to the terms and conditions of a collective-bargaining agreement, either may be required, on request, to sign a written agreement embodying the terms and conditions orally agreed to. *H. J. Heinz Co. v. NLRB*, 311 U.S. 514, 525-526 (1941). The law is also settled that while there is no collective-bargaining contract when a contract offer is withdrawn by a party prior to its acceptance by the other party (*Loggins Meat Co.*, 206 NLRB 303, 307-308 (1973)), that generally the normal rules of offer and acceptance as applied in the context of commercial contracts do not apply in those collective-bargaining situations where a party rejects a proposed contract or offers a counterproposal and thereafter accepts the other party's contract proposal which was never withdrawn. The Board's policy in this area, as set forth with approval by the court in *Pepsi-Cola Bottling Co.*,⁸ is as follows:

[A] contract offer is not automatically terminated by the other party's rejection or counterproposal, but may be accepted within a reasonable time unless it was expressly made contingent upon some condition subsequent, or was subject to intervening circumstances which made it unfair to hold the offeror to his bargain.

Under this policy, an offer, once made, will remain on the table unless explicitly withdrawn by the offeror or unless circumstances arise which would lead the parties to reasonably believe that the offer had been withdrawn.

The basis for this policy, which differs from traditional contract principles, was briefly set out by the court in *Pepsi-Cola Bottling*, supra at page 89, and is more fully explicated below.

Collective-bargaining agreements are significantly different from commercial contracts. As the Supreme Court observed (*John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 550 (1964)): "A collective bargaining agreement is not an ordinary contract for the purchase of goods or

services, nor is it governed by the same old common law concepts which control such private contracts." Accord: *NLRB v. Donkin's Inn*, 532 F.2d 138, 142 (9th Cir. 1976); *Lozano Enterprises v. NLRB*, 327 F.2d 814, 818 (9th Cir. 1964). Rather, as the Supreme Court has explained (*United Steel Workers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580 (1959)):

A collective bargaining agreement is an effort to effect a system of industrial self-government. When most parties enter into a contractual relationship they do so voluntarily, in the sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties. The choice is generally not between entering or refusing to enter into a relationship, for that in all probability preexists the negotiations.

Another critical difference flows directly from the scheme of the Act. Where commercial contracts are concerned, there is no public policy favoring or disfavoring the consummation of such agreements; the parties are free to bargain with complete freedom; their position can be as extravagant or unreasonable as they please. Not so with the parties to a collective-bargaining agreement. Where employees have opted for collective bargaining the Act attributes special significance to the reaching of a labor agreement. As the Supreme Court emphasized (*Teamsters Local 24 v. Oliver*, 358 U.S. 283, 295 (1958)): "The goal of federal labor policy, as expressed in the Wagner and Taft-Hartley Act, is the promotion of collective bargaining to encourage the employer and the representative of the employees to establish, through collective negotiations, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife." See also *Fibreboard Paper Products v. NLRB*, 379 U.S. 203, 209-211 (1964).

It is in order to facilitate the establishment of such collective-bargaining regimes that the Act expressly imposes the duty to bargain "in good faith." In other words, the parties are forbidden to be indifferent to the outcome of their bargaining. Instead, the Act "requires that the parties involved deal with each other with an open and fair mind and sincerely endeavor to overcome obstacles or difficulties existing between the employer and the employees to the end that employment relations may be stabilized and obstruction to the free flow of commerce prevented." *Lozano Enterprises v. NLRB*, 327 F.2d 814, 818 (9th Cir. 1954).

These differences explain the need for different rules to govern the formation of labor and commercial contracts—in particular the rules about the offer and acceptance of agreements. Where commercial contracts are concerned, the common law rule is that an offer automatically terminates once the offeree has rejected it or made an inconsistent counteroffer. This rule leaves the offering party free to strike a bargain in a different quarter, secure in the knowledge he will not have to perform on more than one agreement. No such problem arises, however, in connection with the bargaining over a labor agreement. Rather, the Board's rules, as described by the court in *Pepsi-Cola Bottling*, effectuate the purposes of

⁷ The Charging Party contends that by refusing since July 12, 1982, to bargain with the Union over the employees' wages, pursuant to the contractual wage reopener provision, that the Respondent has committed an additional violation of Sec. 8(a)(5) and (1) of the Act. I have not considered this contention because this violation was not alleged in the complaint, it was not otherwise placed in issue during the hearing, and it was not sufficiently related to and intertwined with the allegations of the complaint to have been fully litigated and in fact was not fully litigated.

⁸ *Pepsi-Cola Bottling Co. v. NLRB*, 659 F.2d 87, 89-90 (8th Cir. 1981). Accord: *Presto Casting Co. v. NLRB*, 708 F.2d 495 (9th Cir. 1983).

the Act by facilitating the making of mutually satisfactory agreements between parties *who are bound to deal exclusively with each other*. Thus, the rules about the offer and acceptance of collective-bargaining contracts properly provide that a contract offer does not automatically terminate with a rejection or counterproposal. An "offer, once made, will remain on the table unless explicitly withdrawn by the offeror or unless circumstances arise which would lead the parties to reasonably believe that the offer had been withdrawn." *Pepsi-Cola Bottling Co. v. NLRB*, 259 F.2d 87, 90 (8th Cir. 1981). Accord: *Georgia Kraft Co. v. NLRB*, 696 F.2d 1931 (11th Cir. 1983); *Penasquitos Gardens*, 236 NLRB 994, 995 (1978), enf. 603 F.2d 225 (9th Cir. 1979); and *Presto Casting Co.*, 262 NLRB 346 (1982), enf. *Presto Casting Co. v. NLRB*, 708 F.2d 495 (9th Cir. 1983).

In sum, an offeree's rejection of a collective-bargaining proposal—or his tender of a counterproposal—does not operate to render the original offer null and void. That proposal remains "on the table" for the offeree's acceptance within a reasonable time, unless the offeror expressly rescinds it before such acceptance, or unless circumstances intervene which make it unfair to hold the offeror to such a bargain.

G. Discussion

As described in detail supra, the Union in April 1982 notified the Respondent that it was accepting the Respondent's September 29, 1981 contract proposal, as revised on October 2, 1981, referred to as the September 29 contract proposal, and asked the Respondent to sign the agreement.⁹ On May 11, 1982, the Respondent's general manager, Scott, responded by informing the Union that the Respondent would not comply with the Union's request because the September 29 contract proposal was no longer on the bargaining table since it "was only open for consideration through October 7, 1981," and "some significant changes in circumstances . . . have rendered

⁹ I reject the Respondent's contention that the Union's letters to the Respondent of April 14 and 26 do not constitute an acceptance of the Company's revised September 29 contract proposal, but constitute the Union's offer to the Respondent to accept this proposal. The Union's letters when read together, by their expressed terms, unambiguously constitute an acceptance of the Respondent's September 29 proposal which the Union asked the Respondent "to sign." If the Union thought that the Company's September 29 contract offer had been previously withdrawn, and was offering it as its own offer, the Union would not, as it did, inform the Respondent "we have finally reached agreement" and asked the Respondent "to sign" its copies of that proposal. Indeed the Respondent's response to the Union of May 11, 1982, reveals that the Respondent understood that the Union by its April 14 and 26 letters had accepted the Respondent's September 29 contract proposal. The fact that the Union at the June 8, 1982 meeting when it was presented with the Respondent's new contract proposal and when it was informed by General Manager Scott that the June 8 proposal differed in only three respects from the September 29 proposal, indicated that it would review the terms of the June 8 proposal, is not inconsistent with its position that it had a contract by virtue of its acceptance of the Company's September 29 proposal. In the face of the Respondent's adamant opposition to signing the September 29 proposal, the Union, in the interest of industrial peace and harmony, was merely attempting to resolve the dispute amicably (cf. *F. W. Means & Co. v. NLRB*, 377 F.2d 683, 687 (7th Cir. 1967)), and having discovered that General Manager Scott had falsely represented that there were only three differences between the two proposals, the Union at the next meeting between the parties sought the Respondent's signature on the September 29 proposal.

that proposal inappropriate." As a matter of fact, as described in detail supra, when the Respondent offered its September 29 proposal to the Union it advised the Union that the proposal would be automatically withdrawn if it was not accepted by October 7, 1981,¹⁰ and, as further described in detail supra, the Union rejected the Respondent's September 29 contract proposal by virtue of its October 7, 1981 counterproposal.

I am of the opinion that the Respondent's conduct which postdates October 7, 1981, establishes that the Respondent intended that its September 29 contract proposal remain on the bargaining table even though the Union failed to accept it by October 7, 1981. Thus, at no time between October 7, 1981, and its June 8, 1982 contract proposal did the Respondent ever replace the September 29, 1981 contract proposal with another contract proposal.¹¹ Quite the opposite, as described in detail supra, in October 1981 and November 1981, immediately after the Union's October 7 rejection of the September 29 contract proposal, the Respondent, through General Manager Scott, notified the Union that "you have my final proposal [referring to the September 29, 1981 proposal] and I have yours [referring to the Union's October 7, 1981 counterproposal],"¹² and told the Union that due to the

¹⁰ The Union contends that the Respondent's September 29 contract proposal, as revised on October 2, 1981, constituted a new proposal separate and apart from the September 29 proposal, which the Union urges was still on the bargaining table in April 1982 because, unlike the September 29 proposal, it did not contain an expiration date for the Union's acceptance. The Union argues that the timing of the October 2 revisions and the wording of the transmittal letter which accompanied those revisions created a new contract proposal, not conditioned by an acceptance deadline. I do not agree. The October 7, 1981 deadline of the Union's acceptance established by the transmittal letter accompanying the September 29 proposal was unequivocal and the transmittal letter accompanying the October 2 revisions to this proposal states, "I have revised the following areas of my September 29, 1981 proposal," thus indicating by its silence and unwillingness to withdraw the October 7 deadline for the Union's acceptance. Even though the Union did not receive the revisions until October 6, 1981, since they were sent by regular mail, it is undisputed that the Union knew about the three revisions and the exact nature of those revisions as early as October 1, when Scott spoke to Lowery. Lowery did not indicate to Scott that it would be impossible for the Union to act on the revised September 29 contract proposal prior to the October 7 deadline imposed by Scott for the acceptance of the offer.

¹¹ As indicated supra, unlike a party who is negotiating for a commercial contract for goods and services, a party who is negotiating for a collective bargaining contract cannot withdraw his bargaining proposal and fail to replace it with a new proposal. Such conduct would constitute the end of collective-bargaining and, as such, would constitute a refusal to bargain in violation of Sec. 8(a)(5) of the Act. This remains true even where, as here, an impasse in bargaining has occurred, for while an impasse in bargaining allows the parties to engage in certain conduct, including the cessation of negotiations until the impasse is broken, it does not permit a party to withdraw his bargaining proposal without replacing it with a new proposal for "it is clear that an impasse is but one thread in the complex tapestry of collective bargaining, rather than a bolt of a different hue A genuine impasse is not the end of collective bargaining." *Hi-Way Billboards*, 206 NLRB 22 (1973).

¹² I have carefully considered the testimony of General Manager Scott that his purpose in using this language in his November 2, 1981 letter to the Union was not with the intent to "reinstate or rejuvenate" the Respondent's September 29 contract proposal. I have rejected this testimony because his testimonial demeanor was poor and because not only do the circumstances fail to corroborate his self-serving testimony, but, viewed in their totality, the circumstances tend to refute his testimony. Thus, as described supra, Scott never replaced the Company's September 29 contract proposal with a new proposal, as would have been expected if Scott

Continued

fact that negotiations were at an impasse that the Respondent intended to implement all of the terms of its September 29 contract proposal. In short, it is clear that when the Respondent's bargaining tactic of placing a time limitation of October 7, 1981, on the Union's acceptance of the September 29 contract proposal failed to secure the Union's agreement to that proposal, that the Respondent did not withdraw the proposal from the bargaining table as would have been evidenced by the substitution of another proposal, but instead Scott notified the Union that "you have my final proposal [referring to the September 29, 1981 proposal]" and announced that the Respondent intended to implement the terms of this proposal. All of these circumstances, when considered in their totality, persuade me that the Respondent's September 29, 1981 contract proposal was not withdrawn and was still on the bargaining table when the Union in April 1982 notified the Respondent of its acceptance of that proposal.

The Respondent urges that even if its September 29, 1981 contract proposal was not withdrawn from the bargaining table on October 7, 1981, that it terminated prior to the Union's acceptance in April 1982 due to the significant lapse of time between the offer and the acceptance and that, in any event, significant changes in circumstances took place since September 29, 1981, which justified the Respondent's refusal to sign the September 29, 1981 contract proposal. I shall evaluate these contentions.

As I have indicted previously, "a contract offer is not automatically terminated by the other party's rejection or counterproposal, but may be accepted within a reasonable time . . ." *Pepsi-Cola Bottling Co. v. NLRB*, 659 F.2d 87, 90-91 (8th Cir. 1981); *Georgia Kraft Co. v. NLRB*, 696 F.2d 931 (11th Cir. 1983); *Presto Casting Co. v. NLRB*, 708 F.2d 495 (9th Cir. 1983). Here the Union's acceptance of the Respondent's contract proposal came 6-1/2 months after the proposal was placed on the bargaining table, a period of time which the Respondent contends is unreasonable. In determining the reasonableness of the period between an outstanding offer and an acceptance it is not the length of time per se which governs, rather it is the "surrounding circumstances" which determines whether the time period is reasonable. See *Worrell Newspapers*, 232 NLRB 402, 406-407 (1977) (6 months between offer and acceptance held reasonable); *Salem News Publishing Co.*, 230 NLRB 927 (1977) (4 months between offer and acceptance held reasonable); *Scientific Research Co.*, 110 NLRB 393 (1954) (4 months between offer and acceptance held unreasonable); and *Lucas County Farm Bureau Cooperative Assn.*, 218 NLRB 1150 (1975), supplemented 218 NLRB 1155 (1976) (3 months between offer and acceptance held unreasonable).

In the instant case the surrounding circumstances do not warrant a finding that the Respondent's September 29 contract proposal lapsed with the passage of time.

had really withdrawn that proposal from the bargaining table, instead he notified the Union that he intended to implement all of the terms of the September 29 contract proposal and further notified the Union that the Union had in its possession the Company's September 29 offer.

Even after the Union by virtue of its October 7, 1981 counterproposal had rejected the September 29, 1981 contract proposal, the Respondent notified the Union that the September 29 proposal was still on the bargaining table and that it intended to implement all of the terms of that proposal. As a matter of fact the Respondent implemented a significant portion of that proposal—the economic package. The delay in the Union's acceptance of the Company's September 29, 1981 proposal was caused by the Union's belief that the parties during the September 28 bargaining session had reached an agreement on all of the terms of a collective-bargaining contract which agreement was embodied in the Union's October 7, 1981 contract proposal. When the Respondent refused to sign a contract embodying the Union's October 7, 1981 contract proposal, the Union, rather than strike the Respondent during the Respondent's peak season, invoked the processes of the Board and filed an unfair labor practice charge contending that the Respondent was violating the Act by refusing to sign an agreed-upon contract. When the Board's General Counsel notified the Union that the Board would not issue a complaint based on its charge, the Union promptly communicated this to the employees who instructed the Union to accept the Respondent's September 29, 1981 contract proposal, which the Union did. In short, during the period prior to the Union's acceptance of the Respondent's September 29, 1981 contract proposal, the Respondent knew that the Union was actively attempting to secure a collective-bargaining contract, albeit on terms more favorable to the Union than the Company's September 29 proposal. Yet at no time during this period did the Respondent notify the Union that its September 29, 1981 proposal had lapsed and was being replaced by a new proposal. Under all of the foregoing circumstances, I am persuaded that the Union's acceptance of the Respondent's September 29, 1981 offer was made within a reasonable period of time.¹³

Regarding its contention that changed circumstances nullified its September 29, 1981 contract proposal, the Respondent argues that the proposal lapsed due to a significant change in circumstances between the date the proposal was initially offered, October 2, 1981, and April 14, 1982, the date of the Union's acceptance. More specifically the Respondent relies on these alleged intervening circumstances: (1) "The Respondent's relative economic strength improved significantly [as] its seasonal economic peak had passed, lessening the impact of the Union's potential economic coercion";¹⁴ (2) "Problems

¹³ *Scientific Research Co.*, 110 NLRB 393 (1954), and *Lucas County Farm Bureau Cooperative Assn.*, 218 NLRB 1150 (1975), supplemented 218 NLRB 1155 (1976), cited by the Respondent are factually distinguishable in significant respects from the instant case. In those two cases after the union rejected the employer's contract proposal the employer did not indicate that its contract proposal was still on the bargaining table and during the hiatus between the employer's offer and the union's acceptance in those cases, the union took no action either at or away from the bargaining table in an effort to secure a collective-bargaining agreement.

¹⁴ The Respondent's most critical period of operation occurs during October and November when it harvests its Christmas trees.

arose because the Union's representatives attempted to visit employees without giving prior notice as required by the contract then in force";¹⁵ (3) "As the Respondent began farming new lands situated at considerable distance from its base of operations, it became aware of the serious problem caused by paying employees for their time in transit to these far fields";¹⁶ and (4) "The Respondent became aware that the availability of information on subcontractors was causing problems."¹⁷

I am of the opinion that the Respondent's contention that changed circumstances nullified its September 29, 1981 contract proposal is without merit. "A mere change in bargaining strength does not make it unfair to hold the Company to its [September 29, 1981] offer." *Pepsi-Cola Bottling Co. v. NLRB*, 659 F.2d 87, 90 (8th Cir. 1981).¹⁸

¹⁵ As described in detail supra, once in August 1981 and once in November 1981 union business representatives visited the Respondent's premises and talked to employees, with no interruptions in production, but in doing so failed to comply with the existing contractual limitation regarding prior notification to the Respondent.

¹⁶ The record, as described in detail supra, establishes that the Respondent began farming these distant farm lands well before offering its September 29, 1981 contract proposal. Scott during the June 8, 1982 meeting, as I have found supra, told the Union that it was his acquisition of the fields near Mossyrock, Washington, some 65 miles from the Company's Olympia facility, which caused him to change his mind about continuing to pay for the time the employees spend going to and from the Company's facilities and these fields. It is undisputed that the Respondent employed employees to cultivate these fields as early as the spring of 1981, as well as to cultivate fields in Onalaska, Washington, some 57 miles from the Olympia facility, as early as August 1981. Thus, prior to several months of exposure to the problem posed by the farming of land located at a considerable distance from its facilities and presumably foresaw this problem during the period it was considering leasing these lands. I also note that the Respondent had the contractual right to subcontract out this work if the payment of travel time to its employees proved to be economically unfeasible and, as a matter of fact, exercised this option at the Mossyrock field.

¹⁷ The record establishes, as described in detail supra, that the information involved was furnished by the Respondent to the Union in May 1981, 5 months prior to the Company's September 29 contract offer. Scott testified that after this information was furnished to the Union that he discovered that some of the information "was out and about" and was causing dissension among the subcontractors. Scott failed to testify when he discovered that this information was allegedly released to third parties or how he discovered this. His testimony concerning this matter was vague; it was entirely lacking in specificity and was not given in what appeared to be a sincere manner. I also note that when Scott during the June 8, 1982 meeting was asked by the Union why he was proposing a new contract provision which limited the Union's right to subcontracting information, that Scott did not explain that in the past this information had gotten into the hands of third parties, rather he simply stated that this information was none of the Union's business. Under the circumstances I am persuaded that Scott's testimony that he discovered that some of the information furnished to the Union about the Company's subcontractors in May 1981 "was out and about" is not credible. In any event I am convinced that, even if in fact Scott was informed that this information had gotten into the hands of third parties, he was told this prior to making the Respondent's September 29 contract proposal. For, as I have indicated supra, Scott significantly failed to testify that he made this discovery after the September 29, 1981 proposal and inasmuch as the information involved was furnished to the Union 5 months prior to the September 29 contract proposal, presumably this discovery was made well before that date.

¹⁸ The court in *Hickinbotham Bros. Ltd.*, 254 NLRB 22 (1981), cited by the Respondent, "the employer expressly withdrew and changed its earlier bargaining proposals before the Union's acceptance." *Pepsi-Cola Bottling Co. v. NLRB*, 659 F.2d 87, 90 (8th Cir. 1981) fn. 5.

Accord: *Presto Casting Co. v. NLRB*, 708 F.2d 495 (9th Cir. 1983). The other intervening circumstances relied on by the Respondent when coupled with the change in the Respondent's bargaining strength are insufficient to warrant the conclusion that it would be unreasonable to bind the Respondent to its September 29, 1981 contract proposal. Thus, As I have discussed in detail supra, the sole change in circumstance which took place between the date of that offer and the Union's acceptance is the fact that in November 1981 union business representatives visited the Respondent's premises on one occasion and talked to employees, without interfering with production, but in violation of the existing contractual notification requirement. Compare this situation with *Associated Printers*, 225 NLRB 619 (1976), cited by the Respondent, which is factually distinguishable in several significant respects from the instant case and where the Board found that "numerous intervening events" had "significantly altered the relationship between the parties."

In summation, I conclude that the Respondent's September 29, 1981 contract proposal remained viable on April 14, 1982, when the Union accepted it, because the Respondent's conduct establishes that the Respondent intended that this proposal remain on the bargaining table even though the Union failed to accept it by the October 7, 1981 acceptance deadline and because the circumstances do not indicate that the parties could have reasonably considered the offer withdrawn. I therefore find, as alleged in the complaint, that the Respondent since May 11, 1982, has violated Section 8(a)(5) and (1) of the Act by refusing to sign a written collective-bargaining agreement embodying the terms of the April 14, 1982 oral agreement reached by the parties.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

All employees at Respondent's Olympia and Shelton, Washington facilities; excluding office clerical, casual, and professional employees, guards and supervisors as defined in the Act.

4. During all times material the Union has been, and is, the exclusive representative of the employees in the aforesaid unit, for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.
5. By failing and refusing to sign the collective-bargaining agreement reached with the Union embodying the terms of an oral agreement reached by the parties on April 14, 1982, the Respondent since May 11, 1982, has violated Section 8(a)(5) and (1) of the Act.
6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(5) and (1) of the Act by failing and refusing since May 11, 1982, to sign the collective-bargaining agreement embodying the terms of an oral agreement reached on April 14, 1982, and, in order to effectuate the policies of the Act, I shall recommend that the Respondent cease and desist from engaging in such unlawful activity and that on request, it sign said collective-bargaining agreement forthwith *H. J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941). In addition, I shall recommend that the Respondent give

effect to the terms of said agreement retroactive to May 11, 1982, as provided for in the agreement,¹⁹ and I shall recommend that the employees be made whole for any losses they may have suffered by reason of the Respondent's failure to execute and sign the aforesaid agreement, with interest thereon to be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[Recommended Order omitted from publication.]

¹⁹ The agreement provides that it "shall become effective upon its execution."