

Brown-Graves Lumber Company and Local Union No. 1242, United Brotherhood of Carpenters and Joiners of America, AFL-CIO. Case 8-CA-19749

October 31, 1990

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On September 7, 1989, Administrative Law Judge Walter J. Alprin issued the attached decision. The Charging Party filed exceptions and a supporting brief. The Respondent filed an answering brief to the Charging Party'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, and conclusions only to the extent consistent with this Decision and Order.

The Respondent is engaged in the wholesale and retail sale of lumber and building products in Akron, Ohio. It has had a collective-bargaining relationship with the Charging Party Union since 1938. The Union represents those employees who work in or about the Respondent's warehouse, yard, shop, and factory, but excluding the warehouse hardware employees, truck-drivers, and office employees.

The Union's most recent collective-bargaining agreement with the Respondent expired on August 31, 1986.¹ Article XXX, section K, of this 3-year agreement basically allowed the Respondent to use casual labor to do certain unit work during the period March 15 through November 30 of each contract year.² According to this provision, the Respondent, however, required the Union's consent to extend the above dates.

As more fully discussed by the judge, the Respondent and the Union were engaged in negotiations for a successor agreement from July 31 through December 22, 1986.³ In these negotiations, the Respondent sought a rollback of employee wages and benefits to achieve savings of \$2.09 per hour in labor costs. Early in their negotiations, the Respondent and the Union tentatively agreed to change article XXX, section K, of the old contract⁴ to permit the Respondent to use cas-

ual labor year round.⁵ At their November 12 session,⁶ following the discussion on the selection of a date for their next negotiation session, the Respondent told the Union that it intended to retain the casual labor after November 30.⁷ During this meeting, the Union objected to any extension beyond November 30.⁸ At their next bargaining session held on December 8, the Respondent presented a final contract offer, which was subsequently rejected by the Union and its members. The Respondent took the position that an impasse in bargaining existed and, on December 22, essentially implemented its December 8 final offer. Meanwhile, after November 30, the Respondent retained the casual labor to do unit work.⁹

In 1984 and 1985, the Union also refused permission to the Respondent to retain casual labor beyond the contractual cutoff date. On those occasions, unlike the situation in 1986, the Respondent responded by hiring the casuals as regular unit employees.

The judge found that the Respondent's continued use of casual labor after November 30 was lawful because a material, substantial, and significant unilateral change had not occurred. Although he found that, after November 30, the casuals performed work that regular unit employees would have done, thereby decreasing work opportunities and possible overtime of regular unit employees, he concluded on his review of similar events in 1984 and 1985 that the retention of the casuals in 1986 did not have a significant effect on the bargaining unit. He reasoned that any loss in work opportunities for unit employees on the payroll prior to November 30 was the same whether the casuals were hired as additional unit employees (the 1984-1985 method) or continued to be supplied by an outside contractor (the 1986 method). The judge also found that the Respondent was justified in implementing its December contract proposals on December 22 because a valid bargaining impasse existed as of December 8. In light of the above findings, the judge dismissed the 8(a)(5) complaint allegations.

The Union excepts and argues that the judge's findings are erroneous. The Union first contends that the retention of the casual labor in 1986 differed from the Respondent's past practices of 1984 and 1985 and, thus, contrary to the judge's findings, had a substantial effect on the number of unit employees and on the amount of work hours available to the unit after November 30. The Union thus argues that the retention

⁵The record shows that this change would amount to a labor-cost savings of 9-1/2 cents per hour for the Respondent.

⁶The record shows that the parties agree that a bargaining impasse was not reached at this meeting.

⁷The judge found that when this announcement was made, the Respondent had already decided to retain the casuals regardless of the Union's position.

⁸In a November 26 letter to the Respondent, the Union renewed its objection to this extended use of casual labor.

⁹The record indicates that about 9 or 11 casual employees were retained after November 30 and worked several weeks for the Respondent.

¹After that date, the contract was extended on a day-to-day basis.

²In 1986 the Respondent obtained the casual labor from Hours, Incorporated, a provider of temporary and casual help.

³All dates are in 1986 unless otherwise indicated.

⁴The record shows, as recognized by the judge, that the Union had not agreed to implement this change before reaching, or independent of, a complete successor contract with the Respondent.

of casuals beyond November 30 was a unilateral change in terms and conditions of unit employees' employment. The Union further contends, inter alia, that any purported bargaining impasse reached in December was tainted by the Respondent's unlawful retention of the casual labor after November 30.

In response to the Union's first exception, the Respondent's defense of its actions focuses on the following two grounds: (1) the retention of the casual labor in 1986 was not a material, substantial, or significant change in the terms and conditions of the bargaining unit employees;¹⁰ and (2) the Union had previously agreed to the use of casual labor after November 30 and never pursued bargaining over this issue after November 12. In response to the Union's second contention, the Respondent claims that the judge correctly concluded that a good-faith bargaining impasse was reached at least by December 8.

We find merit in the Union's exceptions. For the reasons set forth below, we conclude that the Respondent violated Section 8(a)(5) and (1) when it unilaterally retained the casuals after November 30. We additionally find that this unfair labor practice tainted the parties' further bargaining in December. Consequently, we conclude that the Respondent also violated Section 8(a)(5) and (1) when it implemented its contract proposals on December 22 in the absence of a valid, good-faith bargaining impasse.

Initially, we find that the judge's analysis fails to recognize a critical difference between the Respondent's practices of 1984 and 1985 and its action in 1986 and the full ramification of that difference. When the casual employees were hired as unit employees after November 30, in 1984 and 1985, the unit work which had been temporarily removed from the unit between March 15 and November 30 pursuant to article XXX, section K of the contract, was returned to the unit on expiration of the period specified by that contractual provision. In contrast, when the casual employees continued to be retained as nonunit employees beyond the contractually specified period, as was done in 1986, the unit work assigned to them effectively was permanently removed from the unit. Thus, the Respondent's retention of casuals as nonunit employees in 1986 had a substantial effect on the unit employees as a group because post-November 30 work opportunities formerly enjoyed by fellow unit employees (i.e., casuals

subsequently hired as regular unit employees) were no longer available and would no longer be performed under the unit's own terms and conditions of employment.¹¹ We therefore find that the 1986 retention of the casuals as nonunit employees past November 30 represents a material, substantial, and a significant change from the Respondent's prior practices of 1984 and 1985.

In view of the above finding, we next address the Respondent's waiver argument. The Respondent argues that the use of the casual labor after November 30 had been previously agreed to by the Union during negotiations and that the Union never pursued bargaining over this issue after November 12. Initially, we find that the parties' tentatively agreed-on revision of article XXX, section K of the contract is not indicative of a waiver here because, as found by the judge, the parties always negotiated a complete contract rather than implementing their agreements piecemeal. Thus, the Union's agreement to the revision was part of the give and take of collective bargaining and, as such, can only be deemed tentative or conditional and dependent on the ultimate outcome of negotiations.¹² It is undisputed that the Respondent's announcement about the extended use of the casual labor occurred in the midst of the parties' ongoing bargaining over the Respondent's overall rollback plan. It is also undisputed that the Union made clear its specific objection to the extended use of the casuals, which constituted one component of the Respondent's overall rollback plan. Under these circumstances, we do not find a clear and unmistakable waiver by the Union. Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) of the Act by its use of casual labor after November 30.

We now turn to the question of whether the parties had reached a valid, good-faith bargaining impasse before or on December 22. The Union contends that, in view of the Respondent's unlawful unilateral retention of casuals after November 30, no impasse existed. The Union relies on *Associated Machine*, 271 NLRB 367, 374 (1984), enfd. mem. 782 F.2d 1051 (9th Cir. 1986), in which the Board found that an employer's earlier unlawful wage reduction would so "poison" the bargaining atmosphere as to prevent any finding of a good-faith impasse. The Respondent argues that even if the retention of casuals after November 30 constitutes an unlawful unilateral change, it nevertheless reached a good-faith bargaining impasse with the Union before December 22. In support of the argument that parties can bargain to a valid impasse even after

¹⁰As an initial matter, we note that the casual-labor issue was litigated and argued before the judge in regard to the resolution of questions of impasse, waiver, and impact on the bargaining unit. The judge resolved this issue by accepting the Respondent's argument that the change had no significant impact on the unit. The linchpin of the judge's reasoning, which the Respondent does not challenge in its answering brief, is the premise that the Respondent's decision to retain casuals in 1986 constitutes a mandatory subject of bargaining. Accordingly, in view of the manner in which this case was litigated and briefed to the judge and to the Board, and in the absence of exceptions to the judge's decision by the Respondent, we conclude that the Respondent has forgone any claim that the retention of the casual labor in 1986 is not a mandatory subject of bargaining, and that this issue is not before us.

¹¹Cf. *Mashkin Freight Lines*, 272 NLRB 427 (1984) (the employer violated Sec. 8(a)(5) and (1) by its increased use of nonunit employees because they affected the work opportunities otherwise available to the unit).

¹²"Absent a valid, preexisting impasse, or the consent of the union, an employer, during the course of contract negotiations, is not free to implement proposed changes or those tentatively agreed to by the parties." *Marriott In-Flite Services*, 258 NLRB 755 fn. 2 (1981), enfd. 729 F.2d 1441 (2d Cir. 1983).

an unlawful unilateral change, the Respondent primarily relies on *NLRB v. Cauthorne Trucking*, 691 F.2d 1023 (D.C. Cir. 1982).

Although we agree with the general proposition of *Cauthorne* that there is no absolute rule that an unlawful unilateral change precludes a later good-faith impasse in negotiations,¹³ we find no valid, good-faith impasse occurred here. It is true, as the Respondent contends, that the Respondent and the Union resumed their contract negotiations after the unlawful unilateral change involving the casuals occurred. But following the unilateral change there was no further discussion of the casual labor issue in subsequent negotiations in December. In our view, the omission of what had been an integral part of the economic package is critical.

As revealed by the record, the casual-labor issue constituted just one component of the Respondent's general cost-cutting goal of \$2.09 per hour, and, as such, was inextricably tied to the other matters under consideration throughout the parties' concession bargaining and, in particular, to those matters discussed during the December sessions. When the Respondent announced that it intended to retain the casuals past November 30, it removed this issue, at least as it concerned 1986, from the bargaining table and it clearly deprived the parties of an element of flexibility, i.e., an opportunity to change their minds thereafter and reach the Respondent's desired economic relief with a different combination of concessions. In fact, the judge found that the Respondent was still intent on exploring different ways to meet its \$2.09 figure on costs at the December 15 negotiation session. At the very least, then, the unrescinded unilateral change involving the retention of the casuals after November 30 reduced bargaining flexibility and thus hampered the subsequent bargaining.¹⁴ Under these circumstances, we find that the Respondent was not justified in implementing its final contract offer on December 22 and thereby unilaterally changed the wages, benefits, and other terms and conditions of employment of the unit employees in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. By retaining the casual employees after November 30 and by unilaterally implementing its contract proposals on December 22, thereby changing the wages, benefits, and other terms and conditions of em-

¹³ See *Storer Communications*, 297 NLRB 296 (1989). Member Cracraft agreed with her colleagues in *Storer Communications* that the employer's unlawful unilateral implementation of a revised drug/alcohol policy did not preclude subsequent good-faith bargaining to impasse over the terms of a new collective-bargaining agreement. However, unlike her colleagues in that case, Member Cracraft would have required the employer to rescind the unlawfully implemented policy revisions. In any event, she agrees with her colleagues here that the bargaining subsequent to the Respondent's unlawful unilateral retention of casual workers did not lead to impasse.

¹⁴ See *Associated Machine*, supra at 374-375.

ployment for bargaining unit employees, the Respondent violated Section 8(a)(5) and (1) of the Act.

2. The above 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 and is engaging in certain unfair labor practices, we shall order that it cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

Specifically, we shall order that, on request, the Respondent bargain with the Union and, if an understanding is reached, embody the understanding in a signed agreement. We shall also order that, on request, the Respondent specifically bargain with the Union concerning that decision to retain casual employees after November 30, 1986. We shall also order that, on request, the Respondent restore the status quo ante and rescind the unilateral changes made commencing December 1 and 22, 1986, and make all affected unit employees whole for any losses they incurred by virtue of its unilateral changes from December 1 and 22, 1986, until it negotiates in good faith with the Union to agreement or to a valid impasse. If the Union elects to have previous conditions restored, calculations of the sums and payments necessary to make employees whole, with interest, shall be computed in accordance with normal Board policy. See *Ogle Protection Service*, 183 NLRB 682 (1970); *New Horizons for the Retarded*, 283 NLRB 1173 (1987); *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

ORDER

The National Labor Relations Board orders that the Respondent, Brown-Graves Lumber Company, Akron, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with Local Union No. 1242, United Brotherhood of Carpenters and Joiners of America, AFL-CIO as the exclusive bargaining representative of the employees in the bargaining unit described below by unilaterally retaining casual employees after November 30, 1986, and by implementing its December 1986 contract proposals that changed the wages, benefits, and other terms and conditions of employment of bargaining unit employees.

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

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with Local Union No. 1242, United Brotherhood of Carpenters and Joiners of America, AFL-CIO as the exclusive representative of the employees in the following appropriate unit con-

cerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All employees employed in or about the Respondent's warehouse (excluding warehouse hardware employees), yard, shop, and factory, and excepting truck drivers and office employees.

(b) On request, bargain in good faith with the Union concerning the decision to retain casual employees after November 30, 1986, rescind the unilateral changes in the unit employees' wages, benefits, and other terms and conditions of employment that were made commencing December 22, 1986, and make all those unit employees whole, with interest, for any losses they incurred by virtue of its unilateral changes to their wages, benefits, and other terms and conditions of employment from December 1 and 22, 1986, until it negotiates in good faith with the Union to agreement or to a valid impasse in the manner set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Akron, Ohio office copies of the attached notice marked "Appendix."¹⁵ Copies of the notice, on forms provided by the Regional Director for Region 8, 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.

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

¹⁵If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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 refuse to bargain in good faith with Local Union No. 1242, United Brotherhood of Carpenters and Joiners of America, AFL-CIO as the exclusive bargaining representative of the employees in the bargaining unit described below by unilaterally retaining casual employees after November 30, 1986, and by implementing our December 1986 contract proposals that changed the wages, benefits, and other terms and conditions of employment for bargaining unit employees.

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.

WE WILL, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All employees employed in or about our warehouse (excluding warehouse hardware employees), yard, shop, and factory, and excepting truck drivers and office employees.

WE WILL, on request, bargain in good faith with the Union concerning the decision to retain casual employees after November 30, 1986, rescind the unilateral changes in the unit employees' wages, benefits, and other terms and conditions of employment that were made commencing December 22, 1986, and WE WILL make all those unit employees whole, with interest, for any losses they incurred by virtue of our unilateral changes to their wages, benefits, and other terms and conditions of employment from December 1 and 22, 1986, until we negotiate in good faith with the Union to agreement or to a valid impasse.

BROWN-GRAVES LUMBER COMPANY

Steven D. Wilson, Esq., for the General Counsel.
Gary W. Spring, Esq. and *George W. Rooney, Esq. (Roetzel & Andress)*, of Akron, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

WALTER J. ALPRIN, Administrative Law Judge. Pursuant to a charge filed on January 2, 1987, by Local Union No. 1242, United Brotherhood of Carpenters & Joiners of America, AFL-CIO (the Union) and an amended charge filed on January 22, 1987, by the Union, Region 8 of the National Labor Relations Board (the Board) issued a complaint on February 27, 1987. Brown-Graves Lumber Company (Respondent) filed its answer to the complaint on March 13, 1987. The complaint alleges the following: (1) that Respondent's agent and supervisor, Harvey Graves, coercively told

employees on July 31, 1986,¹ that Respondent would liquidate its assets if the Union failed to accede to Respondent's bargaining demands; (2) that on or about August 20, Howard Shoup, Respondent's supervisor, informed employees that Respondent would withdraw recognition from the Union if the Union failed to accede to Respondent's bargaining demands;² (3) commencing on or about November 30, Respondent unilaterally changed the terms and conditions of employees in the bargaining unit by retaining casual employees, also known as temporary summer employees, beyond that date; (4) on or about December 22, Respondent implemented changes in the terms and conditions of employment of its employees in the bargaining unit by implementing its final proposal prior to having reached a valid impasse in negotiations; (5) on or about December 22, Respondent implemented a change in employee base rates which was different from the employee base rate proposed by Respondent during negotiations.

This case was heard before me at Akron, Ohio, on May 27 and 28, 1987. Both General Counsel and Respondent filed briefs which have been carefully considered.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, an Ohio corporation with an office and place of business in Akron, Ohio, is engaged in the wholesale and retail sale of lumber and building products. The General Counsel asserts, Respondent admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I find also that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

1. Background and July 13 meeting

Respondent and the Union have had a collective-bargaining relationship since 1938, and they entered into a series of collective-bargaining agreements. The most recent agreement was executed on September 1, 1983, and expired on August 31. Prior to the expiration of the 1983 agreement, the parties met on July 31 to begin negotiations for a new contract.

The unit for which bargaining was conducted differed slightly from that alleged in General Counsel's complaint. The parties agreed at the hearing, and I find, that the correct unit description is as follows:

Said employees are those who are employed in or about that warehouse (excluding warehouse hardware employees), Yard, Shop, Factory, and excepting truck drivers and office employees.

¹ All dates hereafter unless otherwise indicated are 1986.

² This allegation was dismissed at the hearing for lack of evidence. I renew that dismissal here.

Harold Graves Jr., owner and president, appeared for Respondent at the first bargaining session, on July 11. It had not been Graves' practice for many years to appear at bargaining meetings, nor did he appear at any of the remaining meetings of this series. Harvey Graves,³ president of a related firm, Empire Wholesale Products, also appeared. Pat Campbell, Howard Shoup, and Glen Bole also appeared for the Employer. Shoup, Respondent's vice president of personnel, became Respondent's chief spokesman at the succeeding meetings. Representing the Union were Union President Glen Lewis; Business Agent Ed Snyder; negotiating committee member Don Thissen; warehouse employees Jim Herold and Tom Fick; and mill employee Richard Eiseman. After the first meeting, only Howard Shoup and Glen Bole represented the Employer. The union representatives, with an occasional absence by one or the other, attended substantially all the meetings. The meetings took place on neutral ground at the Holiday Inn on Interstate 77 in Akron, Ohio.

The union presented a contract proposal on July 31, but the Respondent rejected it. It was at this meeting that Harold Graves supposedly "coercively informed employees that Respondent would liquidate its assets if the Union failed to accede to Respondent's bargaining demands."

Don Thissen's testimony about this alleged threat was that after Harold Graves Jr. rejected the Union's contract proposal, "There was a small discussion on it." When asked the content of the discussion, Thissen testified:

They came in and, of course, the two parties are part of the family that own the Company; and, as I recall, the meeting was started off with Harold Graves, Jr. making a statement that the company was not being cost competitive and they would like very much to see the union work with them and, as he put it, concessions *per se*, were not what they were looking for, but they were looking for a more competitive agreement with the union. And before he left the meeting, he spoke again before he left the meeting and, at that time, he said the family intended to be firm but fair in negotiations. . . . Also, Harvey Graves spoke, and he made comparisons with the way business has been going and the cost efficiency and everything, and he compared it with something that happened back in 1959 with costs. And at that time, in 1959, he made a comparison that if the company couldn't get the concessions they wanted they may end up going out of business; if they could not sell the company, they would liquidate.

Following their remarks both Graves, father and son, left the meeting.

The Respondent offered to open its books to the Union at this first meeting for the purpose of corroborating its claim of economic difficulties. The Union never took up this offer despite Thissen's testimony that he doubted that the Employer was in trouble.

Three sets of bargaining notes were placed in evidence. The first are General Counsel's witness Thissen's notes. The other two are by Glenn Bole and Union President Glenn Lewis. All appear to corroborate, to some extent, Graves' version of what he said at the first meeting. Graves' testimony is as follows:

³ The Graves are apparently father and son.

Well, in recent years, in the 19—1980 and '81 the Company lost substantial money, between \$1,000,000 to \$2,000,000 or more, and we've never made up that loss.

And similarly, we find ourself in a tough predicament financially in that our costs are exceeding profits and our profits in the last few years are marginal, very marginal. We aren't getting our return on investment that we should have.

So, as a result, we felt that after talking to consultants and others and among ourselves that we should attempt to see—should we sell, sell the business. And after talking to consultants and other people, we decided that the best thing and the advice we had was that the best thing we should do is to liquidate, if this unfavorable trend continues.

Subsequently, Graves was asked what message he conveyed to the Union.

Q. At any time in that meeting, Mr. Graves, did you tell the Union committee that the company would liquidate its assets if the Union failed to accede to the Company's bargaining demands?

A. No No. What I said was that the Company may have to liquidate, if this unfavorable trend continues we may be forced to liquidate.

Thissen's notes show Graves saying, "We might liquidate if we cannot improve our profit line." Lewis' notes, as interpreted by his testimony, show that Graves testified that the consultants had said to sell. "It all added up to liquidation of said business." Bole's notes also refer to consultants' recommendations to sell. When that was impossible, a consultant told Respondent to liquidate.

Significantly, neither Graves' testimony nor the three sets of notes corroborate Thissen's testimony, set forth above, that Graves said if the Company couldn't get the concessions they wanted they may end up going out of business."⁴ In light of this evidence, I credit Graves.

2. Subsequent negotiations

Subsequent meetings were scheduled on August 6, 20, 27, and 28, September 2, 4, 16, 25, and 30, October 2 and 9, November 6 and 12, and December 8, 15, and 18. The meetings scheduled for November 6 and 16 did not take place because the Federal mediator failed to appear.

Considerable progress was made through the negotiating session of September 30. Respondent earlier developed a negotiating goal of saving \$2.09 per hour in costs. This goal was communicated to the Union as early as the second session on August 6, in connection with the Respondent's savings of a similar amount on its Teamsters' contract. The Union never seriously contested the need for cost savings in this amount. Indeed, as previously mentioned, it did not avail itself of an offer to examine Respondent's books. The following agreements and bargaining movement occurred through September 30:

(1) Outside work on August 6.

⁴I believe that Thissen, as is not uncommon, had arrived at a conclusion from what he did hear at the July 31 meeting and, nearly a year later, testified to his conclusion rather than to what was actually said by Graves.

(2) Winter casuals agreed upon with certain restrictions on their work activities⁵ on August 20.

(3) Respondent dropped original proposal on rule/recall changes on August 20.

(4) Second tier agreement on August 20.

(5) Respondent agreed to union request to fill journeyman classification through utility classification to prevent attrition on August 21.

(6) The parties agreed to the diversion of insurance trust funds to pension plan on August 27.

(7) Certain prospective retirees to be replaced by second tier and casual employees. Agreement reached on August 27.

(8) Union made proposal to give back total of 5 sick days—two the first year, two the second and one the third—or a three-year contract on 28 August 28.

(9) Some easing of machine restrictions proposed by Union on August 28.

(10) When the old contract expired on August 31, parties agreed to go day-to-day under terms of former agreement.

(11) The parties agreed on Respondent's hospitalization terms on September 2.

(12) Respondent first proposed 8-1/2 hours work for 8 hours pay on September 2.

(13) Hospitalization rider agreed on September 4.

(14) Parties agree to use of federal mediator on September 4.

(15) Union counterproposes that it will work 8 hours 15 minutes for 89 hours pay on September 30.

(16) Union dropped previous proposal regarding seniority on shift changes on September 30 and pulled back to 2 sick days give back.

Up to this point in the bargaining, the parties can fairly be said to have been getting closer to agreement. At the September 30 session, the Employer costed out the Union's concessions at \$1.8375 per hour. As the remaining sessions demonstrated, however, this near approach to agreement was asymptotic and not continue to a meeting of minds.

At the 11th and 12th sessions on October 2 and 9, respectively, no progress toward further agreement occurred. The session of November 6, like the September 16 meeting, was canceled by virtue of the Federal mediator's failure to show up for the session.

3. The meetings of November 12 and December 8

At the bargaining session held November 12, the Union made one further offer. It offered to give up one more additional sick day. The Union had originally offered to give back 5 sick days (two the first year, two the second, and one the third). The Union later reverted to a give back of 2 days. The offer of November 12 therefore represented only a partial return to its original proposal. This one sick day was the last concession of any sort made by the Union. A sick day costed out at 4.3 cents per hour.

Respondent, who had communicated only through the mediator up to this point, said it would like to talk directly to the Union. The Employer thereupon offered a 1-year con-

⁵The casuals' question later divided the parties on November 12 and December 8, infra.

tract. In making this offer, the Employer noted that economics might be different at the end of a year giving the Union an opportunity to negotiate a better settlement. The Union refused this offer. The parties then turned to a discussion of when they might have another meeting. Union negotiator Snyder replied "after the holidays." Upon being asked which holiday, he answered "well, after the Christmas Holidays." The Employer stated that that was entirely too long. After discussion of Union President Lewis' vacation plus another vacation that might present a problem, the parties agreed to meet on December 8.⁶

Following the discussion on the meeting date, Shoup told the Union of the Employer's plans for using casual employees past December 1. The Union asked for a recess to discuss the casual issue and returned to announce "No, we don't want to do that. We don't agree to do that. We don't want that to happen." At the time of this announcement, all issues relating to casuals and their wintertime use had been settled. The Employer was to use the casuals but there were restrictions on what equipment they could operate. Both parties agree that when the casual issue was settled, there were no explicit statements conditioning use of the casuals on the parties arriving at a complete contract.⁷

On December 8, Shoup presented the Union with Respondent's last offer. He suggested it be presented to the membership for ratification.⁸ The Union agreed to take it to the employees but said they would not promote it. The Employer at first intended to implement its proposal on December 15, but later pulled back to December 22. Shoup announced that the parties were at impasse, and none of the union negotiators disagreed with him. Thissen testified that the Union was not willing to make any concession beyond those it had already granted. With reference to the Employer's \$2.09 figure for cost savings, he stated: "We were trying to avoid it. We were willing to negotiate."

4. The December 15 and 18 meetings, and Employer's implementation of its final offer

At the December 15 meeting, Shoup indicated that the Employer was flexible about the method of meeting its \$2.09 figure on costs. Union President Lewis testified that Shoup said "he'd work anything out anyway we could work it out, give the 20 minutes, take the wage reduction, or whatever." Shoup had begun by suggesting a wage reduction instead of 20 minutes additional on the workday. The Union did not respond to this proposal.

At a meeting on December 18, the Employer explained the implementation aspects of its proposal, particularly the manner in which the wage proposal was to be put in place. To avoid problems with the Wage and Hour authorities, the additional 20 minutes of work was treated as overtime, and the nominal regular rate reduced to a point where it, combined with the overtime, permitted an employee to take home a

check no smaller than that issued him under the previous contract.⁹

B. Analysis and Findings

1. The alleged threat on July 31

I cannot find that on July 31 the Respondent threatened the Union in violation of Section 8(a)(1) of the Act. Both Graves, father and son, conditioned their remarks on the very poor economic condition of the Company. An offer was made to the Union to show the Employer's financial records which it did not accept. The written notes of three of the participants, including some of General Counsel's witnesses, do not corroborate Thissen as to exactly what was said. On this record I find that the Employer, faced with a poor economic situation, was being frank with the Union about its situation. Under these circumstances, the Employer's remarks, bottomed on economic fact, cannot be regarded as "threats." See *Gissel Packing Co. v. NLRB*, 395 U.S. 575 (1969); *Kawasaki Motors*, 280 NLRB 491 (1986). ("We have many problems and this plant has to become profitable if it is to survive").

2. The Respondent's use of casual workers after November 30

If the Employer's use of casuals is found to be an unfair labor practice, that finding will prevent ab initio any finding of impasse on December 8 or any later date because, under well-established principles, an impasse cannot come into being in the presence of unfair practices during the relevant bargaining. This issue is also confused because other evidence showed that the Employer, operating under the expired collective-bargaining contract, had retained casuals in the two previous years despite the Union's refusal under article XXX, section K to grant its permission for such extended use. Employer negotiator Shoup testified that the Employer had sought to retain the casuals in 1984 and 1985. The Employer had sought the Union's permission pursuant to the bargaining agreement and been refused. As Shoup stated: "So, as a result, we put the men on the Brown-Graves company payroll, at the rate of pay they were making at that particular time through Hours, Incorporated."¹⁰ This testimony was not seriously contested by any of the General Counsel's witnesses. An exhibit also shows casuals on Respondent's payroll in December 1984. There is no evidence that these short-term hires (as opposed to casual status) were ever contested by the Union.¹¹ One General Counsel witness (Lewis) agreed that, in previous years, when casuals stayed on after December 1, "They were supposed to be kept on as regular employees."

There is little doubt that when Shoup announced the Respondent's intentions concerning the casuals on November 12, he was giving voice to an intent to retain the casuals regardless of the Union's feelings about the matter.¹² One as-

⁶ Snyder denied seeking a meeting after Christmas. I do not credit his denial although I find that he did not renew this contention after the initial suggestion.

⁷ I give no weight to this fact. This record shows that in the past the parties had always negotiated a complete contract rather than implementing their agreements piece by piece. Such a practice might impede bargaining if a party wanted to withdraw a proposal and substitute another.

⁸ A vote took place on December 10. The Employer's proposal was rejected.

⁹ The parties evinced some confusion about this but it seems a matter of simple arithmetic.

¹⁰ The record shows that the Employer obtained the casuals every spring from Hours, Incorporated, a provider of temporary and casual labor.

¹¹ The evidence shows that they were laid off or let go in 3 to 5 weeks after December 1. Thissen thought it to be 6 or 7 weeks.

¹² The General Counsel puts great weight on Shoup's admission that he believed Respondent privileged to implement changes agreed on between the

pect which motivated Shoup was the fact that the discussion about timing of the next negotiating session had just occurred. The Union had suggested that the next session be after the “holidays.” The final arrangement was for a meeting (after Thanksgiving) on December 8. Shoup “then explained that if we go by the first of December, we have to have an understanding, we will use the temporary people, or casuals past the December 1st deadline.”¹³

The Board has long held that to be violative of the Act, unilateral changes must be material, substantial and significant. See, e.g., *Murphy Oil USA*, 286 NLRB 1039 (1988). I am unable to find that this change meets that standard. General Counsel proffered evidence that the casuals, after December 1, performed work which regular employees would have done, thereby decreasing work opportunities and possible overtime of regular employees. That is so, and I so find. However, the same proposition would be true if the Employer had retained the casuals for some weeks as their employer, as it had done in 1984 and 1985, for presumably the same pay and overtime. The work would have been the same in amount and spread over an equal number of individuals. That those individuals have differing abstract entries on employer records would not affect the work available to any of them. General Counsel, in his brief, seems impliedly to have recognized this. He attempted to meet the problem by an argument that relied on the bargaining unit status of the casuals. Conceding that in the past the Employer had retained the casuals by change of status, he argues as follows in his brief at 12:

It is clear from the record that casuals perform work which would otherwise be done by unit employees [citation omitted]. The record also reflects that had Respondent not engaged in the unlawful implementation of the proposal on casuals, these individuals would have become bargaining unit employees [citation omitted]. If not, then the hours of work for existing unit employees would have increased. Therefore, the effect of Respondent’s action on the size of the unit or the number of hours of work available to unit employees was clearly affected by this action.

The critical juncture in General Counsel’s argument is the sentence beginning “If not” If the sentence means to say that hours of work for regular employees would have been affected if Respondent had not retained casuals in any fashion, the statement is true but immaterial. Respondent had retained casuals for the previous two years with no problem as General Counsel impliedly admits. If the sentence is construed to mean that some or all casuals might have left Respondent rather than become regular employees, thus making more work available, the argument is speculative because there is no evidence in the record bearing one way or another on that proposition. Finally, if the argument be that Respondent should have used the 1984 and 1985 method of retaining

parties prior to the negotiation and execution of a complete contract. The question here, however, is whether what Respondent did is a legally cognizable unilateral act. If Respondent’s action is not such Shoup’s misunderstanding of the law will not convert it to one.

¹³ Boles notes (R. Exh. 13). The notes are consistent with Shoup’s testimony at Tr. 257–258. I find that the sequence of events occurred as set out in the notes and Shoup’s testimony. I also find that the Union suggested meeting after Christmas.

casuals and thus avoided any impact on its preexisting group of employees, I cannot agree. As previously noted, additional hires would obviously affect the amount of work available to individual employees, and yet it is exactly these additional hires which General Counsel admits could have been properly made. Indeed it would appear that Respondent would have been following past practice (1984 and 1985) under the expired contract had it hired casuals.

Under these circumstances, I do not find that Respondent’s decision to retain casuals had any significant effect on the bargaining unit. The effect on work opportunities for individuals was the same whether the casuals were retained by one method or the other.¹⁴

3. The implementation of Respondent’s contract proposals

The lawfulness of Respondent’s implementation on December 2 depends on whether an impasse had occurred prior to that date. I find that an impasse occurred on December 8, and that Respondent was privileged to implement its proposals. *E. I. DuPont & Co.*, 268 NLRB 1075 at 1076 (1984), summarizes the relevant considerations in determining the existence of impasse:

The issue before us, then is whether the parties had bargained to an impasse at the time Respondent acted. For if impasse had been reached, Respondent was free to implement its pre-impasse proposal. *Taft Broadcasting Co.*, 163 NLRB 475, 478, 64 LRRM 1386 (1967), petition for review denied 395 F.2d 622, 65 LRRM 227 (D.C. Cir. 1968). The Board has defined impasse as a state of bargaining at which the party asserting its existence is warranted in assuming that further bargaining would be futile. *Alsey Refractories Co.*, 215 NLRB 785 fn. 1, 88 LRRM 1071 (1974); *Patrick & Co.*, 248 NLRB 390, 393, 101 LRRM 1437 (1980). More specifically, we continue to follow the guidelines set forth in *Taft Broadcasting*, above in determining the existence of an impasse:

Whether a bargaining impasse is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

Finally, there need be no undue reluctance to find that an impasse existed. Its occurrence “cannot be said to be an unexpected, unforeseen, or unusual event in the process of negotiations since no experienced negotiator arrives at the bargaining table with absolute confidence that all of his proposals will be readily and completely accepted.” *Hi-Way Billboards*, 206 NLRB 22, 23, 84 LRRM 1161 (1973).

¹⁴ Assuming, but not deciding, that the Union sought to pressure Respondent by letting the December deadline pass without the Respondent being able to retain casuals, I do not consider the failure of this tactic to be any form of material or substantial effect. In any event, it should be noted that Respondent was considering only 3 weeks’ retention of casuals prior to the December 22 implementation.

Application of these standards to the instant case demonstrates that an impasse had occurred as of December 8. The bargaining history of these parties dates back a half-century. During that time they have negotiated and executed a large number of collective-bargaining contracts. General Counsel offered no evidence that Respondent had a background of unfair practices in the negotiation or administration of these numerous agreements. General Counsel argues in his brief that consideration of the long bargaining history is vitiated to some extent by the fact that these negotiations, involving as they did the Employer's economic troubles, concerned a rollback of employee benefits. He compares these negotiations to those involving a new bargaining relationship. I agree that this consideration justifies placing somewhat less emphasis on this factor. However, a related factor—the length of the negotiations—illustrates that these parties did not rush headlong into a deadlock. The negotiations were lengthy and fully explored the issues separating the parties. The bargaining notes from all parties provide a clear illustration of that fact.

The complaint did not allege overall bad faith on the Respondent's part. Its allegations involve unilateral changes of a per se nature and several comments allegedly made at the bargaining table by Respondent. The chief of the unilateral changes—that involving the casuals—has been found to be not violative. No evidence was presented bearing on paragraph 9(b) of the complaint. I have found paragraph 9(a) to be without merit.¹⁵

In viewing the negotiations as a whole, I find that Respondent was candid about its economic problems and consistently sought contract terms that would enable it to deal successfully with those problems. The chief issue that ultimately separated the parties was the failure to arrive at a contract that would allow the Employer \$2.09-per-hour relief on its expenses of doing business. This issue, concerning as it did questions of the Employer's survival in an operating business, was certainly of the utmost importance to both parties. That the parties could not arrive at agreement on these questions, while regrettable, is not, per se, evidence of bad faith on the Employer's part.

¹⁵ These are the alleged violations of Sec. 8(a)(1).

The evidence relating to the bargaining session of December 8 shows that there was at least implied agreement, if not more, that an impasse existed. No negotiator for the Union indicated disagreement when Shoup asserted the existence of an impasse.

Finally, it should be noted that progress in the negotiations had slowed down almost to a crawl since the end of September. From September 30 to December 8, the Union's only movement had been to concede a single sick day. Even that movement represented only a partial return to its August 28 position on the number of sick days.

Under all the circumstances, I find that an impasse existed at least by the meeting of December 8. Accordingly, the Employer was justified, on December 22, in implementing its proposals previously made to the Union.¹⁶ I will, accordingly, dismiss the complaint in its entirety.

CONCLUSIONS OF LAW

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

2. Respondent has not violated Section 8(a)(1) of the Act by informing the Union of its economic difficulties during negotiations.

3. Respondent has not violated Section 8(a)(5) of the Act by retaining casual employees on December 1 or by implementing its contract proposals to the Union on December 22.

[Recommended Order omitted from publication.]

¹⁶ The complaint alleged that on December 22, Respondent implemented a wage proposal different from the one made to the Union. As noted above elsewhere in this decision, the Employer arithmetically converted its wage proposal to one where the extra worktime was treated as overtime, and the regular rate nominally dropped to a point where regular time combined with the overtime resulted in the same take-home pay. This was done to avoid Wage-Hour problems. The record shows that all parties were aware of this consideration, and no evidence was presented to show that employees' take-home pay was affected. Accordingly, I find this complaint allegation to be without merit.

General Counsel also argues that the December 15 meeting opened up new possibilities and, therefore, abrogated any existing impasse. I cannot agree. A number of side issues—such as the length of a new agreement—were discussed. The Employer still stood ready to accept some combination of proposals that would result in the desired savings. However, it is exactly here that the meeting of December 15 illustrates the existence of impasse. While the Union never stated it would not agree to \$2.09 savings, it never moved in that direction. To say that it would have another time is speculative.