

American Meat Packing Corporation and Beef Boners and Sausage Makers Union, Local 100-A, affiliated with United Food and Commercial Workers Union, AFL-CIO. Cases 13-CA-25581 and 13-CA-26279

February 27, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND DEVANEY

On March 7, 1988, Administrative Law Judge David L. Evans issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party Union filed briefs in opposition to the exceptions.

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

The Board has considered the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions, and to adopt the recommended Order as modified.²

We affirm the judge's conclusion that the Respondent violated Section 8(a)(5) and (1) of the Act by, inter alia, engaging in bad-faith bargaining with the Union during negotiations for a new contract. In doing so we rely on the rationale set forth below, rather than on the judge's conclusion that the Respondent's bargaining proposals were unusually harsh or vindictive or so unreasonable as to warrant the conclusion that they were proffered in bad faith. See *Chevron Chemical Co.*, 261 NLRB 44 (1982), enfd. 701 F.2d 172 (5th Cir. 1983). The Board has recently reaffirmed in *Reichhold Chemicals*, 288 NLRB 69, 69-70 (1988), that the content of a party's contract proposals may be a legitimate area of inquiry in bad-faith bargaining cases, but cautioned that the Board should avoid making purely subjective judgments concerning the substance of bargaining proposals. In *Reichhold*, the Board emphasized that its often difficult, but essential, task in bad-faith bargaining cases is to assess from the aggregate of a party's conduct whether that party's intent during bargaining was to reach agreement on the terms of a contract.

In the present case, this task is complicated by the Respondent's volunteering at the outset of bargaining that it was in dire financial circumstances, that many

of its proposals were aimed at achieving financial relief from the labor costs it was currently incurring, and that absent such relief the facility would join the roster of Respondent's plants which had recently been closed. Although the judge found that the Respondent's plea of inability to pay more than its proposed pay rates was a sham, we note that neither the General Counsel nor the Charging Party has attacked the substance of the Respondent's financial claims. Further, although we agree with the judge that the Respondent unlawfully failed to provide the Union with information on request in support of its plea of poverty,³ we find that this failure did not warrant the adverse inference drawn by the judge (and otherwise unsupported by evidence or contention) that the Respondent was not genuinely in some need of economic relief.

Despite our disagreement with some of the judge's reasoning, however, we reach the same conclusion concerning the Respondent's lack of good-faith intent to reach agreement. In determining that the Respondent lacked that intent, we are guided by certain principles stated by the Board in *General Electric Co.*, 150 NLRB 192 (1964), enfd. 418 F.2d 736 (2d Cir. 1969), a case that is similar in important respects to this case. In *General Electric*, the Board emphasized the importance of the parties' full acceptance of the bargaining process itself, observing as follows:

[A]n employer . . . violate[s] Section 8(a)(5) where it enters into bargaining negotiations with a desire not to reach an agreement with the union, or has taken unilateral action with respect to a term or condition of employment. . . . But, having refrained from any of the foregoing conduct, an employer may still have failed to discharge its statutory obligation to bargain in good faith. As the Supreme Court has said:

. . . the Board is authorized to order the cessation of behavior which is in effect a refusal to negotiate, or which directly obstructs or inhibits the actual process of discussion, or which reflects a cast of mind against reaching agreement.

Thus, a party who enters into bargaining negotiations with a "take-it-or-leave-it" attitude violates its duty to bargain although it goes through the forms of bargaining, does not insist on any illegal or nonmandatory bargaining proposals, and wants to sign an agreement. For good-faith bargaining means more than "going through the motions of negotiating." ". . . the essential thing is rather the serious intent to adjust differences and to

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

²We have modified the judge's recommended Order to include the Board's customary remedy for unlawfully implemented unilateral changes in wages and conditions of employment, and to include an expunction remedy for unfair labor practice striker John Frison (whose name appears here correctly spelled), whom the Respondent discharged because of alleged strike misconduct.

³We note that the Respondent has admitted an obligation to supply supporting financial information, and that its sole issue on exceptions before the Board to the violation found on that issue is the claim that it lawfully conditioned the provision of financial information on the Union's conducting an extensive and costly audit covering a period of 5 years. We find that the judge correctly found that the conditional nature of this proffer of supporting information was unlawful. See *Tama Meat Packing Corp.*, 291 NLRB 657 (1988).

reach an acceptable common ground. . . .” [Citations omitted; emphasis in original.] [150 NLRB at 193–194.]

In the present case, as explained below, the Respondent manifested no real intent to adjust differences, but essentially adopted the “take-it-or-leave-it” approach condemned in *General Electric*.

The Respondent and the Union were parties to a collective-bargaining agreement effective from December 20, 1982, through December 19, 1985. Negotiations for a successor agreement began on October 21, 1985.⁴ Although the Respondent and the Union met on 30 occasions in a 1-year period, no new agreement was concluded.

At the outset of negotiations, the Respondent proffered a series of proposals for changes in terms and conditions of employment, the most significant of which was its proposal 38, revising employees’ job classifications and wage rates. Three days after these proposals were given to the Union, and after a single meeting at which only cursory reference was made to proposal 38, the Respondent’s president read a letter to employees, stating in part that its proposal on job classifications and wage rates, which it had posted on a bulletin board “will go into effect on December 20, 1985.” Although the Respondent subsequently declared that such implementation would be preceded by either agreement or impasse, its ability to predict with certainty such an endpoint in negotiations (tied directly to the expiration date of the old contract) has less to do with the Respondent’s prescience, than with its otherwise demonstrable hostility toward the bargaining process.

The Respondent’s attitude toward the negotiations is perhaps most succinctly described by the statements of the Respondent’s chief negotiator, Michael Schumann, at the parties’ 11th bargaining session on December 13, shortly before the prescribed date for the implementation of proposal 38. Walter Piotrowski, the Union’s chief negotiator, pointed out that the Respondent had not agreed to any of the Union’s proposals, and Schumann responded, “We went through this six months ago when we were coming up with these proposals. We put a hard hat on a broom and said it was you. We gave you some and us some.” This was not an isolated remark. During the next bargaining session on December 14, the Union accused the Respondent of entering negotiations with “a bad attitude.” Schumann responded:

The Employer has spent a lot of time revising the present contract and we realized that we have to take drastic action. This Employer has closed a lot of facilities. We went through everything and decided what is our bottom line on these proposals.

We know we’re asking for a lot. We’re not here to give here and take there. We came here to say, “Gentleman, we’re here to convince you of our Proposals.”

During the same session, when Piotrowski commented about the Respondent’s adamancy, saying there is a way of bargaining matters out, Schumann stated, “We aren’t going to move. This is where we stand.” Later, Schumann reiterated, “The Employer’s position is that we did the give and take before we walked in here. What we have here is our bottom line proposal. We want to convince you on the merits of it so that you can convince your people of it.” The Respondent’s obdurate insistence that agreement would be obtained only by the Union accepting the Respondent’s proposals was no hyperbole made in jest, but is fully consistent with the results of bargaining as of this last date. This is documented by the Respondent’s position statement 9, which shows that the only proposals that tentatively had been agreed on were 34 proposals that had been made by the Respondent.

Far from evincing a “serious intent to adjust differences,” as required by *General Electric*, these statements illustrate precisely what *General Electric* proscribes: take-it-or-leave-it bargaining. No valid basis exists to construe these statements as mere inartful expressions rather than, as we deem them to be, a true reflection of the Respondent’s bargaining position.⁵ The statements are symptomatic of the Respondent’s conduct at and away from the bargaining table. Thus, they were but one aspect of a bargaining strategy that also included the following: insistence on contract provisions that, together, would effectively nullify the Union’s ability to act as the employees’ collective-bargaining representative;⁶ a systematic campaign directed at employees in which the Respondent’s president, Carl Herrmann, disparaged and discredited the Union and threatened employees with a loss of jobs and plant closing in letters he read to the employees; unlawful direct dealing with employees about the Respondent’s job reclassification proposal; unlawful unilateral implementation of that proposal; and the imposition of an unreasonable condition on the provision of financial information, i.e., the Union’s conduct of a time-consuming and costly audit.

In finding that the Respondent’s overall bargaining strategy was imbued with bad faith, we of course do not rely on the Respondent’s failure to make substan-

⁵ Cf. *88 Transit Lines*, 300 NLRB 177, 178 (1990), in which the Board found that the Respondent was not “so adamant concerning its own initial positions on a number of mandatory subjects” as to warrant a finding of a bad-faith “take-it-or-leave-it” approach to bargaining” (citation omitted).

⁶ Member Devaney, in agreeing with his colleagues that the Respondent violated Sec. 8(a)(5) and (1) by engaging in surface bargaining, finds it unnecessary to pass on whether the Respondent’s contract proposals evinced an unlawful effort to nullify the Union’s representative capacity after the contract was signed.

⁴ Unless otherwise indicated, all dates are in 1985.

tial concessions; and we are mindful that the Respondent's economic condition was poor and that this at least in part motivated its bargaining on economic issues. But although the Respondent's financial condition may explain its refusal to agree to such union proposals as improvements in health and pension benefits and the elimination of the two-tier wage system and, indeed, its own proposals for retrenchments, it does not explain the Respondent's refusal even to consider any changes in proposals that had the potential for totally eliminating unit work by transferring it to nonunit personnel. It similarly does not explain the Respondent's insistence on a grievance procedure and no-strike clause that required the Union to yield the employees' Section 7 rights to engage in strikes, and even handbilling outside of working hours, in "exchange" for the statutory right to enforce contractual provisions through the courts. And, finally, it does not explain why the Respondent never showed any willingness to consider any framework for reducing costs other than its own.

In proposals 9 ("No Work Preservation")⁷ and 40a ("Part-time and Casual Employees"),⁸ which were part of its initial proposal offered at the first negotiating session, and on which it remained adamant throughout the bargaining, the Respondent essentially reserved the right to assign all the unit work to individuals other than regular bargaining unit employees. Although proposal 9 did express the Respondent's disinclination to assign bargaining unit work to "research and development personnel," and stated that this would be done only if it were "essential to the running of a profitable business," the provision sets no real standards or limits that might be enforceable in court—the only recourse the Respondent would allow the Union for seeking to assure the Respondent's compliance with the agreement.⁹ The provision for the use of casual and part-time employees contained no limitations at all.

⁷The Respondent proposed this as "Section C" in its article on the agreement's "Coverage." It provided as follows:

It is expressly understood and agreed between the parties, that notwithstanding any other provisions of this Agreement, the Employer is not obligated to provide any specific amount of work to the bargaining unit and will relocate work from the bargaining unit during the term of this Agreement, to the extent essential for the running of a profitable business.

It is not the intention of the Employer to have managerial or research and development personnel perform bargaining unit work because that detracts from their assigned work, but to the extent that it is essential for the running of a profitable business, such persons will perform bargaining unit work.

⁸This proposal, which was offered as part of the "Seniority" article, provided as follows:

The Employer, in its sole discretion, will employ part-time and casual [sic] employees to perform bargaining unit work, when it is in the interest of the Employer to do so.

⁹When union negotiators—responding to the Respondent's contention that such employees would be used only "in emergency situations"—asked if that language could be written into the provision, the Respondent rejected the proposed modification outright.

The broad management-rights clause strongly reinforced the Respondent's ability to reduce or eliminate, at will, work performed by the regular bargaining unit employees. Among the lengthy list of subjects left to the Respondent's sole discretion, were the "determination whether to . . . reduce or eliminate the work force temporarily or permanently," and the "relocation, transfer, or subcontracting of bargaining unit work." Thus, although the Respondent's proposals allowed for limited use of departmental seniority in making layoffs of more than 5 days, there was no protection against the work's being assigned or contracted away; and the broad zipper clause (proposal 81 in the Respondent's initial proposals) would prevent the Union from attempting to bargain over the ramifications of such an impact on the bargaining unit during the contract term.

The Respondent's "take-it-or-leave-it" stance was most egregious, however, in its insistence on its grievance and no-strike proposals. Like the employers in *NLRB v. A-1 King Size Sandwiches*, 732 F.2d 872 (11th Cir. 1984), cert. denied 469 U.S. 1035 (1984), and *Prentice-Hall, Inc.*, 290 NLRB 646 (1989), the Respondent was insisting, without any real explanation or incentive, that the Union yield substantial rights which belonged to it by statute. In particular, the Respondent demanded that the Union agree to a procedure for resolving grievances that consisted of the following two steps, the first of which is little more than a codification of what Section 8(a)(5) requires: (1) the grievance (submitted in writing) would be discussed by representatives of the Union and management, and (2) if the grievance were not settled or abandoned, the party would have to resort to a court action under Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185.¹⁰ Going to court would be the Union's exclusive remedy at that point, because in the no-strike clause proposed by the Respondent, the Union and individual employees were asked to waive all rights to engage "directly or indirectly" in any strike activity.¹¹ The proposal included in its definition of "strike" in the following actions:

. . . any concerted refusal to perform assigned work . . . any concerted picketing or handbilling of the Employer's premises at any hour, which is against the Employer's business; any concerted boycott activity against the Employer's business; any other concerted activity the object of which is to cause economic harm to the Employer. Moreover, it is expressly understood that included in

¹⁰The grievance procedure, which was to comprise art. IX of the agreement, was set out in proposals 55 through 59 of the Respondent's initial proposals. On the sheet containing proposal 59, the Respondent stated, inter alia, that "It is the Employer's position that the quasijudicial remedy of arbitration is no longer appropriate in modern labor relations . . ."

¹¹The 1982-1985 agreement, while containing a similar two-step grievance procedure, permitted economic action after the second step.

this definition of strike is (1) any of the above described actions, the object of which is to protest any action by the Union and/or its parent organization; (2) any of the above described actions, the object of which is to protest any action by any party not a signatory to this Agreement, and (3) any of the above described actions, the object of which is to support or be in sympathy with another organization, including another labor organization.

Under that proposal, for example, if the Respondent at various times during the year failed to pay the contractually specified wages to an employee or employees, or to comply with contractual holiday provisions, and if it rejected the Union's grievances on these subjects, the injured employees would not even be able to communicate their protest in handbills to other employees or to the public during periods outside of their regular working hours. A lawsuit (at their own expense) would be all that was left to them. Furthermore, the Respondent was demanding that the Union waive even the employees' right to protest, by handbilling, actions taken by the Union. When, during the December 18 negotiating session (the day before contract expiration), the Union indicated it might agree to the no-strike clause if the language prohibiting handbilling and "concerted picketing at any hour" were removed, the Respondent rejected the offer and insisted that the Union waive all the rights specified in its provision.

Finally, the Respondent's bad-faith approach to negotiations was manifested in its bargaining on its job classification proposal and related wage rate proposal. The job classification designated proposal 38 in the Respondent's initial contract offer at the first bargaining session on October 21 and included as part of the Respondent's proposed "Seniority" article, provided as follows:

As soon as practicable following the execution of this Collective Bargaining Agreement, the Employer, in its sole discretion, will assign every employee to a particular department and to a particular job classification within such department, and the respective employees will have, for this one time only, seniority in such department dating from last hire. Thereafter, seniority within a department will be pursuant to this Article.

The Employer will furnish to the Union a list of employees by department and by seniority in such department. The Employer will revise such seniority lists on a calendar quarter basis thereafter.

At the bottom of the page containing this proposal, the Respondent added the following "Note": "The Employer will prepare position schedules that will reflect

the Employer's position of where each employee will be assigned as of December 20, 1985, i.e., the job classification and rate of pay." This proposal, as supplemented by an attached list of employees slotted into wage classes with proposed wage rates, was designed to bring about a major change not only in the average level of wage rates but also in the relative positions of employees in the work force. As finally implemented, it cut the wages of 193 employees, increased those of 89, and left the wages of 4 unchanged.

The Respondent certainly cannot be found in violation of the Act simply for proposing such a sweeping change or even for adhering to such a position after listening with an open mind to criticisms or counter-proposals. The problem lay, as a union negotiator protested at one point, in the way the plan was "presented." From the very first, the Respondent made it clear that this was to be the only way that cost reductions could be made. The Respondent never expressed any willingness to consider proposals for reducing costs in any other way. Although it sought union and employee "input" into the plan, this consisted not of inviting proposals for alternatives to the plan, but merely of soliciting individual employees to protest their selection for a particular spot and prove that they had the "skills and qualifications" to be placed in a higher paying job. The Respondent, of course, would be the initial and final judge of whether the employee qualified.¹²

The Respondent's intransigence was made unmistakably clear when, on October 24—3 days after the commencement of bargaining, and after only two bargaining sessions had been held—the Respondent's president, Carl Herrmann, read a letter to employees stating that the Respondent's job classification plan would "go into effect on December 20, 1985." This statement was made notwithstanding that there had been little opportunity for bargaining yet on the highly detailed plan and that the union negotiators had requested some time to study it.¹³

¹² Job bidding, under the Respondent's proposals, was conducted solely within departments, and the determination whether an employee qualified for a position was to be in the "sole discretion of the Employer."

¹³ The Respondent contends that it did not actually contemplate implementing the plan unless there was impasse or agreement, but we agree with the judge that statements by two of the Respondent's negotiators, Michael Schumann and Joseph Carey, to the effect that the December 20 date assumed impasse or agreement represented little more than the Respondent's effort to "build a defense." The Respondent could not have known on October 24, what the state of bargaining would be on December 20. It seems clear that the Respondent simply devised its plan and decided to implement it on the first day that the constraints of the existing contract were lifted. In this regard, it is telling that, during the November 4 bargaining session, after negotiator Carey stated that "[w]ith respect to December 20, nothing will be implemented until and if there is impass[e] on the issues at that time," he then asserted, "Without the contract expiring, nothing will be done." In other words, the day following contract expiration was the critical date, and the Respondent had simply decided in advance that it would discover a state of impasse as of that date.

Gaining acceptance of a proposal with such dramatic and devastating effects on longtime employees could not be expected to be an easy task, but the Re-

In this and eight subsequent letters from Herrmann to the employees, the Respondent pictured the union negotiators as people with no legitimate role to play other than agree to the Respondent's proposals, and it sought—by ad hominem attacks¹⁴ and attempts to create and exploit divisions between local and international representatives of the Union¹⁵—to denigrate them in the eyes of the employees. On at least one occasion (in a letter dated November 6), Herrmann misrepresented allusions union negotiators had made to the possibility of a strike by claiming that “the Union said that there will be a strike on December 20, 1985” and then told employees that “AMPAC's owners have said that they will not go through the expense of another strike and will permanently close AMPAC if we do not receive the concessions we have proposed.” Considered together, the letters from Herrmann go beyond truthfully reporting to the employees the proposals the Respondent had offered them through their representative and the Union's response.¹⁶ Rather, they amount to a campaign aimed at “disparaging and discrediting the statutory representative in the eyes of its employee constituents, to seek to persuade the employees to exert pressure on the representative to submit to the will of the employer, and to create the impression that the employer rather than the union is the true protector of the employees' interests.” *General Electric Co.*, supra, 150 NLRB at 195, citing *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 233 (5th Cir. 1960), and *NLRB v. Fitzgerald Mills Corp.*, 313 F.2d 260, 268 (2d Cir. 1963).

In sum, we find that the Respondent's communications with the employees, its negotiations on the job classification and wage rate proposal, and its other bargaining conduct described above manifested an intent to undermine employee support for the Union and enable it to impose, virtually unchanged, what it unilaterally decided at the outset was a fair set of terms and

spondent hardly even made an effort to secure agreement. It waited until December 16, 3 days before contract expiration, to offer a tradeoff for the Union's agreement; and the tradeoff was simply the Respondent's willingness to forgo insisting on eliminating the union-security and dues-checkoff provisions that had been in prior contracts.

¹⁴Thus, for example, in his November 15 letter to employees, Herrmann told them that Walter Piotrowski, the secretary-treasurer of the Local Union, who had gone to Hawaii for a conference on fringe benefit trust funds, was “going to Hawaii free, paid for by your union dues, while you and I must stay here and worry about our jobs.” The letter denounced Piotrowski as “this stubborn old man.” Similar epithets appeared in other letters; and in his December 5 letter, Herrmann told employees: “The Union will not win this fight, because a large majority of you, our employees, do not agree with Piotrowski and his blind, stubborn resistance to AMPAC'S proposals.”

¹⁵In his second letter to employees, dated November 6, Herrmann implied that Piotrowski had become a mere figurehead and that “it is clear that Robert Waters on behalf of the International Union has the final word over Local 100. This is a major change in the politics of the Union in Chicago.” In a letter dated December 17, Herrmann advised employees that “it appears that the International Union may be getting nervous with the way Walter Piotrowski is handling the negotiations for the Union.”

¹⁶Compare *Safelite Glass*, 283 NLRB 929, 930 (1987); *United Technologies Corp.*, 274 NLRB 609, 610–611 (1985).

conditions of employment.¹⁷ On the basis of all the foregoing, we find that the Respondent has refused to bargain in good faith with the Union, and we shall accordingly adopt the judge's recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, American Meat Packing Corporation, Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(b) and reletter the existing paragraphs.

“(b) On request, rescind the unilateral changes made in employees' classifications and wages and make the employees whole for any losses suffered as a result of the changes.”

2. Insert the following as newly relettered paragraph 2(e) and reletter the remaining paragraphs.

“(e) Remove from its files any reference to the unlawful discharge of John Frison and notify him in writing that it has done so and that it will not use the discharge against him in any way.”

3. Substitute the attached notice for that of the administrative law judge.

¹⁷We reject the Respondent's contention that its bargaining conduct at issue in this case was no different from its conduct during the negotiations that were considered in *Kane-Miller Corp.*, 259 NLRB 1075 (1982), in which the Board dismissed allegations of surface bargaining and direct dealing. The proposals advanced here differ in significant ways from those advanced earlier, e.g., the breadth of the no-strike clause. The Respondent's advance statement of the day on which it would implement the job classification scheme and its series of letters undermining the Union's representational role also differentiate this case from the earlier one.

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 collectively in good faith concerning wages, hours, and other conditions of employment with Beef Boners and Sausage Makers Union, Local 100-A, affiliated with United Food and Commercial Workers Union, AFL-CIO, as the exclusive bargaining representative of the employees in the following appropriate unit:

All production and maintenance employees, excluding office clerical employees, administrative employees, guards, salesmen, chauffeurs, engi-

neers, livestock handlers and janitors, and supervisory employees as defined by the National Labor Relations Act.

WE WILL NOT unilaterally change the terms and conditions of employment of bargaining unit employees.

WE WILL NOT bypass the Union by negotiating individually with unit employees.

WE WILL NOT refuse to furnish bargaining information relevant and necessary to the Union because it declines to use methods we prescribe to conduct an audit of our financial records.

WE WILL NOT discharge or otherwise discriminate against employees because of their lawful strike activities.

WE WILL NOT fail to reinstate unfair labor practice strikers on their unconditional application to work.

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

WE WILL, on request, bargain in good faith with Beef Boners and Sausage Makers Union, Local 100-A, affiliated with United Food and Commercial Workers Union, AFL-CIO, as the exclusive collective-bargaining representative of our employees in the above appropriate bargaining unit with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL, on request, rescind the unilateral changes we made in employees' classifications and wages and make the employees whole for any losses suffered as a result of the changes.

WE WILL, on request, furnish the Union's accountant with all books and records concerning financial information to substantiate our claim of financial hardship.

WE WILL offer John Frison and all other employees who made an unconditional application to return to work on or about September 4, 1986, immediate and full reinstatement, without prejudice to their seniority or other rights and privileges, to their former positions or, if such positions are no longer in existence, to substantially equivalent positions, discharging, if necessary, any replacements.

WE WILL make the employees whole for any loss of pay they have suffered as a result of the discrimination against them, with interest.

WE WILL notify John Frison that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

AMERICAN MEAT PACKING CORPORATION

Arly Eggertsen, Esq., for the General Counsel.

Joseph P. Carey, Esq., of White Plains, New York, for the Respondent.

Barry M. Bennett, Esq. (Archer, Pavalon, Gittler & Greenfield), of Chicago, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This matter was tried before me on 1 and 2 December 1986 on charges filed under the National Labor Relations Act (the Act), by Beef Boners and Sausage Makers Union, Local 100-A, affiliated with the United Food & Commercial Workers Union, AFL-CIO (the Charging Party or the Union) and complaints issued by the General Counsel against American Meat Packing Corporation (the Respondent, the Employer, or AMPAC). The charge in Case 13-CA-25581 was filed by the Union on 20 December 1985 and a complaint thereupon was issued on 28 February 1986 alleging that the Respondent had violated Section 8(a)(5) and (1) of the Act by failing to provide financial information which the Union had requested in connection with bargaining. On 19 August 1986 an amended complaint issued alleging that the Respondent had violated Section 8(a)(5) and (1) by refusing to bargain with the Union in good faith by its entire course of conduct during 30 negotiation sessions with the Union, by bargaining directly with employees by refusing to supply the Union with relevant financial information which had been requested, and by unilaterally implementing changes in bargaining unit job classifications and wages. The amended complaint further alleges that a strike by bargaining unit employees, which began on 20 December 1985, was the result of the enumerated unfair labor practices. The Union filed the charge in Case 13-CA-26279 on 15 September 1986. On 20 October 1986 a complaint issued thereupon alleging an unlawful refusal to reinstate unfair labor practice strikers and an unlawful discharge of employee John Frizzon in violation of Section 8(a)(3) and (1). The Company filed answers to the complaints admitting jurisdiction of the matter in the National Labor Relations Board but denying the commission of any unfair labor practices and denying that the strike was caused by any such unfair labor practices.

FINDINGS OF FACT

I. JURISDICTION

At all times material, Respondent, a corporation with an office and place of business in Chicago, Illinois, has been engaged in the business of processing and wholesaling meat products. During the calendar year preceding issuance of the original complaint, which period is representative, Respondent, in the course and conduct of its business operations, purchased and received at its Chicago facilities products, goods, and materials valued in excess of \$50,000 directly from suppliers located at points outside Illinois. Therefore, Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The 8(a)(5) Allegations*

1. Background

Since 1975, the Union has represented the production and maintenance employees of the employer at its Chicago facility which is located on Normal Avenue in Chicago. Prior to the events of this case, Respondent operated two other packinghouses, one in Warren, Michigan, and the other on Racine Avenue in Chicago. The Racine Avenue plant and the Normal Avenue plants were both in operation until 4 February 1984 when the Racine Avenue plant was closed by Respondent. Until that date the Union had represented the production and maintenance employees of both plants in one unit. There was a single seniority list for the two Chicago plants; therefore, on the closing of the Racine Avenue plant, 264 of the least senior employees of the two plants were terminated and all operations were transferred to the Normal Avenue plant. (Respondent also closed its Warren, Michigan plant in September 1985.)

During the relationship between Respondent and the Union, there has been a series of contracts, the negotiation of one of which resulted in litigation before. In negotiating a successor agreement to the contract which was to expire on 19 December 1979, Respondent demanded economic and other concessions. The Union refused and a strike ensued. A charge was filed and a complaint issued, but the complaint was dismissed by the Board. The negotiations in question in that case did result in an agreement on 28 February 1990, which included no wage increases for the first year of the agreement and a wage reopener for the second; it also provided union shop and checkoff, replaced the union pension plan with an employer-sponsored plan, increased health and welfare benefits in place of employer contributions to a union clinic, provided a two-tier wage structure, and eliminated a previously existing arbitration provision.

At the wage reopener the parties agreed to a complete 2-year agreement effective 1 September 1980 through 19 December 1982. This agreement was followed by an agreement effective 29 December 1982 through 19 December 1985. During the existence of the latter agreement (the 1982 contract), the Company twice asked the Union to forgo scheduled wage increases and twice the Union refused.

2. The 1985–1986 negotiations

In negotiating a successor to the 1982 contract, the parties met in 30 bargaining sessions between 21 October 1985 and 21 October 1986. These sessions, the proposal exchanged therein, correspondence between the parties, correspondence between the Employer and the employees, and various “position statements” submitted by the Employer during bargaining were made the subject of a stipulated portion of the record.

The Union was usually represented at the session by Walter Piotrowski, secretary-treasurer of the Local Union, Bob Waters, an International representative, several other union representatives, and several employees. Respondent was usually represented by Michael Schumann, Respondent’s director of industrial relations, Attorney Joseph Carey, and several other management officials. In this (long) narrative, when I say the Union, or the Company “said that” or “took the po-

sition that,” I am referring to statements by Piotrowski, Waters, Carey, or Schumann which were expressly or implicitly adopted by others on the same side of the table.

Bargaining Session 1; 21 October 1985

Schumann began the session by reading all of AMPAC’s proposals. The proposal was for complete agreement¹ and consisted of several pages with the proposals therein listed as numbers 1 through 87; however, several numbers are skipped, so there is actually a lesser amount.

The first two proposals were entitled “job analysis” and “performance appraisal model.” The proposals stated that there were attached analyses of bargaining unit jobs and appraisal forms for employees, but these forms were not placed in evidence. The appraisal model proposal stated that reviews would be conducted in the “sole discretion” of the Employer. No such explicit provisions were contained in the 1982 contract; however, the management-rights clause of the 1982 contract did state that:

The Company has complete legal responsibility except as expressly and specifically limited in this Agreement and sole right to manage its business, including, but not limited to the right to (a) hire, assign, reassign, transfer, promote, demote, schedule production, layoff, recall, discipline, and discharge its employees and direct them in their work, as well as the right to determine the qualifications and ability of employees, (b) make and enforce personnel rules and regulations, (c) determine and schedule (I) work and production, (II) work and production methods and means, to determine the products to be handled, produced, or manufactured, (III) acquisition, installation, operation, maintenance, alteration, retirement and removal of equipment and facilities, (d) establish, evaluate, and measure quality and production standards, (e) control all Company property, equipment, and facilities and the manner and extent of their use, (f) foremen or other personnel designated by management may perform any duties that are necessary in the conduct of the business, (g) the Company retains the right to contract work in areas that it deems necessary to assure as efficient an operation as possible.

The Employer proposed to continue the 1982 contract’s prohibitions against race and age discrimination and proposed compliance with OSHA laws.

The Employer included the same bargaining unit description as in the 1982 contract except that it proposed to exclude production control and shipping/receiving control scalars, exclusions which were not stated in the 1982 contract.

The 1985 proposal injected a “no work preservation clause” proposal which stated that the Employer was not obligated to provide any specific amount of work to the bargaining unit. The proposal further stated that the Employer “will relocate work from the bargaining unit during the term of this agreement to the extent essential for the running of a profitable business.” The “no work preservation clause”

¹ The Company’s proposals did not include an introduction or a “purpose of agreement” clause such as those contained in the 1982 contract, but there is no evidence that such provisions were intended to be eliminated by the Employer. The parties never got beyond the separate-page-for-each-proposal stage, so it cannot be known for certain.

proposal also included a statement that the Employer did not intend to have managerial or research and development personnel perform bargaining unit work, but, to the extent that it would be essential for the running of a profitable business, such persons could perform bargaining unit work. No such clauses existed in the 1982 contract; nor was there a work jurisdiction clause in the 1982 contract.

The 1985 proposal eliminated the existence of union shop and checkoff which had been provided in the 1982 contract.

The 1985 "visitation" proposal limited the right of union representatives to come on company premises for only "proper Union business" and permitted such representatives to make such visits only "during working hours." The proposal provided that no visit should interfere with the work of the employees and "such visitation will be limited to the cafeteria area only." There were no such limitations in the visitation clause of the 1982 agreement which required reporting to the plant superintendent who "may" accompany the union agent wherever he visited.

Respondent's proposal changed the existing plantwide seniority system to a departmental basis, listing seven departments: kill floor, shipping, maintenance, rendering, cut floor, boning, and packaging. The article concludes: "seniority rights shall not accumulate in more than one department at a given time."

The proposal increased the probationary period from 30 to 180 days and further provided that "compensation of probationary employees would be within the Employer's sole discretion." The 1982 agreement stated that "nor will such [probationary] employee be covered by any other portions of this agreement."

The 1985 proposal stated that, if physical fitness and ability were relatively equal, preferences would be given to employees according to seniority within a department for the purposes of bidding on posted job openings, layoff and recall, and selection of vacation (subject to approval by the Employer). In the 1982 agreement seniority was plantwide and was stated determinative only for the purposes of layoff and recall, and there was no expressed job bidding and posting procedure. The 1985 proposal further stated that job bidding would be only on a departmental basis when need, as defined by the Employer, existed. Jobs open for bid were to be filled at the "sole discretion" of the Employer, and employees from other departments who were awarded jobs would lose their seniority in their former departments and begin their new assignments with no seniority in the department to which they had successfully bid. All aspects of the proposed posting and bidding procedures were stated to be "in the sole discretion of the Employer."

The 1985 proposal stated that temporary layoffs were defined as reduction in work force due to lack of work for periods not in excess of 5 days, and that seniority "need not be recognized during a temporary layoff." No such provisions were in the 1982 agreement; seniority controlled for all layoffs.

After stating several different ways that seniority would be strictly on a departmental basis, Respondent, in its proposal 38, proposed:

As soon as practicable following the execution of this collective-bargaining agreement, the Employer, in its sole discretion, will assign every employee to a par-

ticular department and to a particular job classification within such department, and the respective employees will have, for this one time only, seniority in such department dating from last hire. Thereafter, seniority within a department will be pursuant to this Article.

The Employer will furnish to the Union a list of employees by department and by seniority in such department. The Employer will revise such seniority list on a calendar quarter basis thereafter.

Attached to Respondent's proposals was a schedule of job classifications and wage rates which must be considered with Respondent's proposal 38 mentioned above. The first page of the attachment states the following:

*AMPAC PROPOSALS
JOB CLASSIFICATIONS*

JOB CLASS:	NUMBER 1	=	\$6.10/hr
	NUMBER 2	=	\$6.50/hr
	NUMBER 3	=	\$7.00/hr
	NUMBER 4	=	\$7.75/hr
	NUMBER 5	=	\$8.50/hr
EMPLOYEES RECEIVING RAISE IN PAY		=	86
EMPLOYEES RECEIVING CUT IN PAY		=	203
EMPLOYEES RECEIVING NO CHANGE IN PAY		=	3
TOTAL		=	292

Following this schedule, the Employer included a listing of all seven departments. For each department Respondent listed, by name, the employees, the job to which Respondent proposed to assign the employees, and the classification (one, two, three, or four), into which the jobs would fall. The proposal further listed the named employees' present rate and his proposed rate which, of course, would be the rate for classification 1, 2, 3, or 4, depending on which classification had been designated for the employee. Therefore, for example, all job class 3 employees on the cut floor, of which all 15 were named, would receive \$6.50 per hour (because they were in job classification 2), even though all of the employees had been receiving wages in excess of that figure (ranging from \$7.10 an hour to \$9.615 per hour.) Similarly, the 34 named employees who were placed in job class 3 on the kill floor would be receiving \$7 an hour and this constituted a wage increase for 4 of those employees.

The 1985 proposal listed 11 reasons for loss of seniority which would result in termination of employee status, including quit, discharge for cause, etc. The proposal included a provision that seniority was lost after 6 months of layoff, a provision which was in the 1982 agreement, and four absences in a calendar year, a provision which was not. The proposal further stated, in another section, that the departmental seniority would be frozen after an employee is transferred outside the bargaining unit for 6 months.

As a new provision, the Employer proposed:

The Employer, in its sole discretion, will employ part-time and casual employees to perform bargaining unit work when it is in the interest of the Employer to do so.

The Employer further proposed the new unilateral right to schedule lunch periods and the hours of workweek.

Respondent proposed to continue giving a 15-minute rest period during the first portion of a workday and 15 minutes or more if the workday is greater than 9 hours, as in the 1982 contract, but Respondent's 1985 proposal eliminated a provision of the 1982 contract which granted another 15-minute rest period during a workday in excess of 12 hours and further eliminated provision for food or \$2.50 in cash after 10 hours.

Respondent proposed for computation overtime pay, time and one-half after 40 hours in any workweek and double time for all work performed on the seventh scheduled workday, provided that an employee has not been absent on any prior day in such workweek. The previous agreement provided for time and one-half for all work on Saturdays, but the 1985 proposal did not.

The 1985 proposals eliminated all night-shift premiums. The 1982 contract had a 17-cent-per-hour night-shift premium effective for hours worked between 6 p.m. and 6 a.m.

The Respondent's 1985 proposal included all provisions of the expiring contract's management-rights clause and further included:

The right to determine the job analysis for every job in the bargaining unit as contained in the attached Exhibit, and to revise the same, including any new jobs . . . the right to conduct a performance appraisal, as contained in the attached Exhibit for every bargaining unit employee as often as the Employer deems warranted . . . the right to grant merit increases as often and in such amounts as the Employer deems warranted . . . the right to determine the rate of pay for any new job . . . the right to determine whether a given employee is qualified to perform a job to which he has been assigned.

The exhibit referred to is the job classification/wage rate schedule (proposal 38) quoted above.

The 1985 management-rights proposal also included a new section entitled "Cross Training" which, if accepted, would give the Employer the unilateral right to determine which jobs in the plant should have multiple employees trained to perform such jobs and which employees in the bargaining unit would be assigned to such cross-training.

As a new proposal for discipline the Employer proposed 25 employee "do's and don'ts" which it listed as suggestive, that is, not all-inclusive. The do's and don'ts, many of which are compound, began with "to be honest" and end with "not to engage in an unauthorized work stoppage or other forms of disorder." The proposal provides for suspension pending discharge and provides that the Union will be notified of the actions taken by the Company. It gives the accused employee the right to inform the Employer of other witnesses who should be contacted, but the extent investigation lay solely in the hands of management. The Union would be permitted the right to grieve the issue of "just cause."

The grievance procedure proposed included two steps; the first step was the filing of written notice of a claimed violation of the contract; the second step was a Section 301 suit. A note at the bottom of Respondent's grievance procedure

proposal stated that Respondent wished to have the judicial remedies available to it as in other aspects of its enterprise and that it disagrees with court decisions which encourage arbitration as a means of settling industrial disputes. The 1982 contract did not have arbitration; however, it did include a right to strike over unresolved grievances.

The holiday proposal submitted by Respondent included seven of the eight holidays specified in the 1982 contract (birthdays were eliminated) and further provided for double time for work on holidays. The 1985 proposal added: "The Employer in its sole discretion will, on reasonable notice to the employees and to the Union, observe any such holidays on alternate days.

The 1982 contract provided for 1 week's vacation after 1 year's service, 2 weeks after 2 years, 3 weeks after 8 years, and 4 weeks after 14 years. The 1982 contract further provided for pro rata vacation pay in the event of layoff and pro rata vacation pay to the family in the event of the death of an employee. Respondent's 1985 proposal required 1 full year of service for a 1-week vacation, 3 years of service for a 2-week vacation eliminated the 4-week vacation for employees with 14 years of service; it further eliminated all pro rata vacation pay and required, for the first time, 1 week's notice of resignation before any accrued vacation pay would be paid.

The 1982 contract granted leaves of absence for periods of 1 week to 1 month, depending on length of service, for emergencies and for other periods with the permission of the Company for good and sufficient reason. Respondent's 1985 proposal required the consent of the Employer for all leaves of absences.

The 1982 contract and the 1985 company proposal for funeral leave were the same except that the 1985 proposal eliminated "any relative permanently in the household of the employee" as a member of the definition of the immediate family.

Respondent's jury duty proposal, up to 2 weeks' pay, less jury fees, was unchanged from the 1985 contract.

Respondent proposed an "effect of termination of contract" clause which stated that all provisions of the agreement (proposed to be 1 year) would be "null and void at the expiration of contract, except that grievances filed before the expiration date would be administered as if the agreement were still in effect.

The Employer proposed a "new elimination of all past practices" clause which states that "all practices which have existed in the bargaining unit and which are not expressed in this collective-bargaining agreement are expressly rescinded and the same will be null and void for all purposes and have no legal effect."

The Employer proposed to continue a safety and health committee, consisting of three members appointed by each party, to implement the provisions of the Occupational Safety and Health Act of 1970.

Respondent's new "employee on leave returning to work" proposal required 5 working days' notice to the Employer when an employee was returning to work and gave the Employer the right to contest any medical evidence submitted on the employee's returning from sick leave.

Respondent submitted a separate "merit pay increase" clause which, again, gave the Employer the right to "unilaterally award increases in pay." The separate proposal further

stated that the Employer "in its sole discretion, may unilaterally revoke such merit increases." Neither of such provisions were contained in the 1982 contract.

Respondent proposed an "exclusive recourse to agreement and waiver" provision which stated that, except for appeals to the National Labor Relations Board, other Federal agencies, and the United States district court, the Employer, the Union, and all bargaining unit employees "expressly waive the right to bargain on any subject, except as provided for in the applicable federal labor case law, whether or not the same was mentioned and/or discussed during the course of . . . collective bargaining." No such provision was contained in the 1982 agreement.

As noted, the previous agreement allowed strikes if grievances were not satisfactorily resolved. Respondent's 1985 proposal prohibited all strikes, including unfair labor practice strikes and sympathy strikes, and all other concerted activity the object of which is to cause economic harm to the Employer including, but not limited to, handbilling.

The Respondent's proposal did include a "no lockout" provision, but, as definition of "lockout," it proposed:

For purposes of this Agreement, and for any interpretation thereof, a lock-out is defined as the barring, by the Employer, of the employees in the bargaining unit from the performance of bargaining unit work, as the exercise by the Employer of an economic weapon as that phrase is used by the various United States Supreme Court decisions, for the purpose of furthering some objective of the Employer in its dealings with the Union.

Under no circumstances is the Employer's exercise of the management right to reduce the work force, in whole or in part, pursuant to Article 7, and/or pursuant to Article 3, Section C herein, to be construed as a lock-out, and any allegations made during the terms of this agreement, by the Union and/or by any covered employee or employees, that the Employer has locked-out the employees by reason of the exercise of such management rights, will be inconsistent with the expressed terms of this agreement, and will have absolutely no merit and is to be given no legal effect by any Court of competent jurisdiction, by virtue of this section.

The reference to "Article 7" is a reference to Respondent's management-rights proposal. "Article 3, Section C" is Respondent's "no work preservation clause" proposal which is quoted above.

The Respondent proposal further included a new "picket line" proposal which stated that under no circumstances could an employee refuse to cross any picket line at the Employer's premises unless, after conferring with management, there were no adequate safeguards for the physical protection of such employee.

In addition to those already mentioned, provisions of the 1982 contract which were not included in Respondent's 1985 proposal were the following: a provision that uniforms required by Respondent would be furnished by Respondent; a provision that the Company would furnish knives, sharpening steels, whetstones, arm guards, mesh gloves, scabbards, and leather aprons; a provision that the Employer would bargain

about rates of handicapped employees during the life of the contract; 8 hours' holiday pay for all employees, not just full-time employees; voting time; a requirement that the Employer bargain about any changes in wage rates which would be imposed as a result of a timestudy; physical examinations, at the Employer's cost, only for newly hired employees; pay for time lost due to treatment for employment-related accidents; and a pension program. (In a later session Schumann stated that the pension program was omitted by oversight, and the parties generally agreed to continue the previous existing plan.) A "tools and equipment" proposal was submitted by Respondent at the fifth bargaining session, but whetstones were omitted.

After Schumann completed presentation of these proposals, about which the Union asked no questions, the Union recessed and returned with a one-page listing of topics as proposals which was:

1. CONTRACT THE SAME FOR ALL WITH WAGES
2. IMPROVEMENTS IN THE HEALTH & WELFARE & PENSION FUND
3. PAID OVERTIME OVER 8 HOURS
4. REGULATE STARTING TIME ON ALL THE LINES
5. CLEAN-UP TIME ALLOWANCE
6. GRIEVANCE PROCEDURE WITH ARBITRATION
7. IMPROVE HEALTH/WELFARE FROM 40M TO 60M . . . DISABILITY FROM \$125.00 TO \$150.00 PER WEEK.
8. BENEFITS TO BECOME EFFECTIVE SOONER THAN THE PRESENT SIX MONTHS.
9. SET STANDARD TIME FOR LUNCH AND WALK (NOT WHEN THE LINE GOES DOWN).
10. FAIR STANDARDS ON CUTS (ASK TOO MUCH FOR FROZEN MEAT)
11. MONEY . . . \$1.50 WAGES OVER 3 YEARS / 20% C.O.L.A. INCREASE TWICE PER YEAR OVER 3 YEARS
12. USE OF THE MEDICAL CENTER
13. 36 HOUR GUARANTEE
14. FREEZE RED CIRCLE RATES
15. RIGHT TO ADD PROPOSALS

The Company asked no questions about the union proposals or various cryptic comments made by Piotrowski as he presented them. The stipulated bargaining notes reflect that at the end of the session Piotrowski expressed disappointment in the Employer's proposed wage rates and asked if the Company was saying it had been losing money. Schumann replied that the Company had lost \$4 million in the last 4-3/4 years and further stated, "You can look at our records."

Bargaining Session 2; 22 October 1985

The meeting opened by Schumann stating that the initial draft of the job analyses had been completed and that the Union should give the Company its input on that as well as its proposals for job classifications and job rates. Piotrowski stated that the Union had not had time to review all of the proposals but it had been enough to know that many of the employees were getting wage cuts and were likely to be placed in jobs which they did not want. Schumann replied that the employees could bid on other jobs and that the Company needed the reductions in pay because of economic circumstances. Schumann said, "it's a question of survival." Schumann further argued that the Union's request for a \$1.50 wage increase and a 20-percent increase in cost-of-living al-

lowance would result in \$18 an hour for many workers when the Employer actually needed substantial cuts. Piotrowski replied that that was his proposal but he would talk about it. The following exchange occurred:

PLOTROWSKI: You have fine workers in your plant. You have inherited some skills of the plants [sic] here. It is a great asset. They are good.

SCHUMANN: We believe the same thing. But if we want to keep working, we have to incorporate our proposals.

Schumann stated that the performance appraisal model was still being composed and would be presented later. The parties discussed several proposals but there were no agreements except for the statements about equal employment opportunity practices. (Other matters were put on hold or rejected, for example, the Employer's no-union shop and no-checkoff proposals.) The Union objected to the requirement that all visits had to be accompanied by someone from management and could only meet employees in the cafeteria. Schumann replied that it was "common practice" and "past practices" which the Employer wanted to keep.

The Union presented proposals for 10 holidays, clothes changing time, 1-year seniority retention for layoffs, and a proposal that any contract reached be for 3 years. In response to a question by Schumann, Piotrowski stated that the two additional holidays he sought were Martin Luther King's birthday and George Washington's birthday.

24 October 1985

On this date Carl Herrmann, president of Respondent, called all employees together and read them the following letter:

Dear Bargaining Unit Employees:

Three years ago AMPAC's management settled a labor contract that called for a \$1.00 cut in the hourly wage rate in the first year and a 50 cent increase in each of the second and third years because we were losing so much money. That settlement turned out to be a mistake because even with the \$1.00 reduction, when it came time on December 20, 1983 to pay the first 50 cents we could not afford to do so because losses had continued longer than expected. We asked the Union for relief. The Union refused. One year later on December 20, 1984, we again pleaded with the Union to waive the second 50 cents. The Union refused. And our losses have continued!!

Now we are back at the bargaining table, and what has happened? In 3 years 2 months, Racine Avenue plant lost \$3,213,000. We closed it on February 4, 1984. In the past 4 years 9 months, Normal Avenue plant has lost \$4,025,000. That is a total loss for AMPAC of \$7,238,000. And you all know that we were forced to close our Star Meat plant in Detroit last month because its losses were no longer acceptable.

Management is again asking the Union for a reduction in labor costs because without a reduction we cannot survive, and any labor contract we sign will be worthless. And you all will be out of work, permanently.

The Union, as usual, cares nothing about the above facts. Management again offered to have the Union hire a C.P.A firm to audit and confirm the above losses. But the Union refused our offer because they know that we are telling the truth and they do not want to spend the money for the audit. All they want is more, more, more and it's just not there!!

Please look at the bulletin board, where we have posted a copy of AMPAC's offer of job classifications and proposed new wage rates for each classification. This will go into effect on December 20, 1985. We have asked the Union to obtain your input to this document, as well as to the 116 jobs on which we have submitted a job analysis. At least the Union has agreed to do this.

It is important to remember that all the senior and qualified employees will be assigned, effective December 20, 1985 to the highest paying jobs, and in the future will be assured of obtaining higher paying jobs through the new bidding procedure.

If you have any questions about this important matter, ask your Union representatives.

After reading the letter, Herrmann told the employees that the Racine Avenue plant and Respondent's Star plant in Detroit had closed and:

. . . the same thing will happen here at the Normal Avenue plant if we do not reduce our expenses including our labor costs and repay the banks and become profitable again.

Now if you have any questions your stewards are here and they will answer your questions or they will get answers for you. Thank you.

This letter was the first of many from Herrmann to the employees. It is also the first of many representations by Herrmann of things the Union had said or done which are not borne out by the record.

Bargaining Session 3; 4 November 1985

At this session the Union agreed with several of the Employer's proposals: Fair employment practices, equal employment opportunity, no age discrimination, definition of seniority (departmental),² posting of job openings, bidding procedures, requirement that employees keep themselves informed of job postings, definition of recall, recall by reverse seniority, and workweek defined (Monday through Friday).

Other company proposals were rejected or the Union stated that they should be put on hold.

Schumann and Carey explained the Company's position on several of the rejected/held proposals: The Employer did not intend to have management do employees' work but some times employees don't show up for work and the Employer needs the flexibility to have supervisors take over; it was unlikely that the supervisor would do that for a long period of time. The Employer wanted to eliminate the union-security provision and let the employees choose; several employees had expressed to management that they should have that right; several employees expressed displeasure at being rep-

²The Union withdrew from this agreement at the fifth bargaining session.

resented by the Union. The Employer felt that the person doing the job should be paid the same as the employee standing next to him doing the same job and "now we come in with what we can afford."

Schumann said that the Employer had posted a job classification system on the bulletin board and had meetings with the employees wherein the senior employees were allowed to express what classification they would like to be placed under and the Employer felt it had a very up-to-date understanding from all the input of the union membership about the proposed job classification system. The Employer distributed a revised job classification system which had moved some employees around so that the employees receiving raises in pay were 81; employees receiving cuts in pay were 194; and those employees receiving no change in pay were 3. In discussing the proposed job classification system, Piotrowski asked how employees could grieve if they were not satisfied with their assignment on 20 December. Carey stated:

Well, such an employee would not have a grievance because we would correct it beforehand: there would either be a contract on 12/20/85 or disagreement on Proposal 38. If there was impasse on this disagreement, then AMPAC would be free to unilaterally act on Proposal 38.

Schumann added that the job bidding procedure would allow for correction of any inequities. When asked about being confined to the cafeteria for visits, Schumann replied that in 3 years he had never been asked by a union representative to meet an employee anywhere else.

Schumann stated the reason for the demand of a probationary period of 180 days was that it would give the Employer a better chance to see what an employee could do and find out if he would be habitually tardy or otherwise be a disciplinary problem, and it benefited the employees because the Employer would not make a mistake and let a good employee go if that employee, with proper training, could demonstrate that he should be hired.

In stating the reasons for the proposed cut in wages, Schumann again stated that the Employer had lost over \$4 million in the past 4 years and "[w]e must work at a system to give us an opportunity to have a job and the workers too. We are saying that we cannot take such a great loss. We had to close the Racine plant and the Star Meat plant We realized that we had to make cuts ourselves We have no more plants to close. This is it. We all want to keep our jobs."

Schumann stated that the proposed revision of job classifications would be posted on the following day and the Company would like the Union's input from the employees. Schumann stated: "The more input that we receive from those people and you, the less it's going to cost us when the time comes to put this through." International Union Representative Robert Waters, who was present at that meeting, asked if that meant that if the Company did not have a contract on 20 December it was going to close the plant. Schumann replied, referring to Kane-Miller, Respondent's parent corporation:

These proposals will be implemented only after impasse. The people on this list will be set in their posi-

tions. Kane-Miller told us that if we don't have a contract by December 20, 1985, we'll close.

Carey added again that nothing will be implemented until and if there is an impasse on these issues at the time. Piotrowski told Carey not to attempt intimidation by threatening to close the plant; Carey replied: "The Union has to communicate with the employees if they want to keep their jobs, they have to cooperate with us." Schumann added that the Union should attempt to win the employees over to the Company's proposals.

At no point did the Company refuse to answer any of the Union's questions or explain what it meant by its proposals.

During the meeting the Union handed the Employer a one-page sheet entitled "Proposals 11/4/85." There were no details in the proposal; the document only listed the following topics: severance pay, profit sharing, 6 months' closing notice, wage increases of 50 cents per hour (total of \$1.50), and the option to work over 10 hours per day if requested. These proposals were not discussed at the meeting.

Bargaining Session 4; 5 November 1985

At the beginning of this session, Piotrowski complained that the union proposals were not being considered. Schumann replied that the Company incorporating the Union's proposals in its discussions about the Company's proposals; the union proposals which Piotrowski mentioned at that time were simply rejected. The parties went to night-shift premium which the Employer proposed to eliminate. Piotrowski said that the Union wanted a 21-cent premium and asked why the Company proposed to eliminate the current 17-cent premium. Schumann replied that there were a few rendering employees who were working night shifts; a "decent proposal for their wages" was incorporated into the Company's proposal; some employees had asked to start earlier and the Company wanted to start a small night shift without having to pay the employees any more money; 17 cents per hour for a small night shift would be prohibitive.

The parties then went to Respondent's management-rights proposal and Piotrowski asked what the problems were under the present contract. Carey responded:

Let me give an example the—NLRB says absent bargaining, the Employer cannot change personnel rules, and this is why we need clear language. Otherwise, it will result in continuous bargaining through the contract period.

The union representatives repeated that there was nothing wrong with the prior contract language and the management representatives gave the additional example of merit pay increases and stated that it needed its proposed right to grant them without review by the Union to operate more profitably. The discussion drifted over to proposal 3, and Schumann again asked the Union for input, stating that perhaps the Union had knowledge of individual employee skills which the Company did not. Piotrowski asked: "Do you intend to firmly stand on these rates? Are we going to continue these negotiations as leaving those as is?" Schumann replied: "At this time our proposal is firm."

The parties agreed on the Employer's language for the first step of the grievance procedure, but argued over the efficiency of arbitration which the Company had rejected.

The parties went to holiday; Schumann stated that the Company was proposing to drop the birthday holiday because it upsets the operation. Schumann added: "It's economics."

The parties discussed the following topics in the Employer's proposal: eligibility of probationary employees for benefits and holiday pay; pay for work performed on a holiday; holidays occurring during vacation; prohibition of employees' receiving holiday pay while on layoff or leave of absence vacation benefits; pay for vacation benefits; time for receipt for vacation pay; prohibition against receiving pay in lieu of vacation; vacation benefits on termination of employment; leaves of absences; funeral leave; jury pay; effective termination of contract; elimination of all past practices; elimination of red-circle rates;³ safety and health; elimination of work clothes and laundry fees; employees on leave returning to work; notice of resignation; responsibility for keeping employees' records current; merit increases; waiver of rights; prohibition of strikes and strikes defined, and duration of contract.

Agreements were reached only on four of those topics: Time when vacation pay is received; prohibition against pay in lieu of vacation time; jury duty, and employee records. All other matters were either rejected by the Union or placed on hold. Management's representatives gave reasons for their proposals which were either economic or a need to manage the business more efficiently. Respondent further gave as the reason for a proposed 1-year agreement that neither party could envision how things would go under their proposed agreement and did not want to be committed for the 3-year period. Schumann added, in response to Piotrowski's objection to the proposed pay rates, mostly cuts: "We need to make the cuts in order for the Company to survive. Maybe next year we will need more concessions. We cannot know that now." Piotrowski replied that the Union's bargaining committee has given him a vote that if the Company's position didn't improve on its proposals that the negotiating committee would recommend a strike and he believed that the negotiating committee could "swing the rest of the people in the plant." Schumann replied that the Company could not take a strike and that the Union should review what happened to the Star Meat plant after a strike; it closed. Schumann added that if Piotrowski wanted to earn your fancy salary he should convince the people that the Company could pay no more than it was offering. Carey added: "Can we assume that you agree with AMPAC's inability to pay since you have not taken up the offer of the audit?" Piotrowski replied, "Don't assume anything."

There were brief exchanges about the Union's proposals, none of which were agreed on, and thereafter the meeting broke up.

³ Apparently some employees had been "red-circled" under the 1982 agreement: that is, their wage rates stayed the same even though lower rates for their classifications had been negotiated.

6 November 1985

On this date Herrmann assembled the employees and read a letter to them which he was also mailing to them. The letter stated:

Monday night and last night we completed our third and fourth meetings with the International Union and with Local 100. While Walter Piotrowski is the chief spokesman, it is clear that Robert Waters on behalf of the International Union has the final word over Local 100. This is a major change in the politics of the Union in Chicago.

At last night's session the Union was angry over what they refer to as AMPAC's insistence that hourly wage rates be revised and that holiday [and] vacation benefits be reduced. The Union also said that there will be a strike on December 20, 1985. Management rescinded that the Union did not believe AMPAC in December 1983 when it requested a waiver on the 50 cents then due and because of that the Racine plant was closed and 264 people lost their jobs. We said that if the Union now makes the same foolish mistake, they will cause the closing of the Normal Avenue plant. AMPAC's owners have said that they will not go through the expense of another strike and will permanently close AMPAC if we do not receive the concessions which we have proposed. The \$7,238,000.00 loss in the past 4 years 9 months is all that they will tolerate.

I regret to tell you that things look bad at the present time. The Union and some of you—I don't know how many, are making a serious miscalculation. That is that AMPAC is bluffing and will not close the plant if we do not receive these concessions. I can assure you from my personal experience with many plant closings, that AMPAC's owners are serious and I urge you to avoid a common mistake, which is to ignore the warning and lose your job as a result.

Don't join the 264 former AMPAC employees who lost their jobs at Racine because of the Union. Don't join the thousands of employees I used to know who lost their jobs at plants that I had to close. A job at a lower rate is better than no job at all. At least if there is a future, there is always the hope that things will improve. If this plant closes, it will never open again.

If you have any questions, ask someone from the Union.

At the end of the letter Herrmann added:

My goal is to save your job and to save my own job. Your union and some of you are making a big mistake and I want to do all that I possibly can to prevent that mistake from happening. The mistake is that AMPAC will not close if we do not receive these concessions. (Point to bulletin board.) This proposal has been revised once because of your input. Please continue to tell your stewards if you disagree with where your name appears on the proposal.

I have a responsibility to every employee hourly and management—and to their families.

Bargaining Session 5; 11 November 1985

At the beginning of the meeting the Employer introduced two proposals: "Tools and Equipment, which stated certain tools such as knives, mesh gloves, and belly guards, would be furnished by the Employer who would require a reasonable deposit (not to exceed 100 percent); the proposal provided that new tools would be replaced by the Employer if broken or worn out tools were turned in. A proposal entitled "employment physicals" provided that physicals for newly hired employees would be paid for by the Employer and that the employee, if requested, would sign authorizations for the Employer to obtain reports for such examinations. The Employer further submitted its "Position Statement No. 3" which listed, by numbers, union and Employer proposals agreed to, rejected, held, or withdrawn. The listing showed that 24 of the Company's proposals had been accepted; 19 had been rejected; and 29 were on hold. Twenty-three union proposals had been rejected, four were on hold, and seven had been withdrawn; none had been accepted by the Employer.

Schumann introduced the tools and equipment and employment physical proposals with the statement that they represented small changes from the current contract (which was true); Piotrowski stated that the Union would review them and get back to him.

Also distributed at the meeting, but not placed in evidence, was a performance appraisal form. Schumann introduced the performance appraisal model by stating that it tied in with the Company's job analyses and he reviewed the tasks enumerated in the job descriptions. He stated that performance appraisals would be done by two supervisors or a supervisor and a plant superintendent. They would review it with the employees and both parties would agree on an improvement plan. Piotrowski objected that the matter was "all within the Employer's sole discretion," and there was no room for union input or participation in this process except to file a grievance which could not go to arbitration. Waters asked if the review would be a one-time process; Schumann replied that it would be periodic with the Employer picking out employees in need of assistance. Carey stated that some employees were unhappy with the jobs to which they had been slotted and they would be evaluated first. Piotrowski stated that many employees had not been classified properly; Schumann replied that the Company wanted to be made aware of such objections, and if there were conflicts, the performance appraisal model could be used to resolve them. He added:

We don't want chaos on December 20, 1985. The employees with the most seniority will get to bid on the highest paying jobs. We don't want the chaos of everyone moving around come December 20th. If he tells us now, we will move him now if he can handle it.

Piotrowski stated that the Employer was just trying to intimidate the workers; Schumann replied that when the Employer closed the Racine Avenue plant, employees were transferred to inappropriate jobs because they had skills the Employer did not know about; the Employer was now giving the employees an opportunity to tell it about the skills they had.

In a discussion of seniority, Piotrowski stated that his previous agreement for departmental seniority applied only to

changes within a department; he wanted the parties to continue the existing contract's provisions for plantwide seniority in cases of layoff. Schumann replied that there was no way the Company could live with such a system.

The parties returned to Employer's proposal 38, the assignment of all employees into specified jobs at specified rates. Waters again objected that the Company was proposing to allow itself to change wages and put every one in the plant into any job it wanted in its sole discretion, and that some employees were not properly classified. Schumann answered Piotrowski's objections:

We want to be made aware of that, of course, since we need the Boners. If there is any conflict, this is a tool that we can utilize. If he doesn't qualify, then we will let him know how he can improve. We don't want chaos come December 20, 1985. The employees with the most seniority will get to bid on the highest paying jobs. We don't want the chaos of everyone moving around on December 20th. If he tells us now, we will move him now if he can handle it.

We are putting them where we feel they would end up on December 20, 1985 with the bidding procedure. At that time (Dec. 20th) they have a free and open choice to try for other jobs based on their seniority. This assumes either a contract on December 20th or impasse on AMPAC Proposal 38.

Schumann also stated that beginning 20 December the Employer intended to start posting a few jobs in each department and employees with seniority and qualifications could bid on the jobs. When asked by Waters how the Company was going to determine which jobs would be posted, Schumann replied:

It's a process we are still looking at. We'll start taking those with the most seniority and are presently doing the jobs. We'll talk to them and see if they want to stay on the job or not. This is to minimize confusion.

When asked by Waters what would be the total number of jobs posted per week Schumann replied that he did not know.

The parties moved on to other topics. To a union objection that the Employer should not have sole discretion as to when to determine starting and quitting hours, Carey replied:

If you don't have the sole discretion language, then the Employer can't change those starting times. The Employer wants to negotiate it now and then get back to work. They don't want to continue negotiating with you during the contract term.

The parties discussed an array of other Employer proposals with no further agreements being reached; the Union continued to insist that it wanted to leave the contract as it was; the Employer arguing that it needed the changes for operational efficiency and economy.

12 and 13 November 1985

On the days between the 5th and 6th negotiating sessions, a systematic survey of employees was conducted by Re-

spondent. The surveys began with supervisors' requiring union stewards to meet with them in the supervisors' offices. Thereafter employees were called in and the supervisor told the union steward to ask the employee if he was satisfied with the placement which Respondent had given him under proposal 38. After getting the answer, the supervisor told the steward to ask the employee what other jobs he believed he could perform. This went on for a while the morning of 12 November before John Frizzon, a union steward, asked for permission to be excused to call the Union about what was going on. Frizzon was denied permission to do so then but was told by his supervisor that he could call at a break. Frizzon did call the Union at a break and was instructed not to cooperate further with the survey. Frizzon, in turn, informed other stewards to refuse to cooperate in the surveys. Thereafter Respondent, through its supervisors, completed the survey on 14 and 15 November. No prior notice of the conduct of this survey had been given to the Union by Respondent.

Bargaining Session 6; 14 November 1985

At the beginning of the session, Respondent gave the Union a revised proposal on discipline and its "Position Statement No. 4." In that statement the Employer gave its reasons for conducting the survey which it called "business justification." The position statement said that proposal 38 had once been revised "based upon the input from only a few employees," and faulted the Union for refusing to cooperate with the survey to get more employee input. The statement recited the results of the survey which indicated 183 (62.9 percent) agreed with the jobs that they had been assigned under proposal 38; 61 (21 percent) disagreed; 11 (3.8 percent) refused to respond; 36 (12.3 percent) were not available for contact during the survey; and 64 (22 percent) stated that they were skilled in other jobs. The position statement concluded with a statement it was Respondent's position "that it is significant that 183 employees, who are the vast majority, believed that management has correctly classified them on the schedule of proposed job classification assignments." The position statement was signed by Carl Herrmann, president.

The parties then returned to the Employer's proposal with Schumann defending the Employer in many positions where it had insisted on the sole discretion to do such things as assign working hours. The Union either stated that the matters should be placed on hold or rejected them outright. When the parties again returned to economic issues Schumann stated: "We have to make a decision—do we keep this plant open? We know we're asking some pretty tough concessions here, but we looked at what we felt were all aspects of it. . . . We're saying to [the senior employees], give us a break and work with us 'cause we're trying to keep this plant open.'"

A further comment on the wage proposals by Schumann was: "I can assure (the employees) that if this proposal is accepted, AMPAC will do everything in its power to keep this operation going. That's not a guarantee, but it's a commitment that we'll try to get Kane-Miller to keep this thing going." Schumann added that this was the reason Respondent was proposing that all employees get paid the same for all jobs, no matter what their seniority. Piotrowski replied that the employee were angry over the Company's demand

for such drastic wage reductions and added, "Maybe we'll see the closing of AMPAC. It won't be my fault."

The parties returned to the management-rights proposal, and during the colloquy Carey stated that the NLRB required bargaining on the topics listed therein unless there was such a management-rights clause. Schumann added: "We don't want to share with you the right of sole discretion."

The parties repeatedly stated their positions on the matters of sole discretion which the Employer insisted that it had to maintain. Piotrowski stated that at one point the Union only wanted to help to see that the Company ran successfully. Schumann replied: "You're having the opportunity now to give us your input and work out this contract, but not on a day-to-day basis."

The parties repeated their respective positions on arbitration, holiday vacations, and vacation benefits, and engaged in an extensive discussion of why an employee should/should not be required to give notice of termination before he is entitled to accrued vacation benefits, but there were no agreements except for the Employer's proposal that there would be no lockout during the contract; however, there was no agreement on Respondent's proposed definition of "lock-out."

15 November 1985

On this date Herrmann sent another letter to the employees. The letter stated that the Union had refused to agree to the conduct of the survey and reported the results recited above. The letter stated that the Union had been told that AMPAC needed financial relief in order to prevent it from going out of business but that Piotrowski had said that the employees do not care if it goes out of business. Herrmann stated that he did not believe that Walter Piotrowski spoke for all of AMPAC's employees when he said such things. Herrmann continued that that he believed that employees remembered that Piotrowski had said the same things a few months before the Racine Avenue plant was closed. When Respondent had asked for a 50-cent-per-hour waiver, Piotrowski had refused and refused to conduct an election on the issue. He concluded:

Now Walter Piotrowski is about to cost 291 members to lose their jobs when the Normal Avenue plant closes. I believe that a majority of our people do not agree with this stubborn old man. Make your voices heard. Save your jobs! Tell the Union that you want to save AMPAC. Under Federal law you are entitled to a secret ballot to vote to save your job.

Bargaining Session 7; 26 November 1985

Walter Piotrowski was absent from this session, and Ruben Ramirez and Bob Waters took his place for the Union. Respondent submitted its "Position Statement No. 5" listing the matters which had been agreed on, and the parties went to the Union's proposals all of which the Employer rejected on the basis of economics, its needed ability to manage, or its objections to arbitration which had been stated previously. Other items were rejected for reasons previously stated or the matters were put on hold.

The parties then went back to the Employer's proposals and the Union's position did not change except that the exclusive recognition clause was agreed on, and the Union in-

licated that it would agree to limitations of the areas in which the union representatives could speak to employees if the locker room were included as well as the cafeteria.

When the parties got to proposals 38 and 39, the Union again objected that the Employer was seeking to retain the right not only to place the employees initially but unilaterally determine where they went thereafter. Schumann responded:

We have already told you up front what the assignments are. You have our proposal of what it's going to be on December 20 if we sign a new agreement or if there's impasse on Proposal 38.

Bargaining Session 8; 27 November 1985

After an initial skirmish about whether the Union would proceed without a full committee (some of whom were still working), there was an exchange between Schumann, Carey, and Ruben Ramirez, a local union representative. The transcript of the bargaining session reflects the following:

CAREY: How can you ask us to give them a raise when we tell you we're losing money?

RAMIREZ: We have all our sessions planned. The people aren't convinced that that is what you need.

CAREY: Why don't you at least send your auditors over to verify it for yourselves and them?

RAMIREZ: Maybe the burden is on you.

SCHUMANN: No, it isn't.

RAMIREZ: You keep wanting more and more relief.

SCHUMANN: If we don't get some relief, these people will be out of a job. We're not here to give; we're here to take.

The parties then went into the substance of both union and company proposals, the only agreement being reached was that the Union agreed to the Company's proposal that pay for vacation benefits would be 40 times the straight-time hourly wage rate per week of vacation in effect at the time the vacation is taken. At several points in the session the Company objected to the Union's refusal to give an answer on proposals on the basis that the Union's lawyers had not had an opportunity to review them.

Bargaining Session 9; 4 December 1985

Walter Piotrowski reappeared as the chief union spokesman at this meeting. After some initial, nonproductive, exchanges, Piotrowski stated that he had been told that while he was away the Company was saying that it was there to take and not to give. He then asked Schumann if the Company was bargaining in good faith. Schumann replied that it was. Piotrowski asked, "What will it really take to keep the plant open, and what sacrifices will the people have to take?" Schumann replied, "It will take for you to agree with our proposals and sign that contract, and we'll keep the plant open."

At this session Respondent produced its statement No. 6 which summarized the agreements reached to that point; the Union had agreed to 29 of the Company's proposals and the Company agreed to none of the Union's.

At this session Respondent introduced a pension benefits proposal (which was the same as in the 1982 contract). Respondent also introduced an insurance benefit proposal which

called for employee contributions for the first time. Piotrowski asked for the cost figures on the insurance benefit proposal and Carey stated that they would be provided before the next meeting.

The parties then went to previously rejected proposals. The Union continued to object to the implementation of a performance appraisal model stating that the Company already had the right to appraise employees and that the model was just a vehicle for harassment of the employees. Schumann stated that he had been advised by counsel that the model would constitute a unilateral change without agreement by the Union. The parties discussed Respondent's proposed removal of certain scale operators from the unit; Respondent stated that it wanted this because those employees were creating and maintaining production records and were never used as production employees themselves. The Union stated it wanted this matter on hold.

The parties again discussed the visitation rights proposal and the Union again stated that it did agree with Respondent's last proposal with the understanding that the union representative would be able to meet in the locker room area with employees.

The Company again insisted on a 180-day probationary period proposal for its previously stated reasons; the Union stated that it had agreed to move from 30 to 60 days and that was enough.

5 December 1985

On this date Herrmann wrote another letter to the employees stating the negotiations were stalled because of the Union's delaying tactics (leave sessions at 8 p.m.; refusing to start any session unless all hourly committee members are present, refusing to discuss subjects which they have previously rejected; and refusing to discuss proposals with their lawyers). Herrmann went on to say that the two main objectives of Respondent in the negotiations were to reduce labor costs and increase productivity. He continued:

The Union will not win this fight, because a large majority of you, our employees, do not agree with Piotrowski and his blind, stubborn resistance [sic] to AMPAC's proposals. This large majority knows that Piotrowski by his refusal to grant concessions in December of 1983, forced the closing of the Racine [Avenue] plant and the loss of 264 jobs in February 1984.

But you can do something to save your jobs. You all have the legal *right to demand* that Piotrowski and the Union committee do what the majority of the membership want; that is to accept AMPAC's proposed job classifications and rates of pay and thereby prevent AMPAC from being forced out of business.

There are only 14 days left. You can make a difference. Make your voices heard now! [Emphasis in the original.]

Bargaining Session 10; 9 December 1985

At the beginning of the meeting, Piotrowski objected to the "interrogation of the work force by your supervisors about the job classifications." Carey denied that Respondent's survey was an interrogation, and the parties went to Respondent's revised proposal on scalars. The Company was

still insisting that they should be excluded from the Union; no agreement was reached.

The Company presented a comparison of the costs and benefits of the proposed health plan as opposed to the current one. Piotrowski sidetracked the discussions by demanding that Respondent stop vilifying him in their publications. Schumann tried to get the talks going again by asking if Piotrowski had a proposal; Piotrowski replied that he did: Renew the existing contract with the \$1.50 increase per year for 3 years. Schumann stated that that proposal was rejected and the Company would continue to insist on its job classification system and wage rates (proposal 38).

Further discussion of the health and insurance proposal occurred, but the matter was put on hold.

The parties thereafter discussed their respective positions on Respondent's proposal to change the seniority to departmental, rather than plantwide as had existed before. The Union objected that the proposal would allow probationary employees in one department to remain working while senior employees in another department were laid off. Schumann replied that by the proposed procedure Respondent would not have to retrain someone in the event of a layoff in another department. Waters replied that a probationary employee could not have too much expertise anyway, and that Respondent should absorb the cost of retraining senior employees rather than retain a probationary, or otherwise junior, employee.

The parties discussed Respondent's proposal for reasons for loss of job seniority; the Union agreed with obvious ones such as when the employee quit or is discharged for just cause, but no other agreements were reached except that the Union agreed that when an employee reaches the age of 70, or otherwise retires, seniority is lost.

10 December 1985

On this date Herrmann sent another letter to employees stating that Piotrowski was wasting time in the meeting and added, "I don't believe that Walter Piotrowski is in touch with you, our employees. That's why I must send these letters to you. We understand that the Union committee is not allowed to talk with you about negotiations." Herrmann went on to outline the Company's health and insurance program. He concluded: "I feel strongly that the vastly improved benefits we are proposing more than justify the small contribution. The Union again walked out of the session early over AMPAC's protest. If you have any questions, please ask someone from the Union because the Union is not telling you all that you need to know about saving your job at AMPAC."

Bargaining Session 11; 13 December 1985

At the beginning of the session, Schumann accused Piotrowski of refusal to bargain on 10 of the Company's proposals: management-rights, discipline, Section 301 suits/no arbitration, leaves of absences, waiver of rights, no-strike clause, definition of strike, no-lockout, no picketing or handbilling clause, and employment physicals.

The parties then went to management rights, Piotrowski objecting to the "sole discretion" vested in Respondent and several other provisions of the proposal. When pressed for a reason Piotrowski would only say that it was on the advice

of counsel that he refused to agree with the Company's proposals. The parties then moved to disciplinary rules and Piotrowski stated that he promised an answer by the next session. Schumann objected to another delay for a reference to counsel, a frequent response by Piotrowski by that point.

Reference was made to Respondent's closing of its Detroit plant. Schumann stated that it had been for "economic reasons" and Piotrowski stated that the Company had made a profit in Detroit. Schumann replied: "What profit? I'm glad you brought that up. Why don't you come in to our plant. Spend some money and come into our plant and see how much money we've lost." Jim Forbes, another management representative, added: "Please come in and bring your auditors to see how much we've lost."

The parties moved to health insurance and Schumann distributed pamphlets regarding its proposed switch to another insurance company. Piotrowski objected to the fact that under the proposed system the employees would have a contribution to make and he added that the Union was still insisting on a \$1.50-per-hour wage increase over 3 years. Schumann stated that alternative to the Company's proposal was no jobs at all for the employees and, "I suggest you use your skill to convince these employees that if AMPAC is to survive, you should put your wonderful name on the dotted line of AMPAC's proposals."

At a later point in negotiations, Piotrowski pointed out that the Company agreed to none of the Union's proposals. Schumann replied, "We went through this 6 months ago when we were coming up with these proposals. We put a hard hat on a broom and said it was you. We gave you some and us some." The parties discussed several other topics then in dispute, repeating their prior positions and no agreements were reached.

As the parties were discussing arbitration, Schumann stated:

You've only had a few grievances in the past few years. You've had recourse with the District Court. I guarantee you that this Employer will not move on the position of arbitration.

Bargaining Session 12; 14 December 1985

The parties began covering issues still outstanding and when they got to the Employer's proposal to eliminate premium pay for Saturdays if an employee did not work a full 40-hour week preceding, Schumann stated, "The Employer isn't going to move on this position." Waters replied, "We aren't either." Waters further stated that the Union was not willing to eliminate night-shift premium pay as the Employer had further proposed. When asked why the Union was proposing an additional holiday, Waters cited the "bulk" of employers in the industry. Schumann replied, "You ask, ask, ask. You don't seem to hear us when we say we lost a great deal of money. If you question it, get your auditors in our office."

In discussing the positions in general, and in replying to the Union's statements that the Employer's position was completely negative, Schumann stated:

The Employer has spent a lot of time revising the present contract and we realize that we had to take drastic action. This Employer has closed a lot of facili-

ties. We went through everything and decided what is our bottom line on these proposals. We know we are asking for a lot. We're not here to give here and take there. We came here to say, "Gentlemen, we're here to convince you of our proposals. Let's get down to the brass tactics." . . . We aren't going to move. This is where we stand.

Later in the meeting, Schumann added:

The Employer's position is that we did the give and take before we walked in here. What we have here is our bottom line proposal. We want to convince you of the merits of it so that you can convince your people of it. Then with the one year contract, we'll be back here to negotiate again.

Schumann further stated during the meeting that concessions for which the Employer was asking would not guarantee that the Company would be open during next year.

The parties did discuss other substantive proposals, repeating themselves for the most part, but reaching agreement only on such matters as time when vacation pay was received, safety and health, and rules regarding employees returning to work from leaves of absence.

Bargaining Session 13; 16 December 1985

At the beginning of the meeting, Piotrowski asked Schumann if the Company would be willing to split the bill for auditing the Company's financial reports; Schumann said the Company would not. Piotrowski named his CPA firm as Thomas Harvey of Chicago, and indicated that Mr. Harvey wanted to review the records the next day. After conferring with Walter Soliunas on the Company's negotiating team, Schumann stated that the records would be ready Saturday, 21 December.

At this meeting Schumann proposed that the Company would grant a union shop and checkoff if the Union would agree to the proposal 38. The Union refused.

The Company distributed its "Position Statement No. 9" reflecting that the Union had agreed to 34 of Respondent's proposals but the Respondent had agreed to none of the Union's. The parties began discussing various proposals. At one point Piotrowski stated that he would agree with Respondent's step 2 grievance procedure, resort only to a Section 301 suit in the event that a grievance was not resolved; however, Piotrowski also stated that the Union still sought arbitration. (Later, the Union made it clear that it still wanted arbitration.) Piotrowski further stated that the Union still wanted 50 cents more per hour for 3 years for all employees. Schumann asked Piotrowski if he was serious, Piotrowski replied that he was. The Union agree to Respondent's proposals regarding discipline and leaves of absence, but there were no other agreements reached during the session.

Bargaining Session 14; 17 December 1985

At the beginning of this session Dwane Carman, an International representative of the Union, introduced John Janz, managing director of the Union's welfare fund, who explained the operation of the existing union health and welfare fund and compared it with the Employer's proposed health and welfare proposal, generally in the negative.

No agreements were reached at this session, although the Employer did agree to review the Union's proposal that when employees asked that the shifts start early, night-shift premium would be waived. When the Union asked again for the Company's reasons for proposing a 180-day probationary period, Schumann this time stated that the employees needed "the full time" to become accustomed to the jobs and Carey added that the Employer needed it for "our role of managing." Waters asked how the Employer had been hurt by even the past practice of 30-day probationary period; Carey replied, "It's part of [Schumann's] experience." Waters demanded any evidence that the Employer had been hurt by the 30-day probationary period in the past. Carey replied, "That's not how it works."

The Union asked again why the Company was proposing to delete the existing contractual provision for hot coffee and food after 10 hours of work (and in lieu thereof \$2.50), and further to eliminate the clothes and laundry allowance. Carey replied, "Economics." Schumann added, "It's economics. Isn't that a wonderful word? It keeps popping up."

In response to the Union's demands, Schumann further pointed out that with its \$1.50-per-hour wage demand (at 50 cents per year for 3 years) and its COL demand, the Union was asking for \$21 an hour by the end of the contract. Carman stated, "You're being ridiculous, calculating it out to be \$21," but he made no estimate of his own.

At one point in the meeting, Piotrowski stated that the employees on the negotiating committee had told him to close the plant rather than accept Employer's proposal 38.

18 December 1985

On this date Herrmann sent another letter to employees. He began the letter by arguing that the health and insurance program proposed by AMPAC was better than that in the expiring contract, he criticized the Union for being late and otherwise delaying negotiations, and he stated that International Representative Carman "promised" a strike against AMPAC. The letter stated that there had been no progress at the 14th session and concluded that the employees should attend an upcoming union meeting "which will be held immediately after our session, and vote in support of AMPAC's last offer—and keep AMPAC open and keep your jobs. Please attend the Union meeting tonight and keep your jobs."

Bargaining Session 15; 18 December 1985

After initial arguing about what had been agreed on as far as the date on which the Company would allow the Union's auditor to examine records, Schumann stated that the Company agreed to the Union's proposal to retain section 11 of the current contract was acceptable. (The section states in full: "Work clothes and laundering—the uniform required by the Company shall be furnished and laundered by the Company.")

At one point in the discussion the parties reached the Employer's proposal that employees be required to submit physical examinations for which the Employer would pay. The Union proposed that the employees be given a 7-day waiting period before being so required. The Company stated its position, centering on the fact that 7 days would, of course, give time for evidence of drug or alcohol abuse to disappear.

At this meeting Schumann distributed the Employer's position statement 10 which contained "an update" of the effect that Respondent's proposal 38 would have, if accepted. (These numbers changed, as Schumann then told the Union, because of employee turnover). Under the revised schedule, 89 employees would receive wage increases; 193 would receive pay cuts; 36 would receive pay raises up to a \$1; 37 would receive raises between \$1 and \$2; 14 would receive raises between \$2 and \$3; and 2 would receive wage increases of over \$3; 80 employees would receive cuts up to \$1; 59 would receive cuts between \$1 and \$2; 50 would receive cuts between \$2 and \$3; and 4 would receive cuts \$3 and above; 4 employees would receive no change in pay.

The Employer also submitted its position statement 11 which stated:

AMPAC's Proposal No. 38 with job classification and wage rate attached has been at impasse for some period of time and such impasse continues to the present hour. Economic necessity dictates that AMPAC unilaterally implement the job classification and hourly wage rates as per AMPAC's Proposal No. 38 effective 6 a.m., Friday, December 20, 1985. AMPAC does not intend at this time to unilaterally implement any of the many other bargaining subjects about which impasse also exists.

When the Company presented the above statement, Waters stated: "Our position is that the impasse is premature. There are a number of issues that still haven't been discussed. The Union is ready to continue to meet. . . . We believe that the wage rates are a total package and that there is no impasse."

The meeting concluded after other topics had been discussed with no further agreements being reached.

18 December 1985

After the bargaining session of this date concluded about 8 p.m., the Union conducted a meeting of the membership at the union hall. Speaking at the event were Walter Piotrowski and Bob Waters. The comments of Piotrowski and Waters were translated to Polish and Spanish for the benefit of the many employees who spoke only those languages.

Waters told the employees that the Employer was delaying furnishing information regarding its financial records (which, at that point, was not correct) and that the Employer was engaged in surface bargaining. The representatives explained to the employees that by surface bargaining they meant the Employer was negotiating without intent to reach agreement; that it was demanding that the Union surrender all rights to represent the employees; that it was insisting on agreement to proposals which it had originally made; and the Employer was refusing to agree to any of the Union's proposals or negotiate about them.

At the end of the speeches a secret-ballot election was conducted on whether a strike should ensue. The vote was 268 in favor of a strike with no votes opposed.

19 December 1985

On this date Carl Herrmann sent another letter to employees stating that no progress had been made in the 15th bargaining session and he argued the Employer's position on

one topic, merit pay increases. He concluded the letter by stating that AMPAC had informed the Union that it would put into effect its proposal on job classifications and wage rates "because we are deadlocked on the subject." The letter stated that the Company had not been informed as to any vote by the union membership in a meeting which had been scheduled for the previous evening. The letter further stated that while the job classifications and wage rate proposals had been put into effect, "Under the Federal Labor Law all of the other terms and conditions of the present contract must remain in effect, except that it will be unlawful for AMPAC to check off dues or compel Union membership after the contract expires at midnight tonight."

20 December 1985

On this date the employees began a strike which continued until 4 September 1986 when the Union made an unconditional offer to return to work on behalf of the striking employees.

30 December 1985

After some difficulties in communicating when an audit could be made, Steven Felke, the Union's certified public accountant, presented himself at AMPAC's place of business prepared to conduct an audit. Felke had previously informed Respondent's attorney, Carey, that he wished to examine AMPAC's previous tax returns and audits performed by Respondent's accountant, Touche Ross & Co.

When Felke presented himself to the office of Respondent, he was presented with "AMPAC Position Statement No. 12" by Carl Herrmann. The statement was, in full:

At collective bargaining session #15 on 12/18/85, the Employer informed Local 100 that because the Union had not responded on 12/16/85 to AMPAC's offer to make records available for an independent CPA audit on Friday, 12/20/85, that the next available date for the commencement of such audit would be Tuesday 12/24/85. This date was computed on the basis that AMPAC needs 3 working days notice from the Union in order to prepare for such audit.

Subsequently on 12/19/85, Steve Felke, CPA of the CPA firm of Thomas Harvey & Company, telephoned AMPAC's labor attorney, Joseph Carey, and informed him that because of his vacation schedule, he could not start such audit on 12/24/85 but would do so on 12/30/85.

The reason that AMPAC is allowing this discovery audit is because AMPAC at session #1 on 10/21/85 informed the Union that AMPAC was unable to grant the general wage increases because of the following losses from operations:

	Operating Income Loss		
	<i>Normal</i>	<i>Racine</i>	<i>Total</i>
1981-1985 (4 yrs., 9 mos.)	4025	3213	7238

This total loss of \$7,238,000 for the period of 12/30/80 to 09/29/85 is a financial fact that the Union has apparently refused to accept.

It is AMPAC's position that given the Union's demands for general wage increases of 50 [cents] + 50 cents for a 3-year agreement with corresponding 6 month C.O.L.A. adjustments of 20% in each of such 3 years, that AMPAC will be unable to persuade the Union to accept its economical [sic] offer for a 1-year contract, until the Union verifies by an independent CPA that the above losses from operations are agreed [sic].

It is further AMPAC's position that such discovery audit be conducted in accordance with generally accepted auditing standards, and that the results of such audit will thereby be entitled to unquestioned credence, allowing AMPAC to utilize the results of such audit in its attempt to persuade the Union to accept its economic offers for a 1-year contract.

Because such audit will span a period of almost 5 full years, the volume of financial records to be removed from storage in 2 separate buildings and made accessible to Mr. Felke is enormous. In order to minimize disruption in the ordinary course of AMPAC's business, AMPAC will require that the following schedule be complied with during the course of such audit:

- (1) The entire records for the 1981 audit will be made accessible, the audit completed and such records returned to storage.
- (2) The entire records for the 1982 audit will be made accessible, the audit completed and such records returned to storage.
- (3) The entire records for the 1983 audit will be made accessible, the audit completed and such records returned to storage.
- (4) The entire records for the 1984 audit will be made accessible, the audit completed and such records returned to storage.
- (5) The entire records for the 1985 audit will be made accessible, the audit completed and such records returned to storage.

During the course of such audit, AMPAC's controller, Mr. Brad Melville, will monitor the conduct of such audit and assure that all records and documents which are necessary for the performance of such audit in accordance with generally accepted auditing standards, are made available to Mr. Felke.

In the aforementioned telephone conference between Mr. Carey and Mr. Felke, Mr. Felke stated that in order to minimize expenses for the Union, who must pay the fees for such audit, he intends to merely verify for the years of 1981, 1982, 1983 and 1984 and 1985, AMPAC's tax returns and the audits performed by Touche Ross & Co., AMPAC's independent auditor. However, this procedure is not acceptable to AMPAC for the following reasons:

- (1) Kane-Miller Corporation files consolidated tax returns and for such purposes, transfers and allocates certain expenses across subsidiary lines, which have the effect of distorting AMPAC's losses of operations, as above enumerated.

- (2) The Touche Ross & Co. auditors employ similar transfers and allocations with the same resulting distortions of AMPAC's losses from operations, as above enumerated.

AMPAC will allow Local 100 of U.F.C.W. to audit AMPAC's financial statements by outside independent auditors for years 1981 through 9 months of 1985.

The audit will have to be made in accordance with generally accepted auditing standards. The audit's scope should be in sufficient, but not unreasonable detail that would be required by an outside auditing firm, and it would permit issuance of a separate report on the financial and operational status of the Company. Documentation produced by the subject audit should be available to the Company and its outside auditors for review that it agrees with their conclusions.

Should there be any questions or statements concerning this Position Statement either by the union bargaining committee or by Mr. Felke, such questions or statements are to be directed only to the undersigned.

At trial Felke testified that the cost of proceeding as Respondent required would have cost \$100,000 and would have taken a minimum of 3 months to perform. He further testified that the examination which he requested would have cost a maximum of \$10,000 and would have taken no more than 2 or 3 weeks depending on how the Company made the information available. None of these estimates about Felke as to time or cost was challenged by Respondent. Respondent did produce a certified public accountant who testified that the audit which the Company demanded of the Union would have been much more accurate, ultimately, than what the Union proposed to do.

On 2 January 1986 the Union, by its attorney, Donald W. Cohen, wrote Respondent stating:

At this time the Union once again requests that its auditor be furnished with the financial statement [sic] which he requested for purposes of making a determination as to the financial status of AMPAC during the years 1981 through 1985. In view of the extensive costs of conducting a full audit and the time delays which would be severely damaging to effective collective bargaining, this information is necessary and should be provided immediately. We are prepared to make provisions to protect the confidentiality of any elements which you are fearful might be utilized for other purposes or which may impact upon other aspects of the Kane-Miller operation.

The information was never furnished.

Bargaining Session 16; 3 January 1986

The parties met before Federal Mediator Bill Seigler and began going over open issues. When they got to seniority, the Union stated that it was withdrawing its prior agreement to departmental seniority for any purposes and stated that it wanted straight, plantwide seniority.

The parties discussed the company proposal for transfers outside the bargaining unit which stated that employees shall continue to accrue seniority for 6 months after such transfer; seniority would be frozen as of the end of that 6-month pe-

riod; and if an employee returned to the bargaining unit thereafter total length of service would be reduced by the amount of time spent outside the bargaining unit minus 6 months. At this meeting Schumann noted that the Union had proposed that seniority would be lost after 6 months and the Company was, then, agreeing to that union proposal.

The parties discussed the Employer's "loss of seniority" proposal. Schumann noted that the parties were still in disagreement over the Employer's proposals that seniority be lost after a layoff of 6 months and the proposal that an employee loses seniority when he accumulates four unexcused absences within a calendar year unless excused by the Employer. Schumann stated that the Company was standing by the first proposal but modified its second to be that seniority was lost when there were six unexcused absences in a year or 3 days of consecutive absences. The Union persisted in its demand that seniority not be lost except in cases of layoff in excess of 12 months although the prior contract stated that seniority was lost in such cases after 6 months. The Union did not respond to the Employer's proposal that seniority be lost with four unexcused absences within a calendar year. The Union also refused to agree to a proposal that seniority was lost after 1 year of medical leave.

The Employer had previously proposed to eliminate a provision in the 1982 contract for a break after 12 hours, 15 minutes (in addition to breaks during the first portion of the day and after 9 hours, 15 minutes). At this meeting Schumann proposed that a paid 15-minute rest period would be given after 12-1/2 hours if "at least one hour of work remains." The Union rejected this proposal.

When the parties got to the computation of overtime pay proposal by the Employer (time and a half after 40 hours and double time on the seventh scheduled workday provided that employee has not been absent on any prior day in such workweek), the Union stated it was still insisting on time and a half after 8 hours, double time on Saturdays, and triple pay for Sundays and holidays. The previous contract provided for time and a half after 40 hours, time and a half on Saturdays (if it was a sixth scheduled day) and double pay for Sundays unless Sunday was one of five regularly scheduled workdays. Schumann replied that the Company would never pay time and a half after 8 hours but would provide time and a half for a sixth scheduled workday if an employee had not been absent for any reason during the five preceding workdays. The Union agreed to discuss this proposal, but there was no agreement reached at this session.

The parties discussed the Employer's proposal that the Employer could designate alternate days as holidays. The Union stated that the Company should spell it out if, as they represented, they would not change such days as Independence Day and Christmas Day. Schumann agreed to get back to the Union on that. (The Employer never stated which holidays of which it would never change the celebration date.)

At this meeting, in discussing pay for holiday benefits the Employer agreed to drop its proposals that employees who worked regularly less than 8 hours would not receive 8 hours of holiday pay.

At Respondent's proposal for pay for work performed on a holiday the Employer dropped its proposal that it pay only double time for such holidays and agreed to triple time as the Union proposed (8 hours for the holiday plus double time for hours worked).

On funeral leave, the Employer agreed to the Union's proposal to include the deaths of relatives permanently in the household of the employee as those which would justify funeral leave.

The Employer further agreed at this session to the Union's demands that sharpening stones and smocks be among the tools provided by the Employer. There was extensive discussion about the health and welfare proposals, the Employer again stated its many reasons why it felt that its proposal was superior, and more beneficial, to the employees. No agreement was reached.

Many of the sections of the Employer's proposals were discussed, but no other agreements were reached.

Bargaining Session 17; 4 January 1986

At the beginning of the meeting, the Union accepted the Employer's proposals on lost seniority upon transfers outside of the bargaining unit, pay for holiday benefits, pay for work performed on a holiday, funeral leave, tools and equipment, and the Union further acknowledged that it had previously agreed, and would agree, that seniority would be lost after 1 year of medical leave. The Union further proposed that the Employer provide rubber boots and aprons for four stated job classifications; Schumann replied that the Company would answer after a later caucus.

The Union further acknowledged that for layoffs departmental seniority could be observed, but still wanted plantwide seniority for job bidding purposes. The company officials argued that a dual seniority system would be chaotic.

At this session the Union dropped its request for 20 percent cost-of-living allowance but persisted in its demand for a \$1.50-per-hour increase in wages over 3 years. The Employer representatives did not respond and the Union accused the Employer of not bargaining in good faith. Schumann replied:

You walked in here with bloated demands. The Employer has stood by the position that our financial future requires a reduction in costs, not an increase. We are here to take, not give. We can't afford your demands and, therefore, we reject your proposals. . . . If we give away any more money, we can't compete.

The parties discussed further union economic demands and no agreements were reached, except that the Employer did agree that employees would be guaranteed 4 hours' showup pay, something which was present in the 1982 contract which Respondent had proposed to eliminate.

6 January 1986

On this date Schumann delivered to Piotrowski the Employer's "Position Statement No. 13" which stated:

AMPAC's Proposal No. 30, probationary period, has been at impasse for some period of time and such impasse continues to the present hour. Economic necessity dictates that AMPAC unilaterally implement the probationary program as per AMPAC's Proposal No. 30, effective 6 a.m. January 7, 1986. AMPAC does not intend, at this time, to unilaterally implement any of the

many other bargaining subjects, about which impasse also exists.

Also on this date, Carey (company lawyer) sent a letter to Cohen (union lawyer) reaffirming the Employer's position that only the full 5-year audit could be conducted by the Union and the Union could not have the prior auditing statements which had been prepared by the Company's auditors.

Bargaining Session 18; 13 January 1986

At this meeting, the parties only discussed relative bargaining strengths during the strike situation. No proposals were discussed; however, the Employer did state that it was instituting the "pay boning system" which cuts the training time for boners; Schumann stated during this discussion, "if Local 100 wishes to be a part of AMPAC's operation, they should do so soon."

On the same day the Employer issued a letter to all employees stating that replacements being hired were permanent employees and would not lose their jobs at termination of the strike, as was the case after the 1980 strike.

22 January 1986

On this date, by letter, Schumann advised Piotrowski that, because of economic necessity, AMPAC was unilaterally implementing its proposals on insurance benefits, leaves of absence, and elimination of all past practices. Schumann stated again that these matters had been at impasse for some time and that the Employer intended at that time to implement no further unilateral actions.

Bargaining Session 19; 27 January 1986;

At this session only a few topics were discussed and neither party made a concession and no agreements were reached. The Company announced that the striking employees would be required to pay their life, health, and benefits insurance premiums and, on the same day, sent the employees a notice to that effect, stating that single coverage would be \$81.85 a month and employee and dependent coverage would be \$158.08 per month.

Bargaining Session 20; 11 February 1986

On this date the parties met for 4 minutes and exchanged the information that neither had anything to offer.

14 February 1986

On this date the Company delivered to the Union its "Position Statement No. 16." The statement recites that the strike has been long, accusing the Union of "terrorism" and making the following proposals: Respondent withdrew its offer to grant union shop and checkoff if the Union agreed to its proposal 38, job classifications and wage rates; Respondent withdrew its proposal that six absences in a calendar year would result in loss of seniority and reinstated its original proposal that four such absences would terminate seniority; Respondent withdrew its previous concessions regarding overtime pay and reinstated its original proposal of only time and a half pay for hours worked over 40 in a week; Respondent repropose elimination of night-shift premium; Respondent withdrew its proposal for pay for work on a holiday and repropose only double time for holidays

worked; Respondent proposed a 3-year agreement terminating December 1988; Respondent withdrew its proposal that employees contributed only \$3 a week for health insurance and proposed that for an employee and one dependent it would be \$6 a week and, for an employee and two or more dependents, \$8 a week; Respondent proposed a 25-cent-per-hour general increase effective December 20, 1986, and a 25-cent-per-hour general increase effective December 20, 1987, on top of the wage rates and job classifications on its unilaterally implemented proposal 38; Respondent offered union shop and checkoff if all other proposals submitted by the Employer were agreed on; Respondent proposed that in any strike settlement agreement no permanent replacement employees would be displaced, there would be a 1-year limit on *Laidlaw*⁴ rights, and "former strikers who have been guilty of strike misconduct will be denied reinstatement."

By letter dated 17 February 1986 from Piotrowski to Schumann, the Union rejected these proposals.

Bargaining Session 21; 26 February 1986⁵

The parties agreed to go through their respective proposals to see if any further agreements could be reached. Waters, speaking for the Union, stated that Respondent's proposed evaluation system would be acceptable if the Union had arbitration; the Union wanted some number of employees having displacement rights in cases of layoff; and the Union "was willing to look at 90 days" for a probationary period; Schumann replied that AMPAC would be willing to "look at" 90 days' probationary period also.

Waters further stated that the Union would accept AMPAC's pension program and proposed that certain "red circle" rates be retained, and the Employer would give a 2-cent-per-hour rate in the second and third year of the contract for all except the red circled employees who would get a 10-cent-per-hour rate.

When asked by Waters, Schumann stated that the Company would be willing to go back to eight paid holidays but had no change of position on vacations.

Waters stated that the Union was still adamant in objecting to the Employer's removal of the scalers from the unit and further objected to the Company's proposal to eliminate the work-preservation clause. The Union proposed to keep plantwide seniority in case of layoffs but did add that only certain numbers of employees would be allowed to displace union employees in other departments at a time.

At "loss of seniority," Schumann stated that Respondent would agree that a 1-year layoff (instead of previously proposed 6-month layoff) would terminate seniority "if insurance terminates on the day of layoff." Waters agreed to look at that. Schumann further stated that the Company would be willing to "look at" its previous revision of its proposal that four unexcused absences within a calendar year terminate seniority and go back to its proposal that it would require six.

The Union stated that it wanted to continue the 1982 contract's provisions for rest periods and further wanted to keep all Sunday work as double time. Schumann replied that the Company would consider the double-time proposal.

⁴ 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969).

⁵ The transcript of this bargaining session is of lesser quality than others. For example, at several points the discussion is omitted and only "long discussion" is noted.

Schumann proposed to return to a night-shift premium but without stating how much; the bargaining minutes show no response by the Union.

The Union stated there was "no way that the Employer's management-rights proposal was acceptable and the Union still wanted arbitration. Schumann replied, "if we agreed on everything else, we would not sign a contract where arbitration is in it." The Union further objected to the Employer's proposal that it could designate holidays to be observed on dates it chose; Schumann replied that "We'll look at it."

In response to the Company's proposal that employees on layoff or leaves of absence would not receive holiday benefits, the Union proposed that employees on layoff receive holiday benefits for 60 days; Schumann said the Company would consider it. The Union stated that it wanted the same vacation benefits as in the previous contract; Schumann replied that the Company would stand by its original proposal.

At discussion of the Company's proposal for "elimination of all past practices" Waters again, as he had done before, asked for examples; the notes read: "[Schumann] tried to explain but said he would give better specifics later."

Schumann stated that AMPAC would be willing to give up its requirement of 7 days' notice before resignation. No response from the Union is reflected in the transcript.

The parties discussed Respondent's proposed "exclusive recourse to agreement and waiver" clause, but no agreement was reached.

The parties discussed Respondent's proposed no-strike clause; the Union stated it would be willing to give up its right to sympathy strikes but not give up the right to handbill. Schumann replied that the Company would stand on its proposal. The same discussion ensued when the parties discussed the Respondent's picket line clause.

At "length of agreement," the Union stated, "We want a three-year contract." Schumann replied: "We are still looking for a 1-year contract." However, it is to be noted that in the previous session the Company proposed a 3-year agreement. The bargaining minutes do not explain this conflict; nor do they reflect that the Union accused the Company of going back on its previous proposal.

In regard to the Company's proposal that it be allowed to require physical examinations of employees, Waters stated that the Union would probably move on the issue, "but you will have to earn it. I cannot commit to it today."

The parties then discussed the Union's proposals, but no agreements were reached.

The parties went on to discuss various sections of the expired contract: The Union wanted continuance of 2 hours of excused absence for voting; Schumann said it was not necessary. The Union wanted to continue its right to be consulted about timestudies; Schumann replied, "You know our position on this." (It was not proposed by Respondent.) The Union wanted continued compulsory physical examinations for new employees only; Schumann insisted on the company proposal for examination of all employees.

The parties then turned to the Union's demands made at the first bargaining session. The Union still wanted cleanup time allowance in the contract; Schumann refused. The Union agreed to the Company's proposal of eight holidays, and the Union stated that it still wanted the clothes-changing time which the Employer had proposed to eliminate.

Bargaining Session 22; 12 March 1986

At the beginning of the session, Schumann presented four statements of position. The first was a revision of wage scales for proposal 38. Several jobs at the kill floor were upgraded and a new classification was created in the maintenance department.

Another statement of position stated that it was AMPAC's position that the Union had lost its economic strike and therefore "AMPAC is hardening its position in collective bargaining by making the following proposal." The proposals were withdrawal from the previous agreement with the Union's proposal for continuation of the prior contract's provision that there would be 4 hours' showup pay. This statement of position further proposed to modify AMPAC's proposal 35(c), seniority at section (g), "regular layoff defined." Respondent proposed that in the event that the layoff exceeded 30 calendar days, insurance coverage under AMPAC's proposals would cease and the employee would be given the right to convert to an individual policy and pay the full cost.

Another position statement submitted on this date recited that the Employer had previously unilaterally implemented its proposals on seniority probationary period, insurance benefits, leaves of absences, and elimination of all past practices. The statement went on that AMPAC now gives notice of its intention to unilaterally implement the following proposals about which impasse has existed for some considerable time. Thereafter were listed, by section numbers, 72 of Respondent's original proposals. This was virtually all of Respondent's proposals which had not been previously implemented.

Finally, the last position statement submitted on this date was a proposal to amend the Employer's retirement plan in the following manners: Redefinition of the term "employee" to include not only employees subject to the collective-bargaining agreement with the Union, but all production and maintenance employees at the plant, including the scalers. This position statement further amended the eligibility requirements to include employees who were members of the plan on 19 December 1985 and all employees hired since then after they had been employed 6 months. The position statement further put a cap of "credited service" under the plan at 40 years.

After presenting these proposed changes, Schumann asked the Union if they wanted to take a break, they did and left the meeting.

13 March 1986

On this date, Herrmann advised the employees that at the preceding meeting AMPAC had informed the Union that it was hardening its position in collective bargaining and that, except for three revised proposals, AMPAC was putting into effect all of its contract proposals. The three revised proposals were listed as the creation of new jobs, inclusion of the permanent replacements as employees under the pension plan, and a proposal to provide insurance conversion privileges to those employees on layoff for more than 30 days.

Bargaining Session 23; 20 March 1986

At the beginning of the session, Piotrowski asked the Company if it had any other concessions which would make the Company's proposals more palatable to the membership.

Schumann replied that he did not and further stated, in writing, that if the strike were ended at that point all strikers except those who were guilty of misconduct would be reinstated; otherwise, if and when the Union made an unconditional offer to return to work, the employees (as economic, not unfair labor practice strikers) would have only their *Laidlaw* rights. The meeting ended with no agreements reached.

21 March 1986

On this date at a membership meeting the employees voted to reject the Employer's proposals. That afternoon Schumann wrote Piotrowski that the Employer was withdrawing its offers of a 25-cent general wage increase, effective December 20, 1986, and December 20, 1987, made at 9:45 that morning. (How those proposals came about is not in the record.) Schumann added that AMPAC was also thereby withdrawing its offers made at the same meeting to give union shop and checkoff in return for the Union's agreement on all outstanding Employer proposals. The letter concluded that, since the Company's proposals had been rejected, returning strikers would be replaced, in effect, only under the *Laidlaw* rules.

5 April 1986

On this date Schumann sent a letter to Piotrowski enclosing a new proposal entitled "Preparatory and Concluding Activities." The proposal was: "AMPAC's long-standing practice of excluding from hours worked time spent by an employee in changing and/or washing at the beginning or end of each shift is hereby confirmed and formalized as part of this collective-bargaining agreement."

The letter further stated that the following proposals "had been at impasse for some considerable period of time and about which AMPAC intends to unilaterally implement." These proposals were proposal 38, the seniority listing with wage rates (as revised on 12 March) and the definition of layoff and pension benefit proposals (also proposed on 12 March).

Bargaining Session 24; 17 April 1986

No substantive proposals were discussed at this meeting. The Union argued that the Employer needed the strikers because its members had seen several employees leaving the plant who were being cut in the process of production. Schumann responded that there would always be accidents in the industry and that the plant's accident rate was no greater than before the strike. The Union concluded the meeting by stating that it would return to work only under the terms it had previously expressed.

Bargaining Session No. 25; 13 May 1986

The Union stated that it was going to a ratification meeting in a few days and asked for the Company's final offer. Schumann stated that the Union already had it. The Union asked how many jobs were open at that point, and Schumann replied that there were 18. (This figure was corrected by letter dated 16 May in which the number was raised to 152.) No agreements were reached at this meeting.

17 June 1986

On this date Schumann sent Piotrowski a letter stating that he had been informed by a Federal mediator that the Union wished another bargaining session. Schumann stated that for purposes of that session, for which he proposed a date, he was enclosing a complete set of management proposals, including those proposals which had been agreed upon and those which had not. Schumann further restated Respondent's position that, for purposes of any strike settlement agreement, strikers would be reinstated only according to their *Laidlaw* rights.

Bargaining Session 26; 26 August 1986

At this meeting the parties only discussed two provisions of the Employer's complete proposal which it had mailed on 17 June. The Union stated that it could agree to the performance appraisal model if the parties could agree on a grievance procedure which did not require going to court on a Section 301 suit. Carey stated that the parties should mark it down as "conditionally approved."

The Union stated that it would accept the Employer's amended proposal 38, with the attendant slotting of individual employees, with the exception of those employees who then were making more than the proposal called for (they would be red-circled with no reduction greater than 50 cents per hour); the Union further asked for a 3-year agreement with 25 cents granted the second and third year. The Company caucused and returned stating that the operation was proceeding efficiently at the rates the Company was then paying and that it saw no reason to offer any wage rates other than those which it had already proposed. The Employer did not plead inability to pay at this point.

The session closed without any agreements being reached.

Bargaining Session 27; 2 September 1986

At the beginning of the session Waters listed several employees and stated that the Employer had slotted them incorrectly in its proposal 38. Schumann said the Employer would review the Union's contention.

The parties began going over the June set of complete management proposals. At this time the Union agreed to the Employer's proposal on job analyses and that there would be a performance appraisal model, although not its content; the Union further agreed to the Employer's proposal for equal pay, equal employment opportunity, no age discrimination, and Occupational Safety and Health Act compliance. The Union further agreed to the Employer's proposed bargaining unit description which included only employees at the Normal Avenue plant and excluded scalers. The Union asked why the Employer refused to include a work-preservation clause; Schumann stated that it needed the provision in view of recent NLRB cases. The Union responded that the Employer's provision for a "no work preservation clause" would allow the Employer to circumvent the entire agreement. Carey stated that he agreed but that was not the Employer's intention.

After a caucus Schumann offered the Union dues checkoff if the Union would agree to the remainder of Respondent's proposals; the Union refused.

Waters stated that he would be meeting with the membership on the next day and recommend that they return to work unconditionally even though no contract had been reached.

Schumann stated that "in a final effort to get you to sign, we will agree to the reinstatement of all strikers in a reasonable amount of time, except those guilty of misconduct, if you agree to sign our contract." Waters refused.

Bargaining Session 28; 3 September 1986

At this session the parties completed review of the Employer's package of proposals submitted in June.

At article 4, union security, the parties noted that there was conditional agreement on the dropping of checkoff.

At article 5, seniority, the parties were in agreement on the following sections: definition of seniority, department seniority, definition of job opening, posting and bidding procedures, responsibility of employees to keep the Employer informed of job openings, definition of layoff, method of layoff (departmental), definition of recall, method of recall, transfers outside of the bargaining unit, and reasons for loss of seniority (the Union agreed at this time that four absences within a calendar year would cause a loss of seniority.) The parties were not in agreement on the following seniority provisions: the Employer's proposal for a 180 calendar-day probationary period, qualifications for, and awards of, jobs, restrictions on bidding after successful bids, definition of temporary layoff, the seniority listing (this was proposal 38 to which the Union would not agree without arbitration), and right of Employer to use part-time and casual employees to do bargaining unit work whenever, in its sole discretion, the Employer chose to do so.

The parties discussed article 6, hours and overtime. On the initial run through, the parties were in disagreement on all sections: workday defined, workweek defined, rest periods, computation of overtime pay, overtime work required, and elimination of night-shift premium pay rate. Later in the session the Union agreed to the Employer's proposal on rest periods and the proposal that overtime work was required; also, later in the session, the Employer proposed a 10-cent-per-hour night-shift differential, but there was no agreement on that.

At article 7, rights of Employer to manage, the parties discussed section A, management-rights clause. The transcript of the bargaining session does not reflect the discussion, but it is clear that the parties were not in agreement. They further were not in agreement on section B, residual rights, and section C, cross-training.

The parties discussed article 8, discipline. There is no coverage of the discussion in the transcript; however, it is clear that the parties were not in agreement.

When the parties got to article 9, grievance procedure, Waters stated that if arbitration were not included there would be no agreement.

When the parties got to article 10, holidays, the Employer still proposed seven designated holidays; the Union continued to demand eight. The parties were in agreement that for holidays occurring during vacation, employees would receive 1 day's extra pay, but could not take an extra day of vacation. The Employer proposed double time for work per-

formed on a holiday; the Union still wanted triple.⁶ The parties were in agreement on eligibility for holiday benefits, pay in lieu of holiday benefits, and prohibition of holiday benefits to employees on layoff or on leave of absence.

The parties were in disagreement as to the amount of vacation benefits per number of years worked but, at this session, the Union agreed to the Employer's proposal that vacation benefits would be granted to those who resigned only if 1 week's notice was given. (Although not mentioned in the transcript of this session the parties were in agreement on pay for vacation benefits being 40 hours per week, the time when vacation pay is received, and the prohibition against payment in lieu of time taken.)

The transcript reflects no discussion of the Employer's proposals for leaves of absence, funeral leave, jury duty, effective termination of contract, safety and health, safety committee, discipline for refusing to wear safety equipment, duty of employees to notify the Employer of changes in residence or other such information, and tools and equipment. All these matters had previously been agreed on. The parties were still in disagreement on "elimination of past practices," terms under which employees could return to work from leave, the right of the Employer to grant and withdraw merit wage increases "in its sole discretion," waiver of all bargaining rights by the Union, right of Employer to require physical examinations of all unit employees, and Respondent's insurance benefits proposals.

The parties remained in disagreement on the Employer's proposals for prohibition against strikes, handbilling, slowdown, interruption of business, definition of lockout, and the picket line clause.

The Employer's proposal on the table at this meeting stated that the agreement would expire on 19 December 1988, which would have been 28 months from the date of that bargaining session. When questioned on this Schumann stated that the Employer would propose a termination date of 3 years after ratification. No agreement was expressed.

After completion of the review, the Union stated its acceptance of the Employer's proposals on loss of seniority, rest periods, requirement of overtime, eligibility for holiday benefits, payment for holidays occurring during vacations and pension benefits.

After a statement of these concessions by the Union, Schumann stated that the Company had these further positions which were contingent on the Union signing a contract: Withdrawal of the Employer's right to make unfettered merit pay increases, a grant of a 10-cent-per-hour night-shift premium, an eighth holiday, and reduction of probationary period from 180 days to 120.

Waters stated that the Union would have to have the following concessions: overtime after 8 hours, sick leave payment increased from \$125⁷ to \$150 per week, 36 hours guaranteed workweek, and amnesty for all strikers. After a caucus, the Company agreed to increase sick leave pay from \$125 a week to \$150 a week, but rejected all other demands by the Union.

⁶Tr. 5 of this session states that the parties were in disagreement on sec. "I" of Respondent's holiday proposal. There is no "section I." The transcript of the following bargaining session makes it clear that the section in dispute at this point was pay for work performed on a holiday, sec. D of that proposal.

⁷Tr. 5 of this bargaining session states "100 to 150." This is an obvious error because the Union had originally proposed 125.

The meeting concluded without any further agreements.

4 September 1986

On this date the Union, through its attorney Donald W. Cohen, made an unconditional offer to return to work on behalf of the bargaining unit employees. By letter of the same date, Herrmann advised the Union that the strikers would be treated as economic, rather than unfair labor practice, strikers and that they would be returned to work in order of seniority. The letter attached a seniority roster of the employees and designated certain of them who would not be reinstated "because of strike misconduct." One of those employees so named was John Frizzon, the alleged discriminatee in this case.

15 September 1986

On this date the Company submitted to the Union its position statement 22 which noted that at the 3 September bargaining session the Company had made seven concessions contingent on the Union's accepting the remainder of the Company's proposals which had not then been agreed upon. These seven listed concessions were: restoration of checkoff, dropping Respondent's proposed merit pay increase provisions; 10-cent-per-hour night-shift differential; 120, not 180, calendar-day probationary period; one additional holiday, making it eight; three not five, days' notification of return from leave of absence; and agreement to the Union's demand that sickness and accident weekly benefits be raised from \$125 to \$150. The letter concluded that since the Union had not accepted these concessions, the seven listed proposed concessions were withdrawn.

Bargaining Session 29; 22 September 1986

On this date the parties met briefly. The Union, by Waters, stated that although the Company had withdrawn its concession as mentioned in Schumann's letter, the Union was standing by all the concessions it had made. Waters said that he was not accepting the Company's last offer as it then stood and asked if the Company had anything else to offer. Schumann stated that the Respondent did not, and the meeting quickly adjourned.

Bargaining Session 30; 21 October 1986

At this final meeting the Union was joined by Phil Imosote, a regional director of region 11 of the Union. Imosote acted as the chief spokesman for the Union. He began the session by asking to review all matters in dispute to see if he understood the Company's proposals. After a review of the items in dispute, and a few questions, Imosote said that the Union would agree to all other proposals if the following union proposals were met: the Union would be notified of grants or elimination of all merit increases to any individuals; the Company will state which holidays would, or would not, be observed on the date observed nationally; if an employee's physician states that he can work when the Employer's position states that he cannot, the two physicians would select a third physician to make the decision; union shop and checkoff; 25 cents wage increases the second and third year of the contract; reinstatement of one holiday (the eighth); reinstatement of all former strikers.

Schumann replied that the Company would notify the Union of all changes and would agree to the proposals for a third doctor to make a binding decision on whether an employee was physically able to work. Schumann stated the Employer was not going to force striker replacements out of their jobs, nor would they be forced to join the Union. The Employer would not grant more holidays or wage increases and Schumann added, "we do not believe the Union has economic power to force us to give more money or to add more holidays." Schumann concluded that, if the Union was willing to sign the Company's version of the contract, the Employer would grant dues checkoff for members or those who wish to become union members.

Imosote stated that the Union would respond in 5 calendar days. There was a subsequent exchange of letters, but no further change of positions were made by either side.

3. Analysis and conclusions

a. *Refusal to furnish information*

In this case, Respondent argued from the first bargaining session until the last (when it had clearly won the strike and had unilaterally lowered wages) that it needed its demanded economic concessions for its very economic survival. Respondent further repeatedly insisted that the Union "look at the books." In this posture it cannot be denied, and Respondent does not deny, that the Union had a right to the information necessary to appraise Respondent's claim of economic necessity.

Respondent refused to furnish to the Union its existing audits and balance sheets and other information with which the Union sought to appraise Respondent's plea of inability to pay more. Respondent argues that it did this because it felt that the information which was requested would present a less than completely accurate portrayal of its financial condition. Thus, the Respondent argues, the Union should have been required to conduct full-scale audits for the preceding 5 years before it could secure any existing information about Respondent's current financial status. As stated in Respondent's position statement 12, this would have involved an "enormous volume of records."

If I wanted to know the telephone number of the zoo, but the information operator would give it to me only after I had copied down all preceding entries in the telephone book, I could fairly say that the operator was refusing to give me the number altogether. Assuming, under some theory of law with which I am not familiar, that the telephone company had an obligation to provide me with the zoo's telephone number, the operator's action would be a violation of that obligation.

Likewise, it is not for Respondent to dictate through what hoops the Union should be required to jump before it receives the information to which it is entitled under the Act. Respondent cites no case of authority to the contrary, and any other construction of the Act would render the duty to furnish information meaningless.⁸

Accordingly, I find and exclude that beginning 30 December 1985, when Respondent presented its position statement

⁸If Respondent had wished, at any point, to present to the employees (or anyone else) a more complete picture than that which may have been drawn by the Union, it, of course, would have been free to do so. The many letters from Herrmann to the employees demonstrate that Respondent is not shy about communicating directly with its employees.

12 to the Union's accountant, to date, Respondent has refused to furnish the Union financial information to which the Union was lawfully entitled, in violation of Section 8(a)(5) and (1) of the Act.

b. *Unilateral implementation of proposal 38*

At the core of the differences between Respondent and the Union was Respondent's proposal 38 which was introduced at the first bargaining session on 21 October 1985. All 290 bargaining unit employees were reclassified under the proposal and, as a summary attached to the proposal reflected, 86 were to receive wage increases, 203 were to receive cuts, and 3 employees would have received no change in pay.

On 24 October, 3 days after presentation of the proposal to the Union, Respondent's president, Carl Herrmann, by letter of that date, informed the employees that the proposed wage rate and classification changes had been placed on the bulletin board, and he further stated, without any qualification whatsoever, "[t]his will go into effect on December 20, 1985."

On 4 November, at the third bargaining session, without any input from or further discussion with the Union, Respondent revised its proposal 38 to call for 194 employees to receive cuts in pay. Carey told the Union that there would be no grievances on the issue of job placement because all disagreements would be handled before 20 December and, failing agreement, if there was impasse, Respondent would be free to act unilaterally. The Union was further told that the revisions would be posted the next day and as Schumann stated, "We would like the input from the Union and the employees. The more input that we receive from these people and you, the less it's going to cost us when the time comes to put this through."

The next day Schumann told Piotrowski, "our proposal is firm." On the day after, 6 November, Herrmann told the employees that AMPAC's owners have said that they will . . . permanently close AMPAC if we do not receive the concessions we have proposed." He added, apparently for the benefit of the obtuse, "a job at a lower rate is better than no job at all." At the fifth session on 11 November, Schumann told the Union that proposal 38 placed the employees where it thought "they would end up on December 20, 1985."

On 12 and 13 November, without prior consultation with the Union, Respondent conducted a systematic survey of bargaining unit employees, asking them if they were satisfied with their placement on proposal 38 and could they do other jobs. On 15 November Herrmann sent another letter to employees stating that the proposal had received overwhelming support from the employees, but that Piotrowski was still refusing to do anything and "Now Walter Piotrowski is about to cost 291 more members to lose their jobs when the Normal Avenue plant closes. I believe that a majority of our people do not agree with this stubborn old man."

At the seventh session on 26 November, Schumann told the union negotiators, "You have our proposal of what it's going to be on December 20 if we sign a new agreement or if there's impasse on Proposal 38."

On 18 December, the Employer proposed a revision of proposal 38 to reflect employee turnover, declared an impasse on that issue, and announced that proposal 38, as revised, would be implemented "effective 6:00 a.m., Friday, December 20, 1985." When the union representatives ob-

jected that there were many other topics in dispute and that a declaration of impasse was premature, Carey replied only that the law of impasse "is as per subject."

In summary, proposal 38 was presented at the first negotiation session as something that Respondent had to have to survive, and that it had to have it by 20 December. Within 3 days of its presentation, Respondent's chief executive told the employees that the proposal would, indeed, be implemented on 20 December. Thereafter, the employees were subjected to a barrage of threats by Herrmann that if proposal 38 were not accepted the plant would close and they would be out of a job. While Schumann and Carey occasionally qualified their pronouncements of Respondent's intent to implement proposal 38 only after impasse, these were clearly no more than statements "for the record" in an attempt to build a defense. Respondent's true intent was revealed by Herrmann's statements and the unyielding insistence on proposal 38 by Respondent's negotiators.

On 26 November, when Schumann told the union negotiators that "you have our proposal on what it's going to be on December 20 if we sign a new agreement or if there's impasse on Proposal 38," he was telling the Union that it could have proposal 38 as the result of an impasse, or it could have proposal 38 as part of any contract which Respondent would sign, but, either way, the Union was going to have proposal 38; and, as Herrmann had told the employees, the Union was going to have it on 20 December 1985. This was not bargaining; this was presentation of a Hobson's choice.

Therefore, Respondent never bargained about proposal 38, and it cannot be said, as Respondent contends, that proposal 38 was implemented only after the parties had bargained to impasse. Accordingly, I find and conclude, that by the implementation of the job classification and wage changes contained in proposal 38 on 20 December 1985, Respondent violated Section 8(a)(5) and (1) of the Act.⁹

c. *The "surface bargaining" allegation*

The General Counsel alleges that Respondent has engaged in "surface bargaining." Use of the term "surface bargaining" has evolved from the fountainhead case of *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131 (1st Cir. 1953), cert. denied 346 U.S. 887 (1953). In that case, the First Circuit reasoned that to determine if the duty to bargain in good faith has been assumed by a party, the Board necessarily looks at the substance of the proposals themselves for "if the Board is not to be blinded by empty talk and by the mere surface motions of collective bargaining, it must take some cognizance of the reasonableness of the positions taken by an employer in the course of bargaining negotiations."

This oft-quoted language of the First Circuit, if taken too far, could serve as a predicate for those who would attempt to determine what proposals are, or are not, "acceptable." Any such attempt necessarily flies in the face of the explicit language of Section 8(d) of the Act which establishes the nature of the duty to bargain and, in so doing, provides: "such obligation does not compel either party to agree to a proposal or require the making of a concession."

⁹ *PRC Recording Co.*, 280 NLRB 615 (1986), enf. sub nom. *Richmond Recording Co.*, 836 F.2d 289 (1987).

The other extreme of the pendulum's swing is, of course, the logic that the Board should never look at the substance of the parties' proposals to appraise their conduct. Proponents of such a view would argue that the National Labor Relations Act brings the parties to the bargaining table, but what happens after that is none of the Government's business. One could say that such thinking produced in *Reichhold Chemicals*,¹⁰ the unqualified statement that: "The Board will not attempt to evaluate the reasonableness of a party's bargaining proposals, as distinguished from bargaining tactics, in determining whether the party has bargained in good faith."

However *Reichhold* is not mentioned in the most recent case in which a Board majority analyzes in detail the totality of a party's conduct to determine whether the party has engaged in bad-faith bargaining. In *Eltec Corp.*, 286 NLRB 890 (1987), the Board analyzed the employer's approach to the bargaining table, but it did not do so under the criteria emanating from *Reed & Prince*, or its progeny; nor did it conduct its analyses on the basis of *Reichhold*. Instead, the Board looked for authority to the older (but hardly old) case of *Chevron Chemical Co.*, 261 NLRB 44, 46-47 (1982), which I quote at length:

As noted above, in ascertaining whether the duty to bargain in good faith has been complied with, it must be remembered that Section 8(d) does not "compel either party to agree to a proposal or require the making of a concession Thus, the Board does not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements. *NLRB v. American National Insurance Co.*, 343 U.S. 395, 404 (1952).⁶ On the other hand, as stated by the Supreme Court, "[The Board has been afforded flexibility to determine whether a party's conduct at the bargaining table evidences a real desire to come into agreement And specifically we do not mean to question in any way the Board's powers to determine the latter question, drawing inferences from the conduct of the parties as a whole. *NLRB v. Insurance Agents' International Union, AFL-CIO [Prudential Insurance Co.]*, 361 U.S. 477, 498 (1960). The Board does, of course, with court sanction, consider the content of bargaining proposals as part of its review when making a determination as to the good faith of parties negotiating a contract.⁷

Contrary to the Administrative Law Judge, we conclude that the proposals described above indicate hard bargaining by both sides, each desirous of improving its position *vis-a-vis* the other as measured by the existing P & M contract. Thus, in our view, the proposals of Respondent do not warrant a finding of bad faith based upon its having offered them. Nor do we find that they can be fairly characterized as harsh, vindictive, or otherwise unreasonable.¹⁰ Apart from the contract proposals themselves, the conclusion that Respondent met its obligation to bargain in good faith is supported by other factors which we deem relevant in our consideration of the totality of the circumstances revealed by

the record. In this regard, we note that the parties have maintained an ongoing bargaining relationship concerning Respondent's P & M employees for several years, and that the record discloses no intent by Respondent to undermine that relationship. Likewise, the record as to the actual negotiations reflects no refusal by Respondent to meet and confer, or to provide information. It reflects no adamant refusal by Respondent to make concessions in its bargaining positions, or failure or refusal to provide justification for its bargaining posture. Nor does the record suggest that the parties were at an impasse when the strike was called.

Finally, no other unfair labor practices are involved here, and the record reflects no conduct by Respondent away from the bargaining table which would suggest that its negotiating positions were taken in bad faith.¹¹

Accordingly, we shall dismiss the complaint in its entirety.

⁶But see fn. 10, *infra*.

⁷See, e.g., *Seattle-First National Bank v. NLRB*, 638 F.2d 1221, 1225-26 (9th Cir. 1981); *Pease Company v. NLRB*, 666 F.2d 1044 (6th Cir. 1981).

¹⁰While unusually harsh, vindictive, or unreasonable proposals may be deemed so predictably unacceptable as to warrant the evidentiary conclusion that they have been proffered in bad faith (see, e.g. *Pease Company v. NLRB*, *supra* at fn. 4, and cases cited with approval therein), the proposals at issue in this case do not, in and of themselves, warrant such a finding.

¹¹Cf. *Safeway Trails, Inc.*, 233 NLRB 1078 (1977), on remand from the United States Court of Appeals for the District of Columbia Circuit, which had concluded that an 8(a)(5) violation can be made out based on other evidence, "even though overt evidence of that bad faith does not appear at the bargaining table itself."

Therefore, using the quotations in, and of, *Chevron*, the compound, complex issue may fairly be framed as: Did Respondent's conduct at the bargaining table evidence a real desire to come to agreement; or is bad faith evidenced by proposals which are unusually harsh or vindictive or so unreasonable as to warrant the evidentiary conclusion that they had been proffered in bad faith; or, is bad faith indicated by an attempt to undermine an established relationship, by a refusal to meet and confer, by a failure to provide information, by adamant refusals to make concessions in Respondent's bargaining positions, or by failure to provide justification for its bargaining posture; or is bad faith evidenced by a combination of conduct at, and away from, the bargaining table?

(1) Proposals to remove the Union as collective-bargaining agent

As repeatedly stated by Carey and Schumann, a principal objective of Respondent in these negotiations was to secure an agreement which would insulate Respondent from being required to deal with the Union throughout the term of any agreement reached. In other words, after signing the agreement, all that was left for the Union to do was to disappear.¹¹

¹¹As Carey, on 5 November, stated in reference to Respondent's management-rights proposal, "otherwise, it will result in continuous bargaining through the contract period." Carey stated it more plainly on 11 November: "They don't want to continue negotiating with you during the contract term." Schumann was also plain-spoken when, on 14 November, he told the Union,

¹⁰277 NLRB 639, 640 (1985).

Examples of Respondent's proposals designed to this end are manifold. Respondent would appraise all employees under its performance appraisal model which gave Respondent the "sole discretion as to when and/or if a performance appraisal will be conducted for any individual bargaining unit employee." Through its "no-work preservation clause" proposal, Respondent would have the right to relocate the bargaining unit work anywhere on the planet, and it further allowed management and research and development personnel to perform bargaining unit work "to the extent that it is essential for the running of a profitable business." Respondent's proposals permitted the same latitude to Respondent in the employment of part-time and casual employees. Job bidding and posting rights were limited to those occasions when the Employer in its "sole discretion" determined that job openings and need for employees existed. Moreover, the duration of any training periods for successful bidders and the initial determination of qualifications to be slotted in jobs will be within the sole discretion of the Employer. Respondent would retain complete discretion of which employees were to be laid off for any period; Respondent's temporary layoff proposal specified this plainly for layoffs of periods not exceeding 5 days and the method of layoff proposal would have resulted in the same thing for longer layoffs because the Employer could base layoff selection on the basis of qualifications and "qualification shall be within the sole discretion of the Employer."

The hours of the workday and the timing of lunch periods were matters left to the sole discretion of the Employer in its proposal. The Employer further demanded the right to observe holidays on any day it wished. (The Employer stated that certain days, such as Christmas and Independence Day would not be moved, but never put such qualification in writing, and Schumann refused to say what other days of holiday celebration would not be moved.)

The management-rights proposal, insisted on from first to last, specified that Respondent retained the rights unilaterally to determine job analysis for each job in the plant (as listed in proposal 38), to revise the same as often and in any manner as Respondent saw fit, and the right, again, to conduct performance appraisals as often as Respondent saw fit, to grant merit raises as often and in such a manner as Respondent saw fit, to determine wage rates for all new jobs, to determine whether an employee is qualified to do any job, and to make and enforce personnel rules and regulations and to revise the same as often as Respondent saw fit.

Respondent insisted on increasing from 60 to 180 the number of days new employees would be absolutely without rights, putative or otherwise, under the contract.

The Employer insisted, from first to last, not only the right to make unilaterally all disciplinary rules, but the right to conduct, unilaterally, all aspects of any disciplinary problem, with only notice to the Union of what it had done. The Union was left to after-the-fact grievances which could not go to arbitration, but could only be the subject of a Section 301 suit.

Assuming that a Section 301 suit were filed over a disciplinary (or any other) matter, Respondent, in addition to a complete panoply of discretionary rights could, under the

proposals upon which it insisted from first to last, defend any such suit with its proposal to eliminate from consideration all past practices by any form. Such changes would necessarily vitiate any theory of contract violation based on alleged disparate treatment. Finally, in the seeming concern that anything had been missed, Respondent insisted, from first to last, that the Union agree that it waived all rights to bargain on "all issues," whether discussed or not, during the term of the agreement. Therefore, these proposals, if accepted would have meant that the employees would be without representation for the term of any contract reached.

(2) Harsh or vindictive proposals

While "harsh" is a relative term, and certainly one which is subject to misuse, there is no question that certain of Respondent's proposals, insisted on from first to last without modification, warrant this characterization.

From first to last Respondent insisted on its proposals for departmental seniority, the unilateral right to transfer, the right to require "cross-training," the right to determine the need for layoff, and the unilateral right to select employees for layoff. These proposals must be read together. Under these proposals Respondent could eliminate any employee from the work force at any time it wished. Upon being sent to another department (via the devices of transfer or "cross-training"), the employee would lose all seniority. Then the Respondent would be free to proclaim layoff, of one employee or more, and the new transferee would be gone. In summary, the transfer, cross-training, and departmental seniority proposals (which Respondent insisted on from first to last) collectively contain an insidious scheme, and the proposals are "harsh" under any concept of the word.

"Harsh" aptly fits Respondent's position on no-strike and lockout. As well as being relegated to the right to file only nugatory grievances, the Union was prohibited not only from striking but handbilling to air complaints on behalf of employees. At the same time, Respondent insisted on the right to lock out employees at any time it saw fit. While Respondent did propose in *haec verba* a no-lockout clause, it simultaneously insisted upon a definition of lockout which excluded any exercises of its open-ended management-rights proposal or its proposal permitting relocation of the work force at any time it saw fit.

Another union-undermining, and "harsh," proposal, insisted on from first to last, was Respondent's proposed right to employ not only supervisors and research and development personnel to do bargaining unit work, but the right to employ part-time and casual labor to do any job in the unit. With this right, any employee, and, indeed, the whole unit represented by the Union, could be eliminated from the plant in the exercise of the "sole discretion" of management.

In this regard, one must view Respondent's merit pay proposals. From first of negotiations to the last, Respondent insisted on the absolute, unilateral right to grant and withdraw merit pay increases. Favoritism could flourish; employees could be pitted against employees; and all employees would be denied union assistance in objecting to any arbitrary conduct on the part of Respondent. It is difficult to imagine a finer tool for fomenting divisiveness.

"Vindictive" is a word appropriately ascribed to Respondent's bargaining approach, especially concerning wages. As stated early in this narrative, in negotiating the 192 contract,

"You're having the opportunity now to give us your input and work out this contract, but not on a day-to-day basis."

the Union agreed to a \$1 pay cut and the Respondent agreed to wage increases of 50 cents for the 2 following years. When the time for the increases came, Respondent asked the Union to forgo them, and twice the Union refused. Respondent thereafter closed the Racine Avenue plant. During the bargaining, Herrmann sent a barrage of letters to the employees blaming the Union for the closing of that plant. He did this in spite of the fact that the union representatives assured Respondent's bargaining team that the employees had voted to refuse to grant the requested concessions.

One must consider the campaign by Herrmann together with the refusal of Respondent to furnish information. If the information requested would have substantiated Respondent's claims, Respondent assuredly would have produced it. It did not, and it is logical to conclude that the plea of inability to pay more than the proposed reduced wages was a sham. It is logical to conclude, further, as I do, that the insisted-upon wage cuts (of up to \$3 per hour for almost all of the unit) were the product of vindictiveness; Respondent wanted to get even with the Union for not granting the requested bypassing of the 50-cent wage increases which had been due in the past.

In sum, I conclude that Respondent's proposals for wage reductions were both harsh and vindictive.

(3) Respondent's bargaining technique

As Schumann told Piotrowski, before the bargaining began Respondent decided what it could do.¹² Then, thereafter, while making no meaningful concessions to the Union¹³ it went to the employees with the message that the Respondent had done the best it could for the employees in its proposals, that the Union was acting only out of malice for them, and that the employees should put pressure on the Union to get the Union to accept the Employer's proposals.¹⁴ This was precisely the technique employed by the employer in *General Electric Co.*, 150 NLRB 192 (1964), *enfd.* 418 F.2d 736 (2d Cir. 1969). There, the Board, with court approval, concluded that this technique was clearly indicative of an intent not to reach an agreement on terms other than those unilaterally determined by the employer.

d. Individual bargaining

Part of the technique employed by Respondent was the use of systematic, individual interviews to ask the employees if they were satisfied with their job slotting in proposal 38 and whether they possessed skills for other jobs. The obvious purposes were twofold: Respondent wished to give the em-

ployees the impression that only Respondent was looking out for them, and Respondent further wished to show the employees that they could get positive results without the Union.¹⁵

Such going-behind-the-back constitutes an independent refusal to bargain, as I find and conclude, because, as the Board stated in *Obie Pacific, Inc.*, 196 NLRB 458 at 459 (1972):

Part of the tasks facing a negotiator for either a union or a company is effectively to coalesce an admixture of views of various segments of his constituency, and to determine, in the light of that knowledge, which issues can be compromised and to what degree. A systematic effort by the other party to interfere with this process by either surreptitious espionage or open interrogation constitutes clear undercutting of this vital and necessary confidential function of the negotiator. It is indeed designed to undermine the exclusive agency relationship between the agent and its collective principles.

The systematic interrogations here, coupled with the denegrating letter-writing campaign by Herrmann, could only have had the purposes of undermining the bargaining stance of the Union and further interfered with the negotiation processes.

e. Conclusion as to Respondent's overall conduct of bargaining

While Respondent was willing to sit and sit and talk and talk, and occasionally offer—as a concession—the restoration of some of what it had previously proposed to take away, it never bargained with the Union as the term “bargain” is envisioned by Section 8(d) of the Act.

On the authority of *Chevron Chemical* and cases cited therein, and taking into account Respondent's refusal to furnish vital information necessary for the bargaining process, its unilateral implementation of its proposals for wage rate and classification changes, its direct dealing with employees (all independent violations of Sec. 8(a)(5) of the Act), as well as its insistence on proposals which would, in effect, remove the Union as the employees' collective-bargaining agent for the duration of any contract negotiated, its further insistence on the unduly harsh and vindictive proposals for wage cuts and other terms which would allow unilateral removal of any and all employees from the unit without any effective recourse by them or the Union, and further allow unfettered favoritism by the Employer by the use of merit pay increases (again without recourse), and further allow lockout of employees at any time, and further taking into account Respondent technique of adamant insistence on terms which it unilaterally found satisfactory while denegrating the Union and soliciting the employees to put pressure on the Union to accept Respondent's uncompromising demands, Respondent has bargained in bad faith with the Union in violation of Section 8(a)(5) and (1) of the Act, as I find and conclude.

I further find and conclude that the strike which began on 20 December 1985 was caused by Respondent's bad-faith

¹² At the 11th bargaining session when Piotrowski complained that the Company had agreed to none of the Union's proposals, Schumann replied, “We went through this 6 months ago when we were coming up with these proposals. We put a hard hat on a broom and said it was you. We gave you some and us some.” Also, at the next session, Schumann stated, “the Employer's position is that we did the give and take before we walked in here.”

¹³ Respondent's “concessions” were proposals to restore what it had previously proposed to take away; e.g., showup pay and providing sharpening stones (Respondent also proposed to restore union shop and checkoff, but only if proposal 38, and all it entailed, were swallowed by the Union.)

¹⁴ While there are several examples, the epitome of this aspect of Respondent's bargaining technique is contained in Herrmann's 15 November letter to employees which stated: “Now Walter Piotrowski is about to cost 291 members to lose their jobs when the Normal Avenue plant closes. I believe that a majority of our people do not agree with this stubborn old man. Make your voices heard. Save your jobs! Tell the Union that you want to save AMPAC. Under federal law you are entitled to a secret ballot to vote to save your job.”

¹⁵ As Herrmann told the employees in his letter of 6 November (and as Respondent confirmed in its position statement 4), Respondent's proposal 38 was modified “because of your input.”

bargaining and that it was further caused and prolonged by its unilateral actions and direct dealings with employees and its refusals to furnish information necessary for the purposes of collective bargaining. Therefore, the strikers were unfair labor practice strikers and entitled to reinstatement on their unconditional application to return to work on 4 September 1986. Respondent's failure to reinstate them was, therefore, a violation of Section 8(a)(3) and (1) of the Act as I further find and conclude.

B. *The Discharge of John Frizzon*

As previously noted in the above chronology, before the Union offered that the employees would return to work from strike, Respondent announced that it would not reinstate John Frizzon because of strike misconduct on his part. This constituted a discharge. Respondent's misconduct allegation is based on a threat which Frizzon allegedly made on 21 March 1986.

Normal Avenue in Chicago runs north and south. Respondent's main entrance faces east on Normal Avenue. The building has a side entrance which is accessed through an adjacent parking lot on the south side of the building.

Schumann testified that about 7:40 a.m. on 21 March 1986 he and Carey arrived at the plant by automobile and they walked through the parking lot toward the sidewalk which runs parallel to Normal Avenue and leads to the main entrance. Schumann testified that no employees were picketing that morning on the sidewalk, but 10 to 15 strikers were standing across the street near a fire barrel; others were in a warmup shanty, also across the street. One of the strikers standing around was John Frizzon.

Schumann testified that as he and Carey approached the sidewalk, with Carey slightly ahead of Schumann, Frizzon stated to him, "Well I guess it will be just you and your scab workers." Schumann replied that he responded, "Well, I guess so."

Then, further according to Schumann, he and Carey turned at the sidewalk and walked toward the entrance. As they approached the door, with Carey slightly behind Schumann, Frizzon "[y]elled out, 'We will get Joe Carey tonight.'" Schumann further testified that he then turned and saw Frizzon out in the middle of the street in front of the fire barrel. Then Carey responded to Frizzon, "[T]ry it." Schumann further testified that as he turned back toward the door, he heard Frizzon reply, "[W]e will."

On cross-examination, Schumann was shown his pretrial affidavit. He acknowledged that in giving that affidavit he was asked what had been said. He further acknowledged that in his affidavit there is no mention of anything said by Frizzon after Carey said, "[T]ry it." Schumann was asked if he had any explanation as to why he did not remember Frizzon's reply when he gave the affidavit, and Schumann replied that he did not.

Carey, who also conducted the case at trial for Respondent, also testified about the incident. He testified that there was an exchange between Frizzon and Schumann, but he had paid no attention to what Frizzon had said, and he did not hear what Schumann's response was. After this exchange, further according to Carey, he and Schumann continued walking toward the front entrance. As his back was to him, "John Frizzon said in a loud voice right toward us, 'We will get Carey tonight.' I quickly said something to the effect 'try

it.'" Carey concluded his testimony, "I was frightened by the remark and that is the end of the testimony." Carey did not testify that Frizzon responded, "We will," as did Schumann.

Frizzon testified that he was at the warmup shack when Carey and Schumann arrived that morning. Frizzon testified that as Schumann and Carey walked toward the main entrance, he spoke to Schumann. His testimony on direct examination concluded:

Q. What did you say to Mr. Schumann?

A. What I said to Mr. Schumann was that, "Mike your last proposal sucked." I told him, it seemed like him and his scabs would have to get in there and do their work. I also asked Mike to give Carey some knives so he could help. Carey waved his hand and said okay, fine. Then when he did that they walked on upstairs into the plant.

Q. Did you say anything else to them?

A. No, that was all that I said.

Q. Did you say anything to the effect that you would get Joe Carey tonight?

A. No.

Q. Did anyone else on the picket line say that?

A. No, if they did, I did not hear it.

In response to a question on cross-examination, Frizzon testified that when he made the remark to Schumann, he was standing on the curb, across the street, "around" a fire barrel which was in front of the warmup shack.

David Webb was a striking employee who was present on 21 March. He testified that he heard Frizzon say, "Schumann, you better give Carey some knives so he [can] help those scabs cut the meat up." On cross-examination Webb acknowledged that he was Frizzon's cousin and that he is a member of the bargaining committee. At one point Webb testified inconsistently with Frizzon in that Webb stated on cross-examination that he and Frizzon were on the same side of the street as Carey and Schumann, carrying picket signs and walking in the same direction (toward the entrance) when Frizzon made his remark.

Tony Richardson, another bargaining committee member, testified that he was present on the morning of 21 March and, "Mr. Frizzon hollered to Mike that if he thought we were going to accept that contract he was crazy. He then told Mike Schumann he better give Joe Carey some knives to help the scabs do their work inside the plant." Richardson placed Frizzon on the street, about 5 feet in front of the fire barrel, essentially the same place where Frizzon, Schumann, and Carey did. Richardson further placed Webb at the fire barrel with the other employees, and not across the street, on the sidewalk, picketing with Frizzon as Webb testified.

The last striking employee to testify was Tommy Williamson. He testified that all Frizzon said was, "Schumann, get Carey some knives to help out the scabs." On cross-examination, Williamson testified that when Carey and Schumann got out of their automobile, they headed for the side door, not the entrance on Normal Avenue as all other witnesses testified. Williamson further testified that he, Frizzon, and about 25 others were on the sidewalk in front of the building, not across the street at the fire barrel. Williamson testified that Frizzon was right next to him and Webb was a few feet behind.

Obviously, there are great discrepancies in the accounts regarding the placement of Frizzon vis-a-vis Schumann, Carey, and the employees. In its brief, Respondent argues that the accounts of the employees are so inconsistent that their testimonies must have been contrived. I disagree. All of the employees, including Frizzon, had a credible demeanor. I believe that all of them were trying to recount accurately what they had heard. Moreover, Richardson placed Frizzon, Carey, and Schumann in essentially the same positions as did Carey and Schumann in their accounts. Finally, there is nothing inconsistent with the accounts of Carey and Schumann in Frizzon's placement of the men involved.

Rather than demonstrating contrivance, I believe that the testimonies of Webb and Williamson reflect a certain ingenuousness. They did not rehearse anything; nor had they been told by anyone what they should say. I feel they were mistaken, but these were mistakes of honest attempts of reflection. I believe that they heard what Frizzon said, but it did not make any particular impression on them at the time because Frizzon's statements were innocuous. The situation was so undramatic to them that their memories did not record the details of where they were, and where Frizzon was, at the time they heard Frizzon's remark. In short, Webb and Williamson remembered what they heard; they just did not remember precisely where the persons involved were standing at the time.

There was nothing particularly revealing in the demeanors of Schumann and Carey. However, because of Schumann's inability to explain his failure to include Frizzon alleged "We will" reiteration of the alleged threat in his affidavit, and the failure of Counsel Carey to include the remark in his testimony, I am absolutely confident that the "We will" statement was testimonial lilly-guiling by Schumann; it did not happen.

All employees placed Carey, Schumann, and Frizzon from 30 to 50 feet apart at the time of Frizzon's statement. It could well have been that Schumann and Carey heard the words "Carey," and "get," and, from that distance, they could have misunderstood the word "knife" and thought Frizzon had said "night." Through their processes of logical reconstruction, they may have come to the conclusion that Frizzon had stated the threat which they testified they heard. However, I need not speculate. As I stated, I found all the employee witnesses credible on the essential issue of what Frizzon said.

I find that the claimed 21 March conduct by Frizzon did not occur. Since, at the time, Frizzon was engaged in a course of statutorily protected activity, his discharge violated Section 8(a)(1) of the Act, as I so find and conclude. *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964).

CONCLUSIONS OF LAW

1. American Meat Packing Corporation 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 American Meat Packing Corporation constitute an appropriate unit for collective bargaining:

All production and maintenance employees, excluding office clerical employees, administrative employees, guards, professional employees and supervisors as defined in the Act, salesmen, chauffeurs, engineers, livestock handlers and janitors.

4. At all times material and continuing to date the Union has been the exclusive representative of all employees within the appropriate unit for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By discharging employee John Frizzon, Respondent violated Section 8(a)(1) of the Act.

6. By the following acts and conduct, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) of the Act.

(a) Refusing to furnish to the Union information necessary for the purposes of collective bargaining.

(b) Unilaterally making wage and job classification changes for the employees in the above unit.

(c) Individually bargaining with the employees in the above unit.

(d) Negotiating in bad faith, without intent to reach agreement, with the Union which is the exclusive bargaining agent of the employees.

7. The strike which began on 20 December 1985 and terminated on 4 September 1986 was caused and prolonged by the above unfair labor practices committed by Respondent.

8. By refusing to reinstate unfair labor practice strikers on their unconditional offer to return to work from strike on 4 September 1986, Respondent has violated Section 8(a)(3) and (1) of the Act.

9. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

In order to remedy the unfair labor practices found here, my recommended Order will require Respondent to cease and desist from further violations of the Act and post an appropriate notice to employees. I shall order that Respondent bargain collectively, on request, with the Union as the exclusive representative of the employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

Having found that Respondent unlawfully discharged employee John Frizzon, and having further found that the Respondent has discriminatorily refused to reinstate the unfair labor practice strikers on the Union's unconditional application on their behalf to return to work, Respondent shall be required to offer Frizzon and the other unfair labor practice strikers (to be identified at the compliance stage of this proceeding) immediate and full reinstatement to their former positions or, if such positions are no longer in existence, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging if necessary, any replacements. Further, Respondent shall be required to make them whole for any loss of pay they may have suffered as a result of the discrimination against them. The amounts due to Frizzon and the other discriminatees shall be computed as provided in *F. W. Woolworth Co.*, 90

NLRB 289 (1950), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).¹⁶

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁷

ORDER

The Respondent, American Meat Packing Corporation, Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Union, as the exclusive representative of the employees in the unit described above by, refusing to furnish bargaining information relevant and necessary to the Union, by making unilateral changes in the terms and conditions of employment of bargaining unit employees, by bargaining individually with bargaining unit employees, or by negotiating in bad faith with the Union.

(b) Discouraging membership in Beef Boners and Sausage Makers Union, Local 100-A, affiliated with the United Food & Commercial Workers Union, AFL-CIO, by discharging employees or by failing and refusing to reinstate unfair labor practice strikers on their unconditional application to work.

(c) 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 which, it is found, will effectuate the policies of the Act.

(a) On request, bargain in good faith with Beef Boners and Sausage Makers Union, Local 100-A, affiliated with the United Food & Commercial Workers Union, AFL-CIO, as

¹⁶See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before 1 January 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

¹⁷If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

the exclusive bargaining representative of the employees in the unit described above and, if an understanding is reached, embody such understanding in a written, signed contract.

(b) On request, furnish to the Union information necessary for and relevant to the purposes of collective bargaining.

(c) Offer to John Frizzon and the other employees engaged in the unfair labor practice strike as of 4 September 1986 immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, discharging if necessary, any replacements, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay or other benefits suffered by reason of Respondent's failure to reinstate them on their unconditional offer to return to work from an unfair labor practice strike in the manner described in the remedy section of the decision.

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

(e) Post at Respondent's Chicago, Illinois facilities, copies of the attached notice marked "Appendix."¹⁸ Copies of the notice on forms provided by the Regional Director for Region 13, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

¹⁸If 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."