

**Natico, Inc. and United Independent Union, Local 1 Teamsters Local 676 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, Party in Interest**

**Teamsters Local 676 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO and United Independent Union, Local 1.** Cases 4-CA-15707, 4-CA-15883, 4-CA-16037-1, 4-CA-16383, 4-CA-16570, and 4-CB-5411

April 24, 1991

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On April 29, 1988, Administrative Law Judge Irwin Kaplan issued the attached decision. The Respondent Employer and the General Counsel each filed exceptions and a supporting brief. The Respondent Employer filed an opposition to the General Counsel's exceptions, and the General Counsel filed a response to the Respondent Employer's exceptions.

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

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings,<sup>1</sup> findings,<sup>2</sup> and conclusions only to the extent consistent with this Decision and Order.<sup>3</sup>

1. The complaint alleges that:

Since on or about March 11, 1986, Respondent-Employer bargained in bad faith and without intention of reaching a final and binding agreement with the Union with respect to wages, hours and other terms and conditions of employment of the Unit, by repudiating its agreement to implement a new wage incentive plan for a period of sixty days, subject to ratification by the Unit.<sup>4</sup>

<sup>1</sup>The Respondent Employer 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.

<sup>2</sup>We correct the judge's incorrect statement that the Respondent Employer had a past practice of eliminating overtime to accommodate Local 1. As the General Counsel asserts, no evidence supports this finding. This factor provides further support for the judge's finding that the Respondent Employer violated Sec. 8(a)(2) and (1) by providing assistance to Local 676 by cancelling overtime to encourage its employees to attend a Local 676 meeting.

<sup>3</sup>The judge inadvertently omitted from his recommended Order and notice his recommended remedy that the Respondent Employer cease and desist from providing assistance to Teamsters Local 676 by cancelling overtime to encourage its employees to attend a union meeting sponsored by Local 676. The attached Order and notice correct those omissions.

<sup>4</sup>The judge noted that the General Counsel disclaimed any "surface bargaining" allegation at the hearing. We note that although the counsel for the General Counsel stated at the hearing that "there is no surface bargaining charge that we're proceeding on," he was obviously referring to an allegation

The judge found that the incentive plan was subject to employee ratification, which never took place. He, accordingly, dismissed this allegation on the grounds that the Respondent Employer was not responsible for Local 1's (the Union) failure to conduct a ratification vote on the incentive plan. The judge further applied a totality-of-circumstances test in which he considered that the Respondent Employer bargained in good faith over this issue for 2-1/2 months, spent time compiling financial data and information as requested by Local 1, and offered inducements to help Local 1 sell the incentive plan to the employees. On all these bases, the judge found that the Respondent Employer's president, Preston Dry, was justified in telling Local 1 that the employees were not interested in the incentive plan and in taking it off the table. He, therefore, found that the General Counsel failed to show that the Respondent Employer did not have good cause or had acted in bad faith by withdrawing from the agreement on the incentive plan. We disagree.

First, we note that the General Counsel does not contend that the agreement to implement the incentive wage proposal for a trial period was a final agreement that the Respondent Employer was obligated to implement. Accordingly, the General Counsel does not seek to require the Respondent Employer to implement the trial incentive agreement. Rather, the parties agreed to test the proposed terms of the incentive wage proposal in order to better enable both parties to assess whether such a system, either in that form or with modifications, should be included in the collective-bargaining agreement. As such, it was an agreement by the parties on how to proceed with negotiations. The General Counsel urges that the repudiation of that procedure, regardless of whether a ratification vote was ever held, constituted bargaining in bad faith and without an intention of reaching a final and binding collective-bargaining agreement. The General Counsel, accordingly, seeks an order to bargain in good faith. We agree with the General Counsel's reasoning in this matter.

The credited or undisputed testimony is as follows. The Respondent Employer, a manufacturer of industrial drums, has recognized the Charging Party Union, United Independent Union, Local 1 (Local 1), as the bargaining representative of its production and maintenance employees at its Pennsauken, New Jersey facility since 1970. The most recent collective-bargaining agreement between these two parties was effective between December 16, 1982, and December 16, 1985. Negotiations for a new contract began November 5, 1985, and, during the first five sessions, the parties reached agreement on some noneconomic issues but on no economic proposals. The Respondent Employer's position with regard to economic proposals was that it

of overall surface bargaining, because he in no way disclaimed the above-cited allegation either at the hearing or in the pleadings.

was undergoing financial losses and, therefore, was asking, inter alia, for a 25-percent reduction in hourly wages, with a two-tier wage structure that provided lower rates for newly hired employees.

At the 11th session, on December 11, Local 1 President Francis Chiappardi offered an incentive wage proposal by which the employees' hourly rate would be determined by how many drums were produced (drums per man hour or DPMH). According to Local 1, this plan would allow the Respondent Employer to be competitive as well as improve the employees' incomes.

During the next 3 months, the negotiations focused almost exclusively on this issue. Most of the parties' other proposals, including their initial wage proposals, were put on hold. Instead, negotiations dealt with such topics as determining the base number of drums per man hour to qualify employees for an increase over their current wage rate; the point in the manufacturing process at which the drums should be counted; how breakdown time was to be treated in the DPMH calculation; and the effect supervisors and temporary employees performing unit work would have on the DPMH.

During sessions in January 1986, the parties agreed to a 3.9 DPMH base rate and that bonuses would start at 4.0 DPMH. They further agreed that employees with a 3.2 DPMH, which was the average for the prior year, would receive a cut in pay amounting to \$1.43 per hour. The parties agreed on a 60-day trial period and discussed starting it on January 27. However, this did not occur because all the incentive plan problems had not been worked out by that date. At a mid-January Local 1 meeting, the employees raised various concerns about the plan such as the issues of machine breakdown and the use of temporary employees and foremen who had no stake in increasing the DPMH, as well as concern about a \$10 per employee weekly health and welfare benefit contribution, which was to be put into effect during the trial period.

Local 1 then attempted to discuss the entire contract package. However, the Respondent Employer refused to do this until they agreed on the incentive plan. Toward this end, on January 19, the Respondent Employer offered to suspend the \$10 per week health and welfare payments during the trial period and change the vacation pay period. By the February 27 meeting, the parties had agreed that the trial period would start March 10, as proposed by Local 1, upon the ratification of the plan by Local 1's membership. The Respondent Employer's president, Preston Dry, promised to have the winder machine, necessary for the incentive plan to work properly, prepared by that date.

In the meantime, Local 1 arranged with Plant Manager Donald Benson to hold the ratification meeting in the plant cafeteria at 11:30 a.m. on Thursday, March 6. A couple of days before March 6, Benson asked

Local 1 Representative Ronald Ferguson to change the date of the meeting because customers would be visiting the plant on that morning. Ferguson said he could not arrange a meeting before Thursday because of his and Local 1 President Chiappardi's schedules.<sup>5</sup> Ferguson would not agree to change the meeting to Thursday afternoon because the employees were paid at noon on Thursday and often consumed alcohol at lunch.

The judge credited Ferguson that Benson then agreed to let the Union hold its meeting on Thursday, March 13. However, the judge also found that Benson did not agree to postpone the March 10 start of the trial period of the incentive plan. Thus, the judge found that although Benson, as plant manager, was a statutory supervisor and assisted Dry in negotiations, he was not the Respondent Employer's agent for purposes of modifying the terms of the trial incentive agreement reached between the Respondent Employer and the Union and that Dry was "virtually the only spokesmen and negotiator for the Company."

According to the undisputed testimony of Benson, he had telephoned Dry on the day the ratification meeting postponement was discussed and had told him that the ratification meeting would not be held by March 10, and that Ferguson had commented, "Well, I guess it doesn't make any difference whether the incentive goes in this week or a week from now." However, as Dry testified, when Benson had informed Dry on March 10 that the trial period would not start that day, Dry immediately made airplane reservations to travel to the plant's location. There, on March 11 or 12, he told Local 1's representatives that he was withdrawing from the incentive agreement and taking the issue off the table as a negotiating subject. Dry told Local 1's representatives that they were responsible for the agreement being withdrawn. He told them that it was unreasonable for them to have allowed only one-half hour between February 27 and March 10 to hold the ratification meeting; that the Union and employees were not interested in the incentive plan; and that he had heard that Shop Steward Robert Zozofsky had told maintenance employees not to work on Saturday to repair the winder, which had to be operational for the trial period to start. Zozofsky was present at this meeting and denied the remarks attributed to himself and asked Dry to bring in whoever had reported that he had made the remarks "and let's get it straightened out right now." Dry refused. Ferguson argued to Dry that Local 1 did favor the incentive plan and that he was sure the employees would ratify it. Ferguson pointed out that it was Benson, not the Local, who had canceled the March 6 meeting, and he had tried to get Dry

<sup>5</sup> Chiappardi was the Union's national president and Ferguson represented the Union at 32 other locations.

to reconsider his decision. Dry did not change his decision.

In his exceptions, the General Counsel contends, citing *Arrow Sash & Door Co.*, 281 NLRB 1108 fn. 2 (1980), that the proper standard for withdrawing from an agreement reached during negotiations is good cause, and that the Respondent Employer has not met that standard. The General Counsel argues that Dry knew before March 6 that the incentive plan would be delayed until after March 10, but did nothing about it until March 11 or 12.

We agree with the General Counsel's exceptions. Thus, we find that Dry's purported reasons, given on March 11 or 12, do not meet the good-cause test either individually or collectively. Dry blamed Local 1 because it had allocated only one-half hour between February 27 and March 10 for the ratification meeting.<sup>6</sup> This reasoning ignores the Respondent Employer's role in postponing of the meeting, i.e., the Respondent Employer itself originally had requested the change after the parties had agreed to March 6. It also ignores the fact that Local 1 offered substantial reasons, which the Respondent Employer did not challenge, why it could not have the meeting at the time suggested by Benson. These reasons were the consumption of alcohol on payday and the conflicting schedules of Local 1's officers. Finally, Dry's reasoning ignores the facts that Local 1 and Benson had agreed to March 13 as the date for the rescheduled ratification meeting, and that the Respondent Employer knew of this change and, by Dry's silence, ratified Benson's agreement to the March 13 vote.<sup>7</sup>

Concerning this last point, the judge credited Ferguson's testimony that, 1 or 2 days before March 6, Benson agreed to reschedule the ratification vote to March 13. The evidence is undisputed that Benson was in constant telephone contact with Dry concerning the attempts to reschedule the March 6 meeting, and had informed Dry that each of the Respondent Employer's

suggestions to reschedule the vote before March 10 had failed. Although Dry denied that Benson had informed him of the March 13 date, Benson testified that, in relaying the information to Dry about his exchanges with Ferguson after the final attempt to agree on a date, he repeated to Dry Ferguson's comment that a week's delay in the incentive plan would not matter. Further, the judge credited Ferguson's testimony that he and Benson had agreed on the March 13 date. Therefore, the credited testimony is that Dry was informed that the meeting was rescheduled and Benson's undisputed testimony indicates that Dry knew, on March 4 or 5, that the implementation of the incentive plan had been postponed for 1 week. The evidence also shows that Dry took no action with respect to this knowledge until March 12. By this failure to take action, we find that Dry has ratified Benson's action in postponing the March 6 meeting to March 13.<sup>8</sup>

The Respondent Employer does not present any reasons why the delay would have been significant or would have caused it any harm or, indeed, any basis for a finding that it had good cause for withdrawing from the agreement. Nor is there evidence in support of the Respondent Employer's assertion that the vote was delayed for a week because Local 1 or the employees did not want the incentive plan. Although the employees had expressed some problems with the plan earlier in negotiations, as detailed above, the Respondent Employer had offered concessions in an attempt to answer these concerns. Further, if Local 1 or its employees were indeed not interested in the plan, their lack of interest would have become obvious when the vote was held on March 13.

Dry also claimed he had been informed that Shop Steward Zozofsky had told the maintenance employees not to work on Saturday to have the winder machine repaired, and stated that his actions as well as their failure to work demonstrated that Local 1 was not interested in the plan. However, it is undisputed that the machine was repaired by March 10; therefore, the condition of the winder did not provide good cause for backing out of the incentive agreement. Nor does Dry's purported belief that Zozofsky was attempting to sabotage the incentive plan amount to good cause for withdrawing from the agreement. Not only could Dry not remember the supervisors who had told him that Zozofsky was sabotaging the plan,<sup>9</sup> but he also did not act on Zozofsky's request to have the matter cleared up with whoever had made the report.

In *Arrow Sash*, supra, the Board found that an employer's unsubstantiated belief that the Union was responsible for a "sickout" did not justify the employ-

<sup>6</sup>Although the judge found that ratification was a condition precedent to implementing the plan, we note that both Dry and Benson denied that the incentive plan was contingent on employee ratification (although Dry also asserted that he would not start the incentive plan "if the employees didn't agree to it"). These admissions that the plan could have gone ahead without employee ratification further detract from the Respondent Employer's claim that postponement of the ratification vote provided good cause for withdrawing from the incentive plan agreement.

<sup>7</sup>Thus, it is well settled that the failure of a party to disavow conduct taken on its behalf and of which it has knowledge amounts to condonation and ratification of that action. See *Hudson Oxygen Therapy Sales Co.*, 264 NLRB 61, 70-71 (1982); *Martin Processing, Inc.*, 224 NLRB 1242, 1244-1245 (1976). Cf. *Wometco-Lathrop Co.*, 225 NLRB 686, 688-689 (1976), in which the Board noted, "Silence by a principal can be an affirmance of an agent's unauthorized conduct if fairly construed that it is indicative of an intent by the principal to treat the unauthorized conduct as authorized. Restatement, Second, Agency § 82 et seq. (1958)." In *Wometco-Lathrop*, however, the respondent informed the union within 19 days that its agent had acted without authority. The Board found, under the facts of that case, the disavowal was made within a reasonable period of time. Here, there was no such disavowal of Benson's actions within "a reasonable time." Dry never repudiated Benson's actions until March 12, at which time he withdrew from the plan completely.

<sup>8</sup>Whether Benson had authority to postpone the start of the incentive plan is, therefore, not crucial to resolving this issue.

<sup>9</sup>Dry testified he had been informed by the plant manager and supervisors but could not remember who the supervisors were.

er's withdrawal from several tentative agreements. Similarly, Dry's unsubstantiated assertions concerning Zozofsky's conduct or the opinions held by Local 1 and by its employees about the incentive plan do not amount to good cause for the Respondent Employer's withdrawal from the incentive agreement. Further, the Respondent Employer failed to show how it would have been harmed by allowing the vote on March 13.

We therefore reverse the judge and find that the General Counsel has met his burden of showing that delaying the ratification vote did not provide the Respondent Employer good cause for withdrawing from the incentive agreement. We find that the Respondent Employer, by withdrawing from the incentive plan agreement, bargained in bad faith and without the intention of reaching a final and binding collective-bargaining agreement, in violation of Section 8(a)(5) and (1).

2. The judge further found that the Respondent Employer violated Section 8(a)(5) and (1) by unilaterally ceasing to make pension fund contributions. Contrary to the judge, we find that this allegation is, as the Respondent Employer contends, barred by Section 10(b).

The facts, as found by the judge or as undisputed in the record, follow. The Respondent Employer was required by its 1982–1985 collective-bargaining agreement with the Union to make payments into the pension fund. In April 1984, 20 months before the contract expired, the Respondent Employer made its last contribution. The charge alleging a failure to make pension payments was filed August 19, 1986. Despite judgment against it in Federal court in late 1985 in a suit to compel it to contribute to the fund, the Respondent Employer did not resume the required payments at any time during the term of the agreement or after it expired. The pension fund was a subject of sporadic discussion and a proposal by the Respondent Employer in contract negotiations commencing in December. In an April 2, 1986 letter, in the course of implementing its so-called “final offer,” to be effective April 7, 1986, the Respondent Employer also informed the Union, “[s]o there will be no mistake,” that it was ceasing to make payments into the pension fund on April 7. The judge found that this letter and similar oral statements made in negotiations in late March 1986 constituted the first unambiguous notice to the Union that the Respondent had repudiated its obligation to make payments into the fund. We disagree. The moment when the Union was on notice that the Respondent Employer was committing an unfair labor practice—or, put another way, when a union “mistake” as to the meaning of the Respondent Employer's failure to make its required contributions to the pension fund was no longer reasonably possible—was long past by late March or early April 1986. Even more importantly, that moment was long past by the

contract's expiration date, the operative date for the running of the Section 10(b) period. We do not view either the April 2 letter, the preceding oral “final offer” statements, or the parties' discussion of the pension fund in negotiations as tolling the Section 10(b) period.

In *Chemung Contracting Corp.*, 291 NLRB 773 (1988), the Board held that Section 10(b) bars a finding that an employer has violated the Act by failing to make contributions when (1) the relevant agreement expired more than 6 months before the charge was filed and (2) the union had notice outside the Section 10(b) period of the employer's failure. Here, it could not be clearer that the operative facts of the alleged violation—the Respondent Employer's refusal to fulfill its contractual obligation to contribute to the fund and the Union's awareness of this failure—occurred outside the 6-month limitations period. Further, nothing in the facts of this case persuades us that the Respondent Employer's conduct was inconsistent with its repudiation of its obligation so as to push the occurrence of either actual repudiation or notice to the Union into the Section 10(b) period. The failure to make the payments month after month was itself tantamount to repudiation, and the Union was put on notice of the repudiation by the “sheer length of time during which [the Respondent Employer] consistently failed to make payments.”<sup>10</sup> We do not find that the Respondent Employer's postexpiration conduct, consisting of a bargaining proposal on the form that future pension obligations might take and a few noncommittal remarks, sufficed to lead the Union to believe that the Respondent Employer was not persisting in its repudiation of the obligation to contribute to the pension fund.

The allegation is, accordingly, dismissed.<sup>11</sup>

3. The judge dismissed an allegation that the Respondent Employer violated Section 8(a)(5) and (1) by ceasing payments to the Union's legal fund as of January 30, 1987. We disagree.

The pertinent facts on this issue are undisputed. The Respondent Employer had continued to make payments to the legal fund even after the contract expired December 16, 1985. However, these payments were stopped on January 30, 1987, when the Respondent Employer withdrew recognition from Local 1 and recognized the Teamsters. No specific charge alleged this as an unfair labor practice. However, at the opening of the hearing on June 8, 1987, the General Counsel amended the fourth consolidated complaint to allege

<sup>10</sup> *Park Inn Home for Adults*, 293 NLRB 1082 (1989) (where the respondent stopped making contributions 2 years before the contract expired, the union was on notice of the repudiation of the obligation, despite intervening arbitration and discussion of the issue in negotiations).

<sup>11</sup> Member Devaney agrees with the judge that, under the circumstances of this case, the preferable approach is to view the Respondent's April 2, 1986 letter as definitively putting the Union on notice that it had repudiated its obligation to contribute to the pension fund. Thus, Member Devaney would agree with the judge that this allegation is not barred by Sec. 10(b).

this cessation of payments to the legal fund as a separate violation. In doing so, the General Counsel relied on the original charge in Case 4-CA-10307-1, filed August 19, 1986, which alleged, inter alia, an unlawful refusal to make contractually required monthly pension payments.

The Respondent Employer then amended its answer to assert the allegation was time-barred under Section 10(b). The judge found merit to this contention. He noted that the charges filed August 19, 1986, upon which the General Counsel relied in amending the complaint, dealt with misconduct occurring at least 5-1/2 months *before* the alleged cessation of payments to the legal fund and did not encompass this misconduct. He further noted that later charges, which resulted in the issuance of the third consolidated complaint, also failed to allege this misconduct. The judge concluded that this allegation was not grounded on or encompassed in any timely charge and should, accordingly, be dismissed.

We disagree.<sup>12</sup> It is well settled that a complaint may be amended to include allegations “which are related to those alleged in the charge and which grow out of them when the proceeding is pending before the Board.”<sup>13</sup> That relation between charge and complaint has been found where the allegation is “of the same class of violations as those set up in the charge” and is a “[continuation] of them in pursuance of the same objects.”<sup>14</sup>

This test has been met here. The legal fund allegation is “of the same class” and has “the same object” as an allegation timely included in the charge in Case 4-CA-16362, filed February 4, 1987, and in the fourth consolidated complaint.<sup>15</sup> That charge included an allegation that the Respondent Employer withdrew recognition from Local 1 on January 30, 1987.<sup>16</sup> That misconduct, yet another instance of repudiation of the Respondent Employer’s bargaining obligation, occurred on the same day as the Respondent Employer is alleged to have ceased payments to Local 1’s legal fund. No basis exists, therefore, for finding that the allega-

tion is untimely or otherwise presents a denial of due process for the Respondent Employer.<sup>17</sup>

It is undisputed that the Respondent Employer ceased contributions to the Union’s legal fund on January 30, 1987. It is also well settled that contractually required contributions to a union fund for the employees’ benefit are encompassed within the terms and conditions of employment and in the absence of waiver survive the collective-bargaining agreement.<sup>18</sup> As there is no claim of waiver, we conclude that the Respondent Employer continued to be obligated to make these legal fund contributions, and that its failure to do so, commencing January 30, 1987, violated Section 8(a)(5) and (1).

#### AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 6.

“6. By withdrawing recognition from Local 1 as the exclusive collective-bargaining representative of the employees in the appropriate bargaining unit on January 30, 1987, and refusing to bargain with Local 1 since that date; by bargaining in bad faith and without an intention of reaching a final and binding collective-bargaining agreement by repudiating without good cause on March 6, 1986, its agreement to implement a wage incentive plan for a period of 60 days, subject to ratification by the unit; by unilaterally reducing the wages of its employees by \$1.43 per hour since April 7, 1986, before any lawful impasse, with a corresponding reduction of vacation benefits for employee Robert Ferguson; and by unilaterally ceasing since January 30, 1987, to make legal fund contributions, the Respondent Employer engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.”

#### ORDER

A. The National Labor Relations Board orders that the Respondent Employer, Natico, Inc., Pennsauken, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize United Independent Union, Local 1 as the exclusive collective-bargaining representative of its employees in the appropriate unit. The appropriate unit, as set forth in section 2, article 2.1, of the last expired collective-bargaining agreement between Respondent Employer and Local 1, effective by its terms for the period December 16, 1982, to December 16, 1985, is:

<sup>12</sup>There can be no contention that the Respondent Employer did not have an adequate opportunity to defend against the additional allegations. The complaint was amended on June 8, 1987, the first day of the hearing, to include the instant allegation. On June 1, the General Counsel had provided the Respondent Employer with notice to amend the complaint. The amendment was clearly within 6 months of the January 30, 1987 cessation of legal fund contributions.

<sup>13</sup>*NLRB v. Fant Milling Co.*, 360 U.S. 301, 307 (1959), citing *National Licorice Co. v. NLRB*, 309 U.S. 350, 369 (1940).

<sup>14</sup>*Ibid.*

<sup>15</sup>Because we have found above that the pension fund allegation included in the August 19, 1986 charge was untimely, we need not address whether the legal fund allegation was closely related to it.

<sup>16</sup>The Supreme Court found in *Fant Milling*, as it had found in *National Licorice*, “the unilateral wage increase was ‘of the same class of violations as those set up in the charge . . . .’ The wage increase was ‘related to’ the conduct alleged in the charge [refusal to bargain] and developed as one aspect of that conduct ‘while the proceeding [was] pending before the Board.’” *Ibid.*

<sup>17</sup>See, e.g., *Davis Electrical Constructors*, 291 NLRB 115 (1988); *Fimco, Inc.*, 282 NLRB 653 fn. 3 (1987); and *Cobb Theatres*, 260 NLRB 857 fn. 1 (1982), *enfd.* 711 F.2d 657 (6th Cir. 1983). See also *Jack LaLanne Management Corp.*, 218 NLRB 900, 913 (1975), *enfd.* 539 F.2d 292, 295 (2d Cir. 1976); *Baughman Co.*, 248 NLRB 1346 fn. 2 (1980).

<sup>18</sup>See *M. J. Santulli Mail Services*, 281 NLRB 1288, 1295 (1986); *KBMS, Inc.*, 278 NLRB 826, 849 (1986); and *Hen House Market No. 3*, 175 NLRB 596 (1969), *enfd.* 428 F.2d 133 (8th Cir. 1970). No party argues that contributions to the legal fund did not constitute a mandatory subject of bargaining.

All employees with the exception of timekeepers, clerks, office employees and non-working foremen and non-working supervisors in charge of any class of labor.

(b) Bargaining in bad faith and without an intention of reaching a final and binding collective-bargaining agreement by repudiating without good cause its agreement to implement a wage incentive plan for a period of 60 days, subject to ratification by the unit.

(c) Failing and refusing to bargain collectively with Local 1 by unilaterally reducing the wages of its employees and correspondingly reducing vacation benefits, and by unilaterally ceasing to make legal fund contributions.

(d) Recognizing Teamsters Local 676 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO as the exclusive collective-bargaining representative of the employees in the appropriate unit, and from applying the terms and conditions of the collective-bargaining agreement negotiated with Teamsters Local 676 covering that unit (although this should not be construed to require or permit the varying or abandoning of any provision which increased wages and benefits over those which previously existed), unless and until Teamsters Local 676 is certified by the National Labor Relations Board as the exclusive collective-bargaining representative for the unit.

(e) Providing assistance to Teamsters Local 676 by canceling overtime to encourage its employees to attend a union meeting sponsored by Local 676.

(f) Unlawfully polling its employees about their desire to be represented by Local 1 or Teamsters Local 676.

(g) Threatening its employees that their hourly wage rate would continue to be cut until they withdrew their support from Local 1.

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

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

(a) Recognize Local 1 as the exclusive collective-bargaining representative of its employees in the appropriate unit, and, on request, meet and bargain with Local 1 concerning wages, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Make its employees whole by paying legal fund contributions as provided in its last expired collective-bargaining agreement with Local 1, which have not been paid and which would have been paid in the absence of its unlawful discontinuance of these pay-

ments<sup>19</sup> and continue those payments until such time as it negotiates in good faith to a new agreement or to an impasse.

(c) Post at its Pennsauken, New Jersey facility copies of the attached notice marked "Appendix A."<sup>20</sup> Copies of the notice on forms provided by the Regional Director for Region 4, after being signed by the Respondent Employer's authorized representative, shall be posted by Respondent Employer immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent Employer to ensure that the notices are not altered, defaced, or covered by any other material.

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

B. The Respondent Union, Teamsters Local 676 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, its officers, agents, and representatives shall take the action set forth in section B of the judge's recommended Order.

<sup>19</sup> Any additional amounts necessary to satisfy our make-whole remedy shall be determined as set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

<sup>20</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

#### APPENDIX A

#### 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 recognize United Independent Union, Local 1 as the exclusive collective-bargaining representative of our employees in the appropriate unit as set forth in section 2, article 2.1, of the last expired collective-bargaining agreement between Natico, Inc. and Local 1, effective by its terms for the period December 16, 1982, to December 16, 1985:

All employees with the exception of timekeepers, clerks, office employees, and non-working foremen and non-working supervisors in charge of any class of labor.

WE WILL NOT bargain in bad faith and without an intention of reaching a final and binding collective-bargaining agreement by repudiating without good cause

our agreement to implement a wage incentive plan for a period of 60 days, subject to ratification by the unit.

WE WILL NOT fail and refuse to bargain collectively with Local 1 by unilaterally reducing the wages of our employees and correspondingly reducing vacation benefits, and by unilaterally ceasing to make legal fund contributions.

WE WILL NOT recognize Teamsters Local 676 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO as the exclusive collective-bargaining representative of the above-noted appropriate unit and

WE WILL NOT apply the terms and conditions of any collective-bargaining agreement between Natico, Inc. and Teamsters Local 676 covering that unit (although this should not be construed to require or permit varying or abandoning any provision which increases wages and benefits over those which previously existed), unless and until Teamsters Local 676 is certified by the National Labor Relations Board as the exclusive collective-bargaining representative for the unit.

WE WILL NOT provide assistance to Teamsters Local 676 by canceling overtime to encourage employees to attend a union meeting sponsored by Local 676.

WE WILL NOT unlawfully poll you about your desire to be represented by Local 1 or Teamsters Local 676.

WE WILL NOT threaten you that your hourly wage rate would continue to be cut until you withdrew your support from Local 1.

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

WE WILL recognize Local 1 as the exclusive collective-bargaining representative of our employees in the above-noted appropriate unit and, on request, bargain with Local 1 concerning wages, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody that understanding in a signed agreement.

WE WILL make you whole by paying legal fund contributions as provided in our last expired collective-bargaining agreement with Local 1, which have not been paid and which would have been paid in the absence of our unlawful discontinuance of those payments, and continue those payments until we negotiate in good faith to a new agreement or to an impasse.

NATICO, INC.

## APPENDIX B

### NOTICE TO MEMBERS 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 act as the exclusive bargaining representative of the unit employees employed by Natico, Inc., at its Pennsauken, New Jersey facility unless and until we are certified by the National Labor Relations Board as the exclusive collective-bargaining agent for the unit employees. The appropriate unit, as set forth in section 2, article 2.1, of the last expired collective-bargaining agreement between Natico, Inc. and United Independent Union, Local 1, effective by its terms for the period December 16, 1982, to December 16, 1985, is:

All employees with the exception of timekeepers, clerks, office employees, and non-working foremen and non-working supervisors in charge of any class of labor.

WE WILL NOT give effect to any collective-bargaining agreement with Natico, Inc. covering the aforementioned unit employees.

WE WILL NOT in any like or related manner restrain or coerce employees of Natico, Inc. in the exercise of the rights guaranteed them in Section 7 of the Act.

TEAMSTERS LOCAL 676 A/W INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO

*Henry R. Protas, Esq.*, for the General Counsel.

*David F. Girard-DiCarlo, Esq.* and *Howard I. Hatoff, Esq.* (*Blank, Rome, Comisky & McCauley*), of Philadelphia, Pennsylvania, for the Respondent Employer.

*William Einhorn, Esq.* (*Sagot and Jennings*), of Philadelphia, Pennsylvania, for the Charging Party.

*David Seliger, Esq.* (*Tomar, Seliger, Simonoff, Adourian & O'Brien*), of Philadelphia, Pennsylvania, for the Respondent Union and Party in Interest.

## DECISION

### STATEMENT OF THE CASE

IRWIN KAPLAN, Administrative Law Judge. These consolidated cases were heard on 8 through 12 June and 22 through

24 June 1987 in Philadelphia, Pennsylvania. The underlying original charges in Case 4-CA-15707 were filed by the United Independent Union, Local 1 (Charging Party, Local 1, or the Union) on 1 April 1986. The Charging Party filed additional charges on 12 June 1986, 19 August 1986, 4 February 1987 and 27 April 1987 (Cases 4-CA-15883, 4-CA-16037-1, 4-CA-16363, and 4-CA-16570). These charges were all filed against Natico, Inc. (Respondent Employer or Natico). On 7 April 1987, the Charging Party also filed charges against Teamsters Local 676 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Teamsters, Respondent Union, or Party in Interest) in Case 4-CB-5411.

The charges in Case 4-CA-15707 gave rise to a complaint and notice of hearing on 30 May 1986. On 30 September, an order consolidating cases, consolidated complaint and notice of hearing in Cases 4-CA-15707 and 4-CA-15883 issued. On 29 October 1987, an order further consolidating cases, second consolidated complaint and notice of hearing in Cases 4-CA-15707, 4-CA-15883, and 4-CA-16037-1 issued. On 9 April 1987, an order further consolidating cases, third consolidated complaint and notice of hearing in Cases 4-CA-15707, 4-CA-15883, 4-CA-16307-1, and 4-CA-16363 issued. On 19 May 1987 an order further consolidating cases, fourth consolidated complaint and notice of hearing in Cases 4-CA-15707, 4-CA-15883, 4-CA-16037-1, 4-CA-16363, 4-CA-16570, and 4-CB-4511 issued (amended further at the hearing).

In essence, it is alleged that Respondent Employer bargained unlawfully and in bad faith with Local 1, the then incumbent union, in violation of Section 8(a)(5) of the National Labor Relations Act (the Act) by, inter alia, repudiating its agreement to implement a wage incentive plan; unilaterally implementing a \$1.43-per-hour wage cut; unilaterally reducing employee Ronald Ferguson's vacation pay by \$1.43 per hour; and cessation of contributions to the pension plan and legal fund. It is also alleged that Respondent unlawfully withdrew recognition from Local 1 in violation of Section 8(a)(5) of the Act. It is alleged that Respondent Employer violated Section 8(a)(3) of the Act by refusing to permit its employee Robert Zozofsky to work as a day-shift extruder operator. Further, it is alleged that Respondent Employer and the Respondent Union violated Section 8(a)(2) and Section 8(b)(1)(A), respectively by Natico's recognition and the acceptance thereof by the Teamsters. In addition, it is alleged that Respondent Employer independently violated Section 8(a)(2) by failing to schedule overtime on 22 April 1987 in efforts calculated to assist the Teamsters in an upcoming election.

It is alleged that the Respondent Employer violated Section 8(a)(1) of the Act by unlawfully polling its employees regarding their desires to be represented by either Local 1 or the Teamsters. Still further, it is alleged that the Respondent Employer independently violated Section 8(a)(1) of the Act by threatening an employee that a wage cut would remain until unit employees withdrew their support for Local 1.

Respondent Employer and Respondent Union filed timely answers conceding, inter alia, jurisdictional facts and the supervisory and agency status of certain individuals but denying the commission of any unfair labor practices.

Based on the record as a whole, including my observation of the demeanor of the witnesses, and after careful consideration of the posttrial briefs, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

The Respondent Employer, Natico, Inc., a Delaware corporation is engaged in the manufacture of fiber, steel, and plastic drums at a plant located in Pennsauken, New Jersey (the Pennsauken plant). The Respondent Employer also maintains facilities in Chicago, Illinois, and Florence, Kentucky. During the past year, in connection with Respondent Employer's Pennsauken plant, it sold and shipped products, goods, and materials valued in excess of \$50,000 directly to points outside the State of New Jersey. The Respondent Employer admits, the record supports, and I find that it 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 ORGANIZATIONS INVOLVED

It is admitted, the record supports, and I find that the Charging Party, United Independent Union, Local 1, and the Respondent Union, Teamsters Local 676 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, are, and have been at all times material, labor organizations within the meaning of Section 2(5) of the Act.

### III. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. Background and Sequence of Events

The Respondent Employer, Natico, manufactures steel, fiber, and plastic drums, as well as components for those drums. The Company has three manufacturing facilities—one in Chicago, Illinois, one in Florence, Kentucky, and a third in Pennsauken, New Jersey. The allegations here relate solely to Natico's Pennsauken location, a facility in operation since 1958.

Natico's production and maintenance employees employed at Pennsauken had been represented by the Pulp and Sulfite Workers Union from 1958 until 1970 when that union was decertified. Since 1960, the truckdrivers at that location have been represented by the Teamsters, the Respondent Union. In 1970, on the basis of authorization cards, the Respondent Employer recognized Local 1, the Charging Union, as the collective-bargaining representative for the production and maintenance employees at Pennsauken. The truckdrivers at that location continued to be represented by the Teamsters. Natico's other facilities have also long been unionized.<sup>1</sup>

The most recent collective-bargaining agreement between Natico and Local 1 covering the production and maintenance unit at Pennsauken was effective by its terms from December 16, 1982, until December 16, 1985 (G.C. Exh. 3). On 5 November 1985, Natico and Local 1 commenced negotiations for a new contract. Local 1 was represented by President

<sup>1</sup> At the Respondent Employer's Chicago facility, the production and maintenance employees have been represented by the United Auto Workers and the truckdrivers by the Teamsters for approximately 40 years. The United Paper Workers have represented the production and maintenance employees and truckdrivers at Natico's Florence, Kentucky facility since it opened in 1969.

Francis Chiappardi (also president of the National Federation of Independent Unions), Secretary-Treasurer Ronald Ferguson, and Shop Stewards Charles McCool, Robert Zozofsky, Douglas Spavlik Sr., and Charles Loggia. These union representatives with the exception of Chiappardi were all employees of Natico. In large part, Chiappardi and Ferguson served as spokesmen for the Union's bargaining committee. The Respondent Employer's chief spokesman was Preston Dry, Natico's president and he was assisted by Plant Manager Donald Benson and Maintenance Manager Okeh Ratliff. The first meeting was the only bargaining session not attended by Dry. Essentially, all that occurred at that session was an exchange of proposals (G.C. Exhs. 5 and 6). The Respondent Employer's proposals only dealt with noneconomic items and was labeled as such (G.C. Exh. 5).

The parties next met on 20 November. Dry outlined a host of wasteful practices at the Pennsauken facility impacting on its ability to be competitive. Thus, Dry complained, *inter alia*, of widespread alcohol and drug abuse, employees leaving work early but having someone else punch them out (theft of time), property damage, and the difficulties getting some employees to work overtime. The union bargaining committee acknowledged that these problems existed and noted a few additional problems impacting on morale and overall efficiency at the Pennsauken facility. For example, the union committee complained of the Company's use of temporary employees noting that they have less at stake in production than regular employees. With regard to the serious drugs and alcohol problem, the Union was amenable to the Company's proposal to institute testing but asked the Company to come up with some plan for treatment. The parties professed their desire to work toward resolving these various problems.

The next bargaining session was held on 3 December. Basically, the Company explained and the parties discussed each of the Company's 18 noneconomic proposals (G.C. Exh. 6), item by item. These discussions continued at the next session on 6 December with the parties arriving at agreement on some of the noneconomic proposals.

The Respondent Employer first presented its economic proposals (G.C. Exh. 8) to Local 1 at the bargaining session on 9 December, which included a 25-percent reduction in hourly wages and a two-tier wage structure whereby new employees could be hired at a lower wage rate. Other features of Respondent Employer's economic package included proposed changes in insurance benefits, holiday and vacation benefits, the elimination of the contractual cost-of-living adjustment and Union Legal Fund and to "replace the current pension with Company/Union money purchase plan." As for the Union Legal Fund, Dry testified that he "basically pointed out that it was a cost item that I thought could be deleted from the contract [G.C. Exh. 3, p. 10] without much pain to the employees as a whole." There was little or nothing else said about that subject at that session. Similarly, there was little or nothing said about replacing the pension with the money purchase plan. Thus, the money purchase plan was not explained nor were any details given. With regard to the contractual pension plan, the Respondent Employer had stopped making payments since 1984 and this subject was then tied up in collateral litigation. Ferguson asked Dry about the past pension funds he believed due the Union and was told by Dry that he would talk to the "chairman of the board

(of Natico)" about these back payments.<sup>2</sup> The parties were far apart on the economic items at the close of that session, particularly in the area of wages, with the Respondent Employer proposing concessions and Local 1 asking for wage increases and profit sharing as reflected in the Union's original proposals of 5 November (G.C. Exh. 5).

The next bargaining session was held on 11 December. Dry spoke of the need to be competitive and of the problems some of the larger companies were having in the drum industry. Union President Chiappardi suggested an incentive plan to address the Company's concerns over production and to remain competitive while at the same time satisfying the desires of employees for improved compensation. Although the mechanics or details of such a program had not been worked out by the Union and it was only discussed most generally at that session, the incentive concept appealed to Dry.<sup>3</sup> For the most part, bargaining over the next 3 months focused on an appropriate formula for dealing with incentives. Thus, the parties' initial wage proposals were put on hold.

The parties met consecutively for 3 days on 17, 18, and 19 December. The discussions regarding the incentive idea intensified. Dry prepared a chart showing production figures for the previous year. Ferguson expressed the view that employees would more easily understand a plan based on the number of drums produced per man hour (DPMH) rather than treating labor cost as a percentage of sales as reflected on Dry's chart (G.C. Exh. 9). Dry acknowledged that Ferguson's point had merit and almost immediately began to prepare new charts with DPMH as the focus for the incentive system. Local 1 also raised a number of "concerns" that had to be dealt with before the parties could arrive at an appropriate DPMH formula. Thus, the parties discussed, *inter alia*, theft of time, the need to monitor overtime, the status of foremen, employees working outside their job classification, how to count plastic department employees not engaged in producing drums, and the need to maintain equipment in proper working order.

At the meeting of 19 December, Dry agreed that the Company would pay its employees for the two Christmas and New Year's holidays and in turn asked the Union to agree to its proposal of a 7-day strike/lockout notice. The Union agreed.

The parties reconvened on 26 December and met again the following day. Dry presented the Union with additional charts showing, *inter alia*, the drums per man hour (DPMH) produced for the previous 11 months (G.C. Exh. 11) and DPMH with corresponding wage rates as a basis for the in-

<sup>2</sup>As noted previously, it is alleged, *inter alia*, that subsequently, the Respondent Employer unlawfully refused to make contributions to the Union Legal Fund (G.C. Exh. 2) and pension plan (G.C. Exh. 1ff, par. 10(a)).

<sup>3</sup>Although it is undisputed that *Chiappardi* introduced the incentive idea, counsel for Respondent Employer contends that *Chiappardi* did not want negotiations to succeed. He represented that for many years, the Respondent Employer and Local 1 had an amicable collective-bargaining relationship and particularly with *Dominic Consentino*, then secretary-treasurer and chief spokesperson for that Union but all this changed with the active participation of *Chiappardi* in the instant negotiations. I fail to discern any cogent basis for the Respondent Employer to take comfort in such history given *Dry's* testimony that he paid off *Consentino* for labor peace and for which the latter pleaded guilty at a criminal trial. Although *Dry* testified as a prosecution witness against *Chiappardi*, the latter was acquitted. Counsel for Respondent Employer failed to articulate any cognizable basis to justify his assertion that as a result of the criminal trial, *Chiappardi* had no intention of reaching an agreement on a collective-bargaining contract.

centive system (G.C. Exhs. 10 and 12). Dry informed the union committee that for the past year, the Pennsauken facility produced drums at the rate of 3.2 DPMH but needed 4.0 DPMH to make a profit.<sup>4</sup> Dry proposed 4.0 DPMH as the base for the incentive plan and any amount produced over that figure would result in a bonus. The Union expressed doubts that 4.0 was attainable or realistic and countered with 3.7 DPMH as the “break-even” point. Further, the Union repeated some of its concerns impacting on incentives and proposed, *inter alia*, that holiday and vacation hours not be counted against employees. The parties also discussed staffing requirements for each department under the proposed incentive system.

The parties met again on 3 January 1986.<sup>5</sup> Dry presented the union committee with still another chart, this time indicating a projected layout for 4.5 DPMH which Dry asserted was an attainable figure (G.C. Exh. 13). At that rate, the average employee would earn a base rate of \$8.93 per hour as compared with their then current rate of \$7.95 per hour. However, the union committee expressed doubt that even 4.0 could be attained and proposed 3.8 DPMH as the break-even point. Although there was no agreement, Dry indicated a willingness to come down to 4.0 DPMH.

Another area discussed at the 3 January session was the point in which drums were to be considered completed for counting purposes under the incentive program. The Company wanted the drums to be counted as shipped. The Union however complained that drums are not always shipped immediately and asked that any delay not be charged against employees. Instead, the Union proposed that drums be counted at the seamer or crimper where employees put the ends on steel and fiber drums respectively. The parties also discussed how to factor machine failure or breakdown time under the incentive system. McCool proposed that breakdowns over 15 minutes be absorbed by the Company and that shorter breakdowns be charged against employees.

Still further, the parties discussed staffing under the proposed plan. The Company then employed approximately 104 employees. Under the Company’s projection, only 84 employees would satisfy the staffing requirements to make the plan a success (G.C. Exh. 13). The Union argued that a greater number of employees were required to effectively run the plant.

Although the parties had still not agreed on a number of features regarding the incentive program, Chiappardi suggested a 60-day trial period and Dry agreed in principle. The parties were aiming for 27 January as a starting date. Ferguson proposed that employees not lose any wages during the trial period and that incentives should provide only increased earnings. Dry on the other hand noted, *inter alia*, that employees needed incentive to increase productivity. Thus, Dry insisted on a “down side.”

The parties continued to negotiate the terms of the incentive program over the next three sessions held on 15, 17, and 21 January. The Union which had been at 3.8 DPMH and the Company at 4.0 eventually agreed to 3.9 as the base rate

<sup>4</sup>At 3.2 DPMH employees would received \$1.63 less per hour in wages than their then current straight time base hourly wage rate but would earn approximately a 20-cent bonus for each additional tenth of a point (G.C. Exh. 10). Thus, under Dry’s incentive proposal, at 4.0 DPMH, the base rate would jump from \$6.52 per hour to \$8.15. (*Id.*)

<sup>5</sup>All dates hereinafter refer to 1986 unless otherwise indicated.

for the incentive system. Thus, at 4.0 the employees would start earning the bonus. The Company also agreed to the Union’s position regarding the need to monitor overtime and to permit the Union to assist therewith and also agreed not to count customer rejects during the trial period as suggested by the Union.

Dry was anxious to commence the incentive program on 27 January as originally suggested by Chiappardi. The latter asked Dry if he was prepared to submit an entire package which Dry refused to do at that time. It is undisputed that there were “loose ends” which the parties had to address although Dry testified that at the close of the 21 January session, he understood that the parties had an agreement which was to be implemented on 27 January. According to Ferguson, he conveyed to Dry that some factors impacting on the plan’s operation still had to be resolved and that it was also necessary to get input from the Union’s membership before any agreement was reached.

A few days after the meeting of 21 January, the union committee met with unit employees in the Pennsauken plant cafeteria to explain the incentive program. The employees reacted negatively pointing out such problem areas as machinery and equipment breakdowns, and the use by Natico of temporary employees and foremen on unit jobs, individuals with no stake in the success of the program. The employees also took this opportunity to express their displeasure at having to make \$10 weekly contributions toward their own health and welfare benefits. Ferguson promoted the incentive idea but he met resistance from employees. As testified by employee William Green, employees were informed by Ferguson, “The only way we can get you guys a raise is by the incentive program.” Green also observed that employees had difficulty understanding the drums per man hours concept and declared, “the people didn’t want it.”

The objections raised by employees to “incentives” were passed on to Dry at the next bargaining session, 28 January. The Union’s efforts to broaden negotiations to encompass the contract package met with resistance from Dry. The latter stated that he could not present a full contract package until he knew whether the incentive was going to work. Thus, the parties largely confined their discussion to the incentive program.

The parties met again on the following day, 29 January. Chiappardi told Dry that he was providing him with the 7-day strike notice.<sup>6</sup> Dry expressed displeasure at this development but still provided some inducements to help the Union sell “incentives” to the membership, as suggested by the union committee. Thus, Dry agreed to suspend the \$10 weekly employee contributions toward the Company’s insurance plan during the incentive trial period and also agreed to change the Company’s vacation pay formula to the benefit of employees.

The parties were assisted by mediation for the first time at the next bargaining session on 13 February when they were joined by Mediator Harvey Young. For the first time since early in the negotiations, Dry reintroduced the subject of a two-tier pay scale, to wit, paying newly hired employees a lower hourly wage rate as well as providing them reduced benefits. In response, the Union discounted the two-tier pay

<sup>6</sup>At a membership meeting in October 1985 before any negotiations commenced, the unit employees voted to provide the union committee with strike authorization.

scale as unnecessary because of the contemplated use of the incentive plan. The Union, largely at the urging of McCool,<sup>7</sup> moved off their earlier agreement with the Company at 3.9 DPMH as the standard under the incentive system and was now proposing 3.8. Dry countered by raising the base rate standard to 4.0. The Union stated it was willing to return to 3.9 if the Company would continue making payments to the Union pension fund and agree to the Union's medical plan. As testified by Dry, this was another Union attempt "to tie pension and the medical plan to the incentive, which I kept saying. I couldn't do until I knew if the incentive was going to work." It appears that by the end of the session the parties were in agreement again on 3.9. As testified by McCool, although at each meeting the Union asked for 3.8, "we always wound up at 3.9 D.P.M.H."

At the meeting of 27 February, the parties finally agreed to implement the incentive program.<sup>8</sup> As part of the agreement, the parties agreed that the break-even point would be 3.9 DPMH with a new hourly base rate of \$5.88; the old rate was \$7.31 (G.C. Exhs. 15 and 16). Further, Dry agreed to incorporate into the incentive plan a number of features recently proposed by the Union. Thus, Dry agreed that the Union would be permitted two representatives or monitors to ensure that production will be recorded accurately and to also help with problems on the production floor as they arose. The Union asked for and was granted by Dry, cabinet space in an office for the Union to maintain its records under the plan. Dry also agreed with McCool's idea an computing machine or equipment failure. Under this agreement, downtime of 15 minutes or less would be absorbed by employees and the Company would absorb downtime for any longer period. Dry pledged to have the winder, a key production machine, in good working order by the time the incentive plan was to begin on 10 March (a date proposed by the Union). On another item, Dry agreed not to factor time worked by foremen against employees under the plan.

Still further, the parties negotiated, compromised and finally agreed on the point at which drums were to be deemed completed for counting purposes. As noted previously (fn. 8) in dispute is whether the incentive program was subject to employee ratification.<sup>9</sup>

Within a few days of the 27 February bargaining session, arrangements were made for the Union to hold its membership ratification meeting in the plant cafeteria on Thursday, 6 March, at 11:30 a.m. However, sometime during the week of 3 March, Plant Manager Benson told Ferguson that the Union could not hold its meeting as scheduled because the Company had customers coming into the plant and he did not think it would be a good idea to have a meeting at that time. Benson suggested that the union meeting be held at another time that week. Ferguson responded that another meeting could not then be arranged because of his and Chiappardi's schedule. Instead, Ferguson got Benson to agree

<sup>7</sup>The record disclosed that almost from the outset, McCool expressed serious doubts that employees could meet the standards proposed by Dry vis-a-vis DPMH. As such, he opposed the incentive program.

<sup>8</sup>The record disclosed a conflict in testimony as to whether a meeting occurred on 15 February as well as some confusion regarding matters discussed at the sessions of 25 and 27 February. However, the only material conflict is whether the Union conveyed to Respondent that the agreement on the incentive plan was subject to employee ratification.

<sup>9</sup>For reasons noted infra, I find, that any agreement on the incentive program was subject to ratification, as contended by the General Counsel.

to provide the use of the cafeteria for the union meeting the following Thursday, 13 March.<sup>10</sup>

On Tuesday or Wednesday, 11 or 12 March. Dry summoned the union committee to meet with him at the Pennsauken plant. There, Dry admittedly expressed anger that the incentive plan had not been implemented and ascribed sole responsibility to the Union. Dry accused Shop Steward Zozofsky of telling maintenance employees to refuse to cooperate with the Company by declining to work the weekend to repair the winder. As noted previously, Dry had pledged to the Union that he would have the winder in working order by 10 March, the time the incentive program was scheduled to commence. Zozofsky denied the accusation. According to Dry, he had to rely largely on supervisory help to repair the winder. Dry expressed doubts regarding the Union's commitment to "incentives" pointing out, inter alia, that the Union did not hold its meeting on 6 March, as scheduled. According to Dry, if the Union had really been interested, it would have found a way to hold that meeting. Dry announced that he was taking the incentive plan off the table. Ferguson tried to reassure Dry that the union committee favored incentives and that he was certain that the employees were going to ratify the plan. He also noted that it was Benson and not the Union who canceled the meeting that had been set for 6 March. Ferguson was unable to get Dry to reconsider. Thus, at the close of that session, the incentive plan was no longer on the table.<sup>11</sup>

The Union conducted its meeting of unit employees on 13 March as scheduled, but no ratification vote was taken. Ferguson explained that because Dry had taken the "incentives" off the table, the Union saw no purpose in conducting a ratification vote. Basically, Ferguson informed the unit employees of Dry's stated reasons for dropping incentives including his questioning of the Union's overall commitment and his accusation that Zozofsky told maintenance employees not to come to work on Saturday, 8 March. Ferguson told the assembled group of the Union's disagreement with Dry's comments and that Dry had no right to drop incentives and was bargaining in bad faith.

The record disclosed virtually no conflict in testimony regarding the negotiations that transpired over the next three bargaining sessions which were held on 27, 28, and 31 March. On 27 March, the parties met for the first time since Dry had removed "incentives" as a subject for negotiations. At that session, the parties dealt variously through the mediator and also face to face. Dry reiterated his last stated position to wit, that he would no longer bargain over "incentives."

<sup>10</sup>Although Benson, provided a somewhat different account I credit Ferguson. On the basis of demeanor factors and noting that Benson at times was equivocal, unresponsive, and exhibited a somewhat selective or vague recall, I found him less than forthright or candid as a witness. For example, Benson was asked whether he and Ferguson had an "agreement" to reschedule the meeting to 13 March responded, "He [Ferguson] may have asked if they could use the lunchroom at that time. I don't specifically recall it." On the other hand, Ferguson who testified at great length over several days, impressed me as responsive, consistent, frank, and plausible. For these and reasons stated more fully, infra, I found Ferguson to be credible and reliable. However, I do not find, for reasons noted infra, that Benson agreed to postpone the date for the implementation of the plan or that he had such authority.

<sup>11</sup>According to Dry, the Union did not respond to his announcement that he was withdrawing from his agreement on "incentives" and made no effort to get him to reconsider. In the total circumstances of this case, including my assessment of Ferguson as a reliable witness, I find Dry's assertion implausible and incredible.

tives.” Further, Dry offered a total contract package which he characterized for the Union as the Company’s “final offer” to take effect 11 days later on 7 April. This final offer included reducing wages \$1.43 an hour, decreasing by three the number of personal holdings and terminating the union pension plan and replacing it with a money purchase plan.

Dry asserted at that same 27 March session that the parties were at impasse which the Union quickly disputed. The Union for its part revised its original contract demands, dropping some and reducing others on both economic and non-economic items. (See bargaining notes for 27 March: R. Exh. 14; G.C. Exh. 17.) For example, the Union’s original proposal (G.C. Exh. 5) called for an additional 50-cent-per-hour differential for night-shift employees which the Union reduced to 30 cents at the 27 March session (R. Exh. 14). The Union also reduced its original demand to increase the Company’s contribution to the pension fund from 40 cents per hour to 25 cents per hour. (Compare G.C. Exh. 3 with G.C. Exh. 5.) In addition, the Union dropped, inter alia, its demand for a dental plan, its demand for Easter Monday as a holiday, and demand relating to uniforms and cost-of-living raises. The parties remained firm on some noneconomic proposals and with some others, agreement was reached. With regard to wages, the Union initially proposed a 15-percent across-the-board increase for each of the 3 years of the contract (G.C. Exh. 5). Ferguson testified without contradiction that this proposal averaged out to approximately \$1.20 per hour for each of the 3 years. On 27 March, the Union reduced its initial wage demand to \$1 per hour the first year and 75 cents per hour for each of the next 2 years (G.C. Exh. 17). The next session was held the following day.

At the bargaining session on 28 March, Dry responded to some of the Union’s modified demands of the previous day. For example, the Company offered to provide night-shift employees a 20-cent (.05 increase) per-hour differential and agreed to the Union’s vacation pay proposal.

The Company also showed flexibility with regard to non-economic issues. In this regard, the record disclosed that the Company initially proposed to use “inverse seniority” to man the plant under certain circumstances. Under this proposal, the Company wanted to ensure that it could staff the plant on so-called seniority days by requiring the least senior employees to work if needed, and the Company was unable to attract volunteers. The Company dropped this proposal at this session. Further, the Company also initially proposed, “A five day time limit on filing a grievance.” Under the most recently expired contract, there was no time limit. The Company modified its proposal to the extent that it agreed to remedy the grievance if it failed to respond thereto within 5 days. The Union agreed to this modification thereby manifesting movement by both parties. Although the Company demonstrated some movement on both economic and non-economic issues, it failed to respond to the Union’s latest wage demands at \$1, 75 cents, and 75 cents per hour each year respectively over the proposed 3-year contract.

The parties reconvened on 31 March. The Union lowered its latest wage proposal from \$1 per hour to 85 cents per hour for the first year of the contract and continued to propose 75 cents per hour for each of the next 2 years. Further, the Union lowered its latest night-shift differential from 30 cents per hour to 25 cents per hour. The Company did not respond to those proposals or make any other proposal or

counterproposal. Instead, the Company reiterated its previously announced intention to implement its final offer on 7 April. The Union was also presented with a summary plan description of the Company money purchase plan (G.C. Exh. 18) and told that it too would be implemented on 7 April. According to the Union, it had not been presented with any material relative to the money purchase plan prior to this meeting. The parties agreed to meet again on 9 April. The next day, 1 April, the Union filed the initial unfair labor practice charges in the instant consolidated cases.

By letter dated 2 April, Dry outlined the contents of his final offer which had already been communicated to the Union verbally at the most recent sessions (G.C. Exh. \$19). The letter noted, inter alia, across-the-board reduction of 1.43 per hour in all classifications, elimination of three personal holidays, a cessation of contributions to the union pension plan and an increase of the night-shift differential of 20 cents per hour. With regard to implementing these items and the reasons therefore, Dry added as follows:

As we previously told you, we plan to implement the foregoing proposal on Monday, April 7, 1986. We are taking this action because after twenty-seven negotiation sessions, the lack of agreement have caused us to be at impasse. We cannot continue to operate as we have since the contract expired in December. [Id. p. 2.]

By letter dated 3 April, Chiappardi requested that Dry furnish the Union the Company’s “last offer” in writing (R. Exh. 20). There Chiappardi also accused the Company of bad-faith bargaining and reminding Dry that the Union had filed unfair labor practices against Natico.<sup>12</sup>

On 7 April, the Company, inter alia, reduced wages by \$1.43 per hour and ceased making contributions to the union pension plan as reflected in its final offer.<sup>13</sup> The Company did not eliminate any personal holidays.

Subsequent to the aforementioned disputed unilateral changes, the parties met approximately 20 times, from 9 April through 25 November (Jt. Exh. 2), sometimes face to face, sometimes through the mediator without ever reaching an agreement on “incentives” or on a new contract.<sup>14</sup>

At the 9 April meeting, the Union proposed that the Company restore the agreement on “incentives” which had been reached on 27 February. Although the Company indicated a willingness to accept a trial incentive plan lasting 6 months (instead of 60 days), in all other respects, it did not move off its “final offer” of 27 March. The Union indicated a willingness to accept a 3-month incentive trial plan. There was no agreement and the parties did not move any closer (Jt. Exh. 2, par. 2). Over the next few meetings, held in May,

<sup>12</sup> Apparently, the letters of Dry and Chiappardi dated 2 April and 3 April respectively crossed in the mail.

<sup>13</sup> According to the General Counsel, the Respondent Employer had merely been negligent in making pension contributions and had not previously claimed that it was not under any such obligation. Thus, the General Counsel asserts, contrary to Respondent Employer, that this allegation is not time barred by Sec. 10(b) of the Act.

<sup>14</sup> The General Counsel contends that during this period, the parties were no longer bargaining at “arm’s length” and Respondent Employer’s evidence relative to these later negotiating sessions is “tainted as self-serving.” Thus, the General Counsel points out, that these later sessions were conducted after Respondent had, inter alia, unlawfully withdrawn from its agreement on “incentives” and that they were also held in the face of viable unfair labor practice charges (giving rise to the initial complaint).

the parties continued to express interest in having a wage incentive plan implemented, but they could not agree on the length of the trial period. The Union wanted a 2-month period and the Company wanted a longer period (Jt. Exh. 2, par. 3).

At the 3 June meeting, the Union proposed a 1-year contract which provided, *inter alia*, for "incentives" during the term of that contract. Further, the Union asked for repayment to its employees of moneys lost since the 7 April hourly wage cut, the current union pension plan with increased employer contributions and a union health and welfare plan. The Company did not make any counterproposal but requested certain information which the Union agreed to provide (Jt. Exh. 2, par. 5).

The Company presented a counterproposal at the meeting of 11 June (Jt. Exh. 2, par. 6, Exh. "A"). Although Respondent's counterproposal appeared to embrace certain of the Union's demands of 3 June, *i.e.*, a 1-year trial plan for incentives at: the 3.9 DPMH break-even point, these terms were to be part of a 2-1/2 year contract as opposed to the Union's 1-year proposal. Further, the Company, *inter alia*, proposed to keep the existing health and welfare benefits and to terminate the existing pension plan and to switch to a money purchase plan. The Company also reintroduced its two-tier wage system proposal for employees hired after the effective date of the new contract (Jt. Exh. 2, Exh. "A", p. 2).

At the 19 or 20 June session, Chiappardi responded to the Company's 11 June written counterproposal by proposing, *inter alia*, a 2-month contract with a 60-day incentive trial period. Chiappardi also asked for restoration of the \$1.43 wage cut plus back wages. Dry rejected the Union's proposal but stated that he was willing to restore the \$1.43 wage cut on the condition he present the Company's contract proposal to the unit employees. The Union told Dry to put his offer in writing and that the Union would present it to the employees as written. Dry agreed to this procedure at the meeting of 26 June (Jt. Exh. 2, pars. 7 and 8). On 7 July, the Company reinstated the \$1.43 wage cut. No action was taken with regard to the Union's proposal for lost wages. On 11 July, the Company submitted its contract proposal to the employees. The offer also provided for back wages lost from the \$1.43 paycut since 7 April to be paid over the term of the proposed 2-1/2 year contract. (Jt. Exh. 2, Exh. C, p. 2).

Over the next few meetings in July and August, the parties revised their most recent proposals and counterproposals. The Company was still proposing, *inter alia*, a two-tier wage system for new employees which the Union continued to resist. Further, the Company's proposal included an offer to reimburse employees for wages lost due to the 7 April wage cut. Ferguson objected to any linkage of such items as lost wages to the Respondent's contract offer as "muddying the waters" because the employees assertedly were entitled to have those wages restored (Jt. Exh. 2, pars. 11 and 12). The Union filed additional charges over the wage reduction and the Company's refusal to make monthly contributions to the union pension fund on 19 August in Case 4-CA-16037-1.

In October, Chiappardi and Dry debated (as prearranged), the relative merits of the union pension fund versus the Company money purchase plan before unit employees. The parties next met on 21 October. Dry proposed, *inter alia*, implementing the incentive plan on a 6-month trial basis and he

also agreed to drop his proposal regarding the two-tier wage system. The Union reiterated its long held position that Dry should place on the table the agreement reached on "incentives" back on 27 February.

At the 30 October session, Dry's revised proposal encompassed elements of the 27 February agreement on "incentives" including the 2-month trial period. The proposal, however, also required concessions and/or changes in the union position concerning health and welfare and the pension plan. The Union, although still receptive to "incentives" proposed an "upside" only. Dry stated that the terms of his proposal would expire if not accepted by the Union that day. No agreement was reached that day. That same day, the Company laid off 57 employees.<sup>15</sup>

At the meeting of 6 November, the Company moved closer to accepting an upside-only incentive plan (Jt. Exh. 2, par. 20). The last bargaining session was held on 25 November. On that occasion, the parties were largely in agreement on an incentive plan with an "upside" only and a number of other provisions. The parties also moved closer on health and welfare and a pension plan. Still, material issues such as the duration of the contract remained (Jt. Exh. 2, par. 22). In late January 1987,<sup>16</sup> a meeting was scheduled for 11 February. This meeting never took place. Also in January, the Teamsters began to organize the same production and maintenance employees at the Pennsacken facility then represented by Local 1.<sup>17</sup>

The Teamsters by letters to Dry dated 21 and 26 January, demanded recognition for the production and maintenance unit and offered to prove its majority status on the basis of "application cards" on 30 January at 10 a.m. (R. Exhs. 23 and 24.) Further, the Teamsters warned that if recognition was not forthcoming at that time, "we will take the people out into the street to prove to you that we do represent the majority." (R. Emp. Exh. 24.)

On 30 January, at or around 9 a.m., Teamsters Representatives Howard Greeley and Tony Pulumbi met with Howard I. Hatoff, the company attorney, and William Dougherty, the plant manager, in Dougherty's office. There, the "Teamsters" offered to demonstrate their majority status by displaying signed union authorization cards. According to Dougherty, Attorney Hatoff told the Teamsters representatives that he would not check the cards because Local 1 was already the bargaining agent for those card signers. The meeting lasted about 10 minutes.

Shortly after the Teamsters left Dougherty's office, the latter learned from supervisors that employees had left the plant in the presence of the Teamsters. According to Dougherty, Hatoff telephonically informed Dry of these activities. After the phone calls, Dougherty left the plant and asked Greeley to get the employees back to work. Dougherty also invited Greeley into his office to conduct a card check.<sup>18</sup> There Dougherty and Hatoff counted 54 authorization cards (R.

<sup>15</sup>It is not alleged nor contended that these layoffs were predicated, in whole or in part, on discriminatory or unlawful considerations. All the employees were brought back to work in December and January.

<sup>16</sup>All dates hereinafter refer to 1987 unless otherwise indicated.

<sup>17</sup>As noted previously, the Teamsters had long represented the drivers at that facility.

<sup>18</sup>It appears that the employees were outside the plant at around 9:25 a.m. The normal break period is 9:30 a.m. to 9:45 a.m. The employees returned at around 9:50 a.m. Thus it appears that the time employees spent outside roughly corresponded to the break period.

Emp. Exh. 26(a)-(bbb)) out of 104 employees on the payroll list (R. Exh. 27).<sup>19</sup> Thereupon, Dougherty and Greeley signed an agreement whereby Natico recognized the Teamsters as the "sole collective-bargaining agent for the production and maintenance unit" (R. Emp. Exh. 25). By a followup letter dated 30 January, Attorney Hatoff notified Local 1 that Natico was withdrawing recognition on the basis that "another labor organization" has demonstrated by "objective evidence" that they represent a "majority" of the employees in the production and maintenance unit (G.C. Exh. 21).

In February, over a 2-week period, the Respondent Employer had restored the money employees lost due to the \$1.43 paycut, from 7 April 1986 to 7 July 1986, the period that the paycut was in effect. Dry had the "Teamsters Committee" inform the employees that they would be receiving these funds (Tr. 1020-1021).

On 15 April, Natico retained the accounting firm of Cunningham, Porter & Philips (CP&P) to conduct a secret-ballot representation election for the unit employees (Jt. Exh. 1). The election was scheduled for 23 April, from 3 p.m. to 4:15 p.m. at the plant. On 16 April, Company Attorney Hatoff advised Local 1 and the Teamsters, by certified mail, of the election arrangements along with an *Excelsior* list. This list contained the names and addresses of bargaining unit employees as of April 1987. (Id.) By letter dated 17 April, the CP&P accounting firm also advised both unions, inter alia, that it had been retained by Natico to conduct the election. A preelection conference was scheduled for 2:30 p.m., one-half hour before the balloting was to commence. Local 1 refused to participate in any of the arrangements or in the election. Thus, on 22 April, Chiappardi advised the unit employees in writing that Local 1 would "have no part of this phoney deal" pointing out that the unfair labor practice trial was coming up on a complaint alleging, inter alia, an unlawful bargaining relationship between Natico and the Teamsters (R. Emp. Exh. 11).

The secret-ballot election was held on 23 April as scheduled. The Respondent Employer and Teamsters each had an observer. Local 1 did not participate. After the polls closed, an agent of the CP&P accounting firm counted the ballots in front of the observers. The tally of ballots disclosed that of 97 eligible voters, 57 cast ballots for the Teamsters, 7 for Local 1, and 3 were void. (Jt. Exh. 1.) On 27 April, Local 1 filed new charges contending, inter alia, that the employer illegally assisted the Teamsters by canceling overtime work the night before the election to permit employees to attend a meeting held by the Teamsters. Local 1 also alleged that "[t]he Employer violated the Act by conducting its own representation election." (G.C. Exh. 1 (dd).) These charges gave rise to still another consolidated complaint.<sup>20</sup>

<sup>19</sup> *Dougherty* testified that the name of *Richard Herr*, an inactive employee on military leave was not included or counted in the total employee complement (Tr. 782). Thus, the total employee complement was reduced to 103. On the other hand, the counted cards included the undated card of employee *Joe Kennedy*, the card of *Craig Dobson* who was no longer employed on 30 January and the card of employee *James Whitaker*, who was out of work on disability since 30 April 1985.

<sup>20</sup> The fourth and last of the consolidated complaints also alleged that in March 1987 the Respondent Employer discriminatorily refused to permit its employee, *Robert Zozofsky*, a Local 1 steward and member of its negotiating committee to work as a day-shift extruder operator. Other allegations include a reduction in the vacation pay of *Robert Ferguson* and a threat by Dry to continue the wage cut of April 1986 until the unit employees withdrew their

## B. Discussion and Conclusions

### 1. The 8(a)(5) allegations

#### a. Respondent Employer's withdrawal from an agreement to enter into a trial incentive plan

It is undisputed that at the bargaining session on 27 February 1986, the parties reach agreement on the substantive formula for an "incentive plan." It is also undisputed, that at the same session, the parties agreed to commence the incentive plan on a trial basis for 60 days starting Monday, 10 March. However, it is alleged, the record supports, and I find, that this trial incentive plan was subject to employee ratification, an event which never took place.<sup>21</sup>

The General Counsel contends that the failure of Local 1 to take the incentive plan to the unit employees for a ratification vote is attributable solely to the actions of Respondent Employer. I find, contrary to the General Counsel, for reasons noted below, that the failure by the Union to conduct a ratification meeting cannot be ascribed to Respondent Employer.

It is undisputed that on or about Monday, 3 March, the Union got permission from Plant Manager Benson to hold an employee ratification meeting in the plan lunchroom on Thursday 6 March at 11:30 a.m. Either that day (3 March) or the following day, Benson tried to get the Union to change the time scheduled for the meeting because he learned that a customer was expected at the plant at the same time. As Benson deemed such circumstances awkward he suggested to Ferguson that the Union hold the meeting earlier in the week or if it had to be on Thursday, then in the afternoon. Ferguson opted to reschedule the meeting for 1 week to 13 March at the same time and place. According to Ferguson, although Benson pressed for the holding of the meeting during the week of 3 March, he eventually agreed (albeit reluctantly) to reschedule the meeting to 13 March. Benson for his part does not recall or deny that he eventually agreed to provide the lunchroom for a meeting on 13 March. Of greater significance is that Benson denied, and I credit, that he did not agree to postpone the implementation of the plan.<sup>22</sup>

The trial incentive plan was not implemented on 10 March because a condition precedent, to wit, ratification had not taken place. When so informed, Dry immediately made plane reservations for Pennsauken and had the Union bargaining committee summoned to meet him at the facility. There on

support for Local 1. These, as well as all other allegations, will be treated more fully separately infra.

<sup>21</sup> Although Dry asserted that he was somewhat confused regarding the import of the term "[r]atification versus a meeting," he also acknowledged that he assumed that Local 1 was going to conduct a ratification meeting and that he would not have implemented the plan "if the employees didn't agree to it."

<sup>22</sup> I also find that Benson did not possess such authority. The record clearly established that *Benson*, as plant manager, was a statutory supervisor and for some purposes an agent, i.e., he admittedly had the authority to permit the Union the use of the cafeteria to conduct a union meeting (Tr. 745). However, I find, that such authority, without more, does not clothe *Benson* with real or apparent authority to change or modify the terms of the trial incentive agreement including the date the incentive plan was to begin. The record disclosed that *Dry* was virtually the only spokesman and negotiator for the Company although he received same assistance from *Benson*. *Dry* attended every bargaining session but the first when basically all that transpired was an exchange of proposals. In short, I find that *Benson* is not an agent within the meaning of Sec. 2(13) of the Act for the purpose contended by the General Counsel.

11 or 12 March, Dry informed the Union that he was withdrawing from his agreement on The incentive plan and taking "incentives" off the table as a subject for negotiations. Dry pointed out a number of factors including his assessment that the Union and the employees were not interested in incentives.<sup>23</sup> Dry also told the union officials that he considered them unreasonable to allow only one-half hour from 27 February to 10 March to hold a union ratification meeting. As stated by Dry after devoting so much time and effort over many bargaining sessions, "I was disgusted. I was outraged." At the next bargaining session Dry asserted that the parties were at impasse and refused again further over incentives.

In pertinent part, it is alleged as follows:

"Since on or about March 11, 1986 Respondent Employer bargained in bad faith and without intention of reaching a final and binding agreement . . ." <sup>24</sup> *by repudiating its agreement to implement a wage incentive plan for a period of sixty days, subject to ratification by the unit.* [Emphasis added.]

In essence, the General Counsel contends that the Respondent Employer bargained in "bad faith" as evidenced by its failure to demonstrate "good cause" in withdrawing from the tentative agreement on "incentives" citing, *Arrow Sash & Door Co.*, 281 NLRB 1108 fn. 2 (1986), and *Farm Boy Restaurants*, 279 NLRB 82 (1986). Although *Arrow Sash* and *Farm Boy Restaurants* produced different results, the Board in both cases continued to apply the "under the totality of the circumstances test" in assessing the Respondent's disputed action.

*Arrow Sash*, largely relied on by the General Counsel is factually distinguishable from the case here. There, unlike the instant case, the Respondent's decision to withdraw from its concessions and tentative agreements was precipitated by a "sickout" in violation of the no-strike provision of the collective-bargaining agreement, as extended. The Respondent mistakenly believed that the "sickout" was sanctioned or condoned by the unions and, in retaliation, inter alia, the Respondent unilaterally terminated the extension agreement. The Board, in finding that the Respondent's actions were not justified stated that the issue did not turn on Respondent's "good faith" but whether it had "good cause" to withdraw from the tentative agreements and concessions made.

In the instant case, unlike *Arrow Sash*, I find that the Union is not without responsibility. Thus, I find, in agreement with Respondent, that the Union failed to act reasonably by allocating only 1 day, and a half hour at that, for the holding of the ratification meeting prior to 10 March, the agreed-upon date for "incentives" to be implemented. In arriving at this conclusion and in assessing the "total circumstances," it is noted that it is not disputed and the record tends to show that the Respondent bargained in good faith

<sup>23</sup> Dry, relying on reports from supervisors, accused Zozofsky at this meeting of telling maintenance employees not to work that previous Saturday. As noted earlier, Dry had promised the Union to make the necessary repairs on the winder so that it would be in working order at the time the trial incentive plan was to begin on 10 March. Zozofsky denied the accusation. The record disclosed that the Company had to rely largely on supervisors on the Saturday in question to repair the winder.

<sup>24</sup> The General Counsel expressly disclaimed any notion that "surface bargaining" is alleged or contended.

over "incentives" for over 2-1/2 months covering many bargaining sessions. During this period, Dry expanded substantial time and effort in compiling data, providing information as requested by the Union and preparing and presenting numerous charts to the Union thereby facilitating negotiations.

Dry's conduct is consistent with his testimony, that he was anxious to get the "incentive" program started, even as early as January. At that time the parties had agreed in principle to aim for 27 January for the 60-day trial period. However, when the Union presented the proposal to the unit employees they reacted negatively to the "incentive" concept. Still, Dry continued to bargain over incentives and even offered inducements to help the Union sell the program to its membership as suggested by the Union bargaining committee. In this regard, as noted previously, Dry agreed, inter alia, to suspend the \$10 weekly contributions to the Company's insurance plan during the trial period and on 27 February the parties reached an agreement subject to ratification to commence the incentive plan on 10 March.

The Union however failed to conduct a ratification meeting prior to 10 March and was therefore not ready to have the plan implemented on that date. Dry had been previously disappointed because the earlier target date for incentives back in January could not be satisfied. As noted above, at that time the Union conveyed to Dry that the bargaining unit employees saw many problems with incentives and had not embraced the concept. In these I circumstances, I cannot conclude that Dry was not justified in telling the Union that the employees were not interested in the incentive system and he was taking it off the table as a subject for negotiations. Thus, I find, on the total state of the record that the General Counsel has failed to establish that the Respondent Employer did not have "good cause" or acted in "bad faith" as alleged. Accordingly, I shall recommend that this allegation be dismissed.

*b. Respondent Employee's unilateral implementation of a \$1.43-per-hour wage cut*

It is alleged that on 7 April 1986, the Respondent Employer unilaterally and unlawfully "implemented a reduction in the hourly wage rate of the unit." The General Counsel contends that the wage reduction was implemented before the parties had arrived at any lawful impasse. It is undisputed that on April that the Respondent Employer reduced the hourly wage rate by \$1.43 for unit employees. However, the Respondent Employer contends that the parties had reached an impasse and that it was therefore entitled to make such unilateral changes where, as here (assertedly), the reduction was encompassed by the employer's preimpasse proposal.

In view of the contrasting contentions and on the basis of well-settled principles, the instant allegation turns largely on whether a lawful impasse existed at the time the disputed action was taken. Thus, unilateral changes undertaken by an employer with regard to terms and conditions of employment during negotiations and before a lawful impasse, contravenes the duty to bargain under the Act. See generally *NLRB v. Katz*, 369 U.S. 736 (1962); *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1186 (5th Cir. 1982); *Supak & Sons Mfg. Corp.*, 192 NLRB 1228 (1971), enf. 470 F.2d 198 (4th Cir. 1978). Or stated conversely. "For if impasse had been reached, Respondent was free to implement its preimpasse proposal." See *E. I. du Pont & Co.*, 268 NLRB 1075 (1974), citing *Taft*

*Broadcasting Co.*, 163 NLRB 475, 478 (1967), petition for review denied 395 F.2d 622 (D.C. Cir 1968).

In determining whether the parties had arrived at a lawful impasse in bargaining prior to the disputed unilateral action, the Board has long followed the guidelines set forth in *Taft Broadcasting Co.*, supra at 478. There, the Board stated as follows:

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

In the instant case, the record disclosed factors tending to both support and militate against a finding of "impasse." However, I am persuaded by the clear weight of the evidence that when the Company implemented the wage reduction, the parties had only barely touched on wages (independent of "incentives") and that continued bargaining, if in good faith, was still viable. In short, I find, for reasons discussed below, that the parties had not reached a lawful impasse at the time of Respondent Employer's action.

First, with regard to *Taft Broadcasting* factors tending to favor "impasse" it is noted that it is not alleged nor contended, that the Respondent Employer failed to bargain in good faith prior to its announcement on 11 or 12 March that incentives were off the table. For reasons noted above, I have already found that the Respondent Employer was justified in taking such action. Further, there can be no question that the wage incentive plan was given major prominence during negotiations from December 1985 until mid-March 1986. As stated by the Respondent Employer in its post-trial brief, "The wage incentive plan was virtually the only issue discussed at the table" from December 1985 to the time Dry dropped "incentive" as a subject for negotiations in March 1986. As for the Union, Ferguson opined, "We knew if the incentive system worked out, we would have no problem getting the contract."

This finding, however, that the focus of the parties was clearly on "incentives" is not, at the same time, dispositive of the wage reduction issue. Or, as stated by the General Counsel, negotiations over the incentive plan in the circumstances of this case, were not "*the functional equivalent* [emphasis added] of negotiations over a wage cut."

The record disclosed that the parties commenced negotiations for a new contract on 5 November. The Union's contract proposal included a 15-percent wage increase demand (G.C. Exh. 5). The Respondent Employer did not submit its own economic proposal until the fifth bargaining session, on 9 December. The package included a 25-percent reduction in wages. Virtually nothing then or over the next few months was discussed regarding wages in the conventional sense. Rather, the parties elected to concentrate on a trial incentive plan which was conceived to accomplish two goals: (1) to increase production to satisfy the Respondent Employer's desire to remain competitive and (2) to provide "incentives" for employees to produce more and thereby earn more money. The idea was Union President Chiappardi's and quickly em-

braced by Dry. Under the plan, the employees had to produce 3.9 drums per man hour to break even and earn a bonus at various intervals for greater production.

Dry refused to discuss other mandatory subjects until he could discern whether "incentives" were effective. The plan failed to be ratified as required by 10 March, the agreed-on date for the incentive plan to be implemented. Within the next 2 days, Dry with justification (for reasons discussed previously) withdrew from his agreement on "incentives" and informed the Union that he would no longer negotiate on that subject.

At the next session on 27 March, Dry submitted what he termed was his "final offer" to take effect on 7 April. This final proposal included an across-the-board wage cut of \$1.43 per hours.<sup>25</sup> Dry stated that he was making a final offer because the parties were at impasse. The Union disputed Dry's assessment and conveyed a willingness to still negotiate the terms and conditions of a collective-bargaining agreement. Toward that end the Union submitted a counterproposal which lowered both economic and noneconomic demands.

The parties met again on 28 March. Dry responded to certain of the Union's modified demands and, inter alia, agreed to the Union's vacation pay proposal. However, Dry did not respond to the Union's latest wage demand. On 31 March, the Union lowered its latest night-shift differential proposal and further lowered its wage demands.<sup>26</sup> The Company did not respond to these proposals or make any other proposal or counterproposal. Instead, Dry reiterated his intention to implement his final offer on 7 April which he later carried out on that date as threatened.

Dry, by taking "incentives" off the table, merely removed that item as a subject for bargaining. Although the Union was then unable to rekindle Dry's interest and hold him to his earlier commitments to the incentive plan, Dry's resistance thereto did not prevent the Union from twice modifying its own wage demands over 3 days of bargaining preceding the Company's unilateral changes. In other words, the Union did not insist that Dry bargain over incentives to the point where negotiations over wages was no longer a viable alternative. For a deadlock or impasse to have occurred "neither party must be willing to compromise." *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1186 (5th Cir. 1982). See also *Cal-Pacific Furniture Mfg. Co.*, 228 NLRB 1337, 1341-1343 (1977).

Here, the record disclosed that the "final offer" reducing wages by \$1.43 per hour had not been proposed independently but rather only as an integral component of the overall incentive plan (see fn. 25, supra). Thus, having taken "incentives" off the table, the Company was now, in effect, making a new proposal on wages, and as such, opened the door for a new round of negotiations. Clearly, Dry's testimony

<sup>25</sup> The \$1.43 pay reduction corresponded to the minimum productivity standard under the trial incentive agreement. As noted above, the break-even point was 3.9 DPMH and anything over resulted in a bonus. If employees produced only 3.2 DPMH, under the downside of the agreement the old base rate of \$7.31 would be reduced to \$5.88 or \$1.43 less (See G.C. Exhs. 15 and 16).

<sup>26</sup> The Union initially demanded wage increases of 15 percent or approximately \$1.20 per hour for each year of the 3-year contract proposal. After Dry made his final offer to reduce wages, the Union lowered its demands to \$1, 75 cents, and 75 cents and then again on 31 March to 85 cents, 75 cents, and 75 cents.

tends to confirm that he recognized his offer as such. Thus Dry testified:

The real reason I made that offer was to get some reaction, to get some kind of feedback, to shake [the Union] up, to say hey, you know, [the Union] better do something, [Dry] is talking about taking a dollar forty-three away, I mean we (the Union) better do something.

As noted above, the Union did in fact respond quickly by reducing its own wage demands not once but twice over a few days. Significantly, there is no reason to presume that the Union was not willing to lower its sights on wages even further. In other words, in the circumstances of this case, the Respondent Employer was not justified, in the absence of continued "good faith" bargaining, to assume that to do so would have been futile. The Board has consistently considered the element of futility in conjunction with *Taft Broadcasting* factors in assessing whether an impasse existed at the time of the disputed unilateral changes. See *SGS Control Services*, 275 NLRB 984, 987 (1985), and cases cited there.

In the total circumstances of this case, noting particularly that the parties had barely touched the surface with regard to bargaining over wages and that the Union was far from intractable on this subject, I find that no lawful impasse existed at the time the Respondent Employer unilaterally reduced wages.<sup>27</sup>

The Respondent Employer raised two additional defenses neither of which I find tenable. First, the Respondent Employer contends that even if the wage cut was unlawful, it cured such action by rescinding the wage reduction 3 months later and, subsequently, also repaying employees all lost wages. As to this defense, it is noted, inter alia, that the Respondent Employer failed to provide any meaningful assurances to employees that it would refrain from taking the same or similar violative conduct in the future. Although under certain circumstances, an employer may relieve itself of Board-imposed remedies by repudiating the violative conduct, such repudiation must be timely, unambiguous, and specific and employees must be provided assurances against such misconduct recurring in the future. *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978); *Headquarters Plaza Hotel*, 276 NLRB 925, 928 (1985). Cf. *Kroger Co.*, 275 NLRB 1478 (1985) (where the respondent, inter alia, "advised each employee that he would be employed whether or not he chose to join a union").

Here, aside from failing to provide the necessary assurances against future misconduct, it is noted that the Respondent Employer also engaged in similar contemporaneous misconduct (as discussed infra) for which it denies liability and for which it has taken no steps to cure. In these circumstances and on the state of the entire record, I reject the Respondent Employer's contention that its conduct has "mooted the necessity of a Board-imposed remedy."

The Respondent Employer also contends that it was justified in reducing wages as it "could have undertaken harsher remedies, such as locking out employees." I find any reliance on lockout cases clearly misplaced. Here, unlike cases

<sup>27</sup> After the changes were made, the parties were no longer dealing at arms' length and the bargaining process was largely tainted, particularly here, where there were outstanding unfair labor practice charges which gave rise to the instant allegation. See *SGS Control Services*, supra at 988.

involving legitimate lockouts, the violative unilateral action contravenes the duty to bargain. As such, I reject and find no justifiable basis to depart from well-established precedent regarding unilateral changes during negotiations before impasse is reached. Compare *NLRB v. Katz*, 369 U.S. 736 (1962), with *Harter Equipment*, 280 NLRB 597 (1986).

In sum, I find that on or about 7 April 1986, the Respondent Employer unilaterally and unlawfully reduced the wages of employees by \$1.43 per hour in violation of Section 8(a)(5) as alleged.<sup>28</sup>

c. *Respondent Employer's repudiation of obligations to make contributions to the Union's pension plan and legal fund*

(1) Pension plan

Under the expired collective-bargaining agreement between Natico and Local 1, effective from 16 December 1982 until 16 December 1985, the Respondent Employer was required to make contributions to the Union's pension plan as follows:

[Section] 5.16 It is agreed that the pension program effective April 1, 1976 will remain in effect for the term of this agreement with the following changes.

Effective 12/16/83 Add 5/Hr. = 20 cent Total  
Effective 12/16/84 Add 5/Hr. = 25 cent Total

In May 1984, the Respondent Employer ceased making contributions to the Union's pension plan. The Respondent's failure to make such contributions became the subject of Federal court litigation resulting, in late 1985, in a favorable disposition for Local 1. On 19 August 1986, Local 1 filed charges alleging, inter alia, that "[b]eginning in January 1986, the Employer refused and continues to refuse to pay its monthly contribution to the Union pension fund." The date of the alleged misconduct was modified in the fourth consolidated complaint in paragraph 10(a) as follows:

Since on or about *February 20, 1986* [emphasis added], Respondent-Employer has failed and refused and is failing and refusing to make pension plan contributions for its employees in the Union.

The Respondent Employer argues variously that under the express contractual language of the expired collective-bargaining agreement, it has no obligation to make pension contributions beyond the term of that expired agreement; that any failure by the Respondent Employer to make the disputed contributions is time barred by Section 10(b) of the Act; and that Local 1 is precluded from relief under the doctrine of laches. For reasons noted below, I reject each of these defenses.

As noted previously, in finding that the Respondent Employer violated Section 8(a)(5) by unilaterally reducing

<sup>28</sup> It is undisputed that as a result of the pay cut, the Respondent Employer made a corresponding reduction of \$1.43 per hour in the vacation pay benefits of employee *Ronald Ferguson*. The Respondent Employer contends that as the payout itself was lawful, the attendant reduction in vacation pay was permissible. However, as the predicate has been rejected for reasons discussed above, a fortiori, I find that the reduction in *Ferguson's* vacation benefits was also unlawful, as alleged. See *Navajo Freight Lines*, 254 NLRB 1272 (1981).

wages, the law is well settled, that unilateral changes undertaken by an employer during negotiations with regard to terms and conditions of employment, absent a lawful impasse or waiver, violate the Act. See *NLRB v. Katz*, 369 U.S. 736 (1962), and other cases cited in section B,1(b), supra. It is also well settled that contractual contributions to a union pension fund is encompassed within the meaning of terms and conditions of employment and, absent waiver, survives the collective-bargaining agreement. *Hen House Market No. 3*, 175 NLRB 596 (1969), enfd. 428 F.2d 133 (8th Cir. 1970); *KBMS, Inc.*, 278 NLRB 826 (1986); *M. J. Santulli Mail Services*, 281 NLRB 1288 (1986).

Here, the Respondent Employer does *not* contend that the parties bargained to impasse over pension fund contributions.<sup>29</sup> However, the Respondent Employer does contend that the 1982–1985 collective-bargaining agreement clearly limits its pension fund contributions only for the term of that agreement. Thus, the Respondent Employer contends on the basis of contractual waiver, that it was at liberty to unilaterally delete or replace the pension fund provision when the agreement expired.

Contrary to Respondent Employer, I do not read section 5.16, the pension provision in question (set forth in its entirety above), as tantamount to a finding of contractual waiver. A waiver of an employer's statutory obligation to maintain benefit levels beyond the termination date of the contract is not inferred unless supported by clear and unmistakable evidence. *Wayne's Dairy*, 223 NLRB 260 (1976); *Timkin Roller Bearing Co. v. NLRB*, 325 F.2d 745, 751 (6th Cir. 1963); see also *Rockwell International Corp.*, 260 NLRB 1346, 1347 (1982) (“[A] waiver will not be lightly inferred in the absence of clear and unequivocal language.”).

As I read section 5.16, the parties merely memorialized their intention not to disturb the pension program effective 1976 for the term of the 1982–1985 collective-bargaining agreement with the exception of providing an additional 5-cent-per-hour increase effective 16 December 1983 and an additional 5-cent-per-hour increase effective 16 December 1984. The contractual language does not state that the pension program will terminate on the expiration of the contract. It appears that language to that effect is required either in the collective-bargaining agreement or in the underlying pension agreement to satisfy a waiver condition.<sup>30</sup> See, e.g., *Cauthorne Trucking*, 256 NLRB 721 (1981). There, the pension trust agreement contained the following language:

IT IS UNDERSTOOD AND AGREED THAT at the expiration of any particular collective-bargaining agreement by and between the Union and any Company's obligation under this Pension Trust Agreement shall terminate un-

<sup>29</sup>The record disclosed that although the Respondent Employer submitted an economic package on 9 December 1985 which contained a proposal to “replace the current pension with Company/Union money purchase plan,” virtually all bargaining over the next 2-1/2 months was over “incentives.” In fact, the Union did not receive a copy of the Company money purchase plan until 31 March 1986. Thus, the parties did not have meaningful negotiations over pensions until after the Respondent Employer implemented its final offer on 7 April 1986.

<sup>30</sup>Here, the underlying pension document is not in evidence. However, the Respondent Employer is not relying thereon in support of its waiver contention but solely on the contractual language itself. Cf. *Schmidt-Tiago Construction Co.*, 286 NLRB 342 (1987). In any event, it is not essential that the record contain the underlying trust or pension agreement. See *M. J. Santulli Mail Services*, supra at 15.

less, in a new collective-bargaining agreement, such obligation shall be continued. [Emphasis added; *id.* at 722.]

In *Cauthorne*, the Board found that the aforementioned language constituted an express waiver regarding the Company's obligations to make pension fund contributions at the expiration of the contract absent a renewal agreement to continue such payments. (*Id.*) In contrast, in the instant case, the contractual provision at best is facially ambiguous. As I find that the contractual provision here does not contain clear and unequivocal language constituting a waiver, I further find that Respondent Employer's obligations to continue pension fund contributions survive the expiration of the collective-bargaining agreement. *KBMS, Inc.*, supra; *Wayne's Dairy*, supra; *Hen House Market No. 3*, supra. See also *Peerless Roofing Co. v. NLRB*, 641 F.2d 734, 735–736 (9th Cir. 1981).

As noted previously, the Respondent Employer also raised a 10(b) defense. The complaint alleges that the Respondent Employer failed and refused to make pension contributions since on or about 20 February 1986. The underlying charges were filed on 19 August 1986. According to the Respondent Employer, the operative date is long before 20 February 1986, pointing out that it had not made pension fund contributions since May 1984. Thus, the Respondent Employer contends that the charges are time barred by the 6-month limitation contained in Section 10(b) of the Act.

It is noted and indeed, the Respondent Employer acknowledged in its brief, that “each failure to make contractually required monthly benefit payments is a separate and distinct violation of an employer's bargaining obligation.” See *Farmingdale Iron Works*, 249 NLRB 98, 99 (1982), enfd. 661 F.2d 910 (2d Cir. 1981).

Having found for reasons stated above, that the Respondent Employer was statutorily obligated to continue making pension contributions beyond the expiration date of the contract, I fail to discern why, as contended by the Respondent Employer, that the failure to make statutory monthly benefit payments shall not similarly be treated as a separate and distinct violation as in *Farmingdale Iron Works*.

Moreover, although it is noted that Natico had not made pension contributions since May 1984, I do not find, without more, that such failure constituted a repudiation of Respondent Employer's statutory obligations. See *Olive Mechanical Contractors*, 281 NLRB 395 (1986). Thus, the record disclosed that the Respondent Employer first submitted its economic package on 9 December 1985 which proposed, inter alia, replacing the pension plan with a money purchase plan. However, over the next 2-1/2 to 3 months, the parties concentrated on “incentives” with little or no time devoted to pensions or any other contractual provision. In fact, as noted previously, Dry refused to negotiate on other items until after the 60 days' trial incentive period which was to commence on 10 March 1986. It was not until late March or early April 1986, well within the 10(b) period that Dry actually repudiated his obligations vis-a-vis pension fund contributions. Thus, Dry's letter dated 2 April 1986 advised the Union “[s]o there will be no mistake” that as of 7 April 1986 the Company would n[c]ease contributions to the Union Pension Plan.” (G.C. Exh. 19.)

As the underlying charges were filed on 19 August 1986, I find that the date of the alleged misconduct "Since on or about February 20, 1986" within the 10(b) 6-month limitation and timely.<sup>31</sup> Accordingly, I reject the Respondent Employer's 10(b) defense.

The Respondent Employer's remaining defense is based on the doctrine of laches. According to the Respondent Employer, the Union failed to exercise due diligence in waiting a full 8 months after the 1982-1985 collective-bargaining agreement expired to file charges over its failure and refusal to make pension fund contributions. On the state of this record, I find no basis either in law or on equity considerations to bar relief from the Union.

The record disclosed that in late December 1985, the Union was successful in its Federal court litigation over the Respondent Employer's failure to make pension contributions during the term of the agreement. As noted previously, "pensions" and other subjects were put on hold during negotiations for a new agreement because the parties concentrated on an "incentive plan." From time to time Ferguson questioned Dry about the "past [pension] money that was owed." (Tr. 620.) Dry reminded Ferguson of the Union's lawsuit and pointed out that the matter was in the hands of the attorneys. (Id.) As noted previously, not until late March 1986 when Dry made the Company's final offer to be implemented on 7 April 1986 did it become clear that the Respondent Employer was repudiating its obligations vis-a-vis pension fund contributions. Up until that time, the Respondent Employer merely had a proposal to replace the pension plan with a money purchase plan. In these circumstances, I am unpersuaded and reject the notion that the Union conveyed to the Respondent Employer that it had abandoned any claims on postagreement pension contributions as contended by Respondent Employer in its brief. Nor do I find that the Union acted unreasonably in waiting to 19 August 1986, a date within the 10(b) period, to file the related charges.

In short, I reject the Respondent Employer's "laches" contention as without merit. As such, and as I have also rejected the various other defenses set forth by the Respondent Employer, I find that the Respondent Employer violated Section 8(a)(5) by failing and refusing to make pension fund contributions as alleged.

## (2) Legal fund

Under the terms of the most recently expired collective-bargaining agreement, the Respondent Employer was obligated to make certain contributions to the "Union Legal Fund." (G.C. Exh. 3, sec. 5.13A.) The Respondent Employer continued to make such contributions even after the aforementioned agreement expired until 30 January 1987 when it withdrew recognition from the Charging Union and recognized the Teamsters. Although no specific unfair labor practice charges were filed against the Respondent Employer for its failure and refusal to make contributions to the Union's legal fund, the General Counsel at the opening of the instant hearing on 8 June 1987 amended the fourth consolidated complaint to allege this conduct as a separate violation of Section 8(a)(5). In doing so, the General Counsel relied on

<sup>31</sup>Counsel for the General Counsel acknowledged in his brief that Sec. 10(b) precludes any finding or relief for monthly contributions which were due prior to 20 February 1986.

the original charges in Case 4-CA-10307-1 which were filed on 19 August 1986 and which alleged, inter alia, the Company's unlawful refusal to make monthly pension contributions. Correspondingly, the Respondent Employer, at the hearing, amended its answer denying the new allegations as time barred by the 6-month limitation contained in Section 10(b) of the Act. I find this defense meritorious for reasons noted below.

The charges which were filed on 19 August 1986 relied on by the General Counsel allege that the Respondent Employer violated Section 8(a)(5) as follows:

(a) On or about April 7, 1986 the Employer unilaterally reduced wages by \$1.43 per hour.

(b) Beginning in January 1986, the Employer refused to pay its monthly contribution to the Union pension fund.

The aforementioned charges also contain the unusual catchall language: "By the above and other acts, the above named employer has interfered with, restrained, and coerced employees in the exercise of rights guaranteed in Section 7 of the Act." (G.C. Exh. 1m.) Clearly, these charges did not then (19 August 1986) encompass nor even contemplate any nonpayment to the legal fund because the Respondent Employer was in full compliance therewith. The Respondent Employer did not repudiate any obligation to the legal fund until 30 January 1987, approximately 5-1/2 months after the charges were filed. It is also noted that, subsequently, the Union filed additional charges which gave rise to a third consolidated complaint on 9 April 1987 without any reference to the Company's failure and refusal to make the contributions in question. (G.C. Exh. 1(r) and (x).)

In the circumstances of this case, I find that the instant allegation is not grounded on or encompassed by any timely charge as required in the proviso contained in Section 10(b).<sup>32</sup>

Accordingly, I shall recommend that this allegation be dismissed.

### *d. Respondent Employer's withdrawal of recognition from Local 1 in violation of Section 8(a)(5) and related 8(a)(2) and 8(b)(1)(A) allegations involving assistance and recognition of the Teamsters*

#### (1) Withdrawal of recognition in violation of Section 8(a)(5)

It is undisputed that on 30 January 1987, the Respondent Employer withdrew recognition from Local 1 while at the same time, it extended recognition to the Teamsters. The Respondent Employer contends that it was entitled to take such action because the Teamsters had demonstrated by objective evidence that they represented a majority of the unit employees. The evidence relied on by the Respondent Employer consisted principally of Teamsters authorization cards signed by a majority or 53 of the 103 unit employees which cards the Teamsters presented on 30 January. Further, that same day, there was a brief walkout by approximately 63 employees assertedly in support of the Teamsters demand for recognition. On the other hand, the General Counsel contends

<sup>32</sup>Sec. 10(b) of the Act in pertinent part contains the following proviso: "That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board."

that given the seriousness of the unremedied unfair labor practices, all such evidence in support of the Teamsters must be rejected as tainted.

In *Robertshaw Control Co.*, 263 NLRB 958, 959 (1982), cited by the General Counsel, the Board, in upholding an 8(a)(5) withdrawal of recognition allegation observed as follows:

We have consistently held that [an incumbent] union enjoys a presumption of continuing majority status. In order to rebut that presumption, an employer must either show that the union in fact no longer retains majority support, or that its refusal to bargain was based on a reasonably grounded doubt as to the union's majority status. *As to a reasonably grounded doubt, the doubt must be based on objective consideration and must be raised in a context free of unfair labor practices.* *Sierra Development Company d/b/a Club Cal-Neva*, 231 NLRB 22, 23, enf. 604 F.2d 606. [Emphasis added.]<sup>33</sup>

Here, I find the conclusion inescapable that any doubt regarding Local 1's continued majority support is inextricably intertwined with the serious and largely unremedied misconduct engaged in by the Respondent Employer. In arriving at this conclusion, I rely particularly on the Respondent Employer's repudiation of its obligations to make pension contributions as well as reducing its employees' wages by \$1.43 per hour in violation of Section 8(a)(5), which action impacted directly on every member of the bargaining unit. Correspondingly, I reject, as incredulous, the Respondent Employer's assertion, as stated in its brief, that such "alleged unfair labor practices, *even if substantiated* [emphasis added], were not of the type which were egregious enough to have a detrimental effect on the Union's majority status." Indeed, Dry's own testimony underscores the magnitude of the impact of the wage loss on employees. Thus, Dry, in explaining why he restored the paycut, testified as follows:

I reinstated the [paycut] because the productivity was terrible; *the people were very angry at me personally and at the Company*; there had been numerous incidents of arguments; a lot of people that I had known all my life were all upset; we were losing customers; we were having bad quality.

And, I spent almost every day, almost every day, from the time we made the wage cut until the time we reinstated it on the floor, the actual production floor, most of every day. And, a lot of people had talked to me and I just felt like it was something that we tried to do and didn't work. And, I decided the best thing to do was to give the money back. It was a bad situation and we were trying to make it better.

Although Dry did not acknowledge that the employees had also held the Union responsible, it is not unreasonable to presume certain employee union defection flowing from Local 1's inability to prevent the wage cut. As Dry's testimony disclosed, he felt compelled to restore the paycuts because the employees "were very angry" and "production" greatly suffered. Nowhere did Dry attribute his change of heart with

regard to restoring the paycuts to efforts undertaken by Local 1.

Contrary to Respondent Employer, I also reject the notion that Natico "cured any detrimental effect of that [pay] cut" by rescinding such action 3 months later. Thus, Dry merely rescinded the paycut; he did not compensate employees for wages lost while the paycut was in effect until after he had withdrawn recognition from Local 1 and had recognized the Teamsters. Moreover, the Respondent Employer never acknowledged any wrongdoing; nor did it provide assurances against the same or similar misconduct in the future. In short, the Respondent Employer did virtually nothing to dispel the lingering effects of its coercive conduct on unit employees. Cf. *Master Slack Corp.*, 271 NLRB 78 (1984) (the respondent's prior unfair labor practices had been substantially remedied).

Having found that the Respondent Employer's reliance on Local 1's loss of majority was not "free" of a context of unfair labor practices as well as the likelihood that such unlawful action had an appreciable impact on employee defection, I further find that the Respondent Employer lost its standing to I otherwise challenge the incumbent union's majority status. See, e.g., *Abbey-Medical/Abbey Rents, Inc.*, 264 NLRB 969 (1982), enf. 709 F.2d 1514 (9th Cir. 1983); *KBMS, Inc.*, 278 NLRB 826 (1986); *Douglas & Lomason Co.*, 253 NLRB 277, 280 (1980); *Guerdon Industries*, 218 NLRB 658 (1975). Accordingly, I find that the Respondent Employer, by withdrawing recognition from Local 1 on or about 30 January 1987, violated Section 8(a)(5) of the Act, as alleged.<sup>34</sup>

#### (2) Recognition of the Teamsters in violation of Section 8(a)(2) and related allegations

Having found that the Respondent Employer's unremedied unlawful actions precluded a challenge to the incumbent Union's presumption of continued majority support, I further find that although it was so obligated to recognize and bargain with that Union, it was not free to recognize the Teamsters or any other labor organization. See *Ana Colon, Inc.*, 266 NLRB 611 (1983); *American Pacific Concrete Pipe Co.*, 262 NLRB 1223 (1982). Cf. *Alexander Muss & Sons*, 274 NLRB 1330 (where recognition of the outside union was in a context free of unfair labor practices). Accordingly, I find that the Respondent Employer's recognition of the Teamsters on 30 January 1987 violated Section 8(a)(2) of the Act as alleged. Further, and coextensive with the 8(a)(2) violation, I find the Teamsters' acceptance of such unlawful recognition is violative of Section 8(b)(1)(A). *Haddon House Food Products*, 269 NLRB 338, 340 fn. 9 (1984), enf. 764 F.2d 182 (3d Cir. 1985).

It is also contended, the record supports, and I find that the Respondent Employer provided unlawful assistance to the Teamsters in violation of Section 8(a)(2) by canceling overtime on 22 April 1987, 1 day before a scheduled non-Board-conducted representation election in order to encourage its employees to attend the Teamsters meeting. It is undisputed that the Company had eliminated overtime work that evening "in order to permit the employees to attend [the] Teamsters

<sup>33</sup> See also *United Supermakets*, 287 NLRB 394 fn. 4 (1987).

<sup>34</sup> Given the aforementioned conclusions, I find it unnecessary to dispose of other related issues raised by the parties reflecting on the Union's loss of majority on or about 30 January 1987. See *Douglas & Lomason Co.*, supra.

meeting.” (R. Emp. Br. 154.) However, the Respondent Employer points out that it had similarly altered overtime schedules to accommodate Local 1 when that Union was the exclusive bargaining representative and therefore it was “merely” providing the Teamsters, as the employees “majority representative” the same service. (Id.)

In the circumstances of this case, noting particularly, that Respondent Employer had engaged in unremedied unlawful action seriously undermining Local 1’s majority status, I find that no question concerning representation could be raised at the time the Teamsters were accommodated. See *Elias Mallouk Realty Corp.*, 265 NLRB 1225, 1236 (1982). Accordingly, I find that the Respondent Employer’s assistance to the Teamsters violated Section 8(a)(2) as alleged.

Still further, the General Counsel contends and I find in the circumstances of this case, that the Respondent Employer’s role in the conduct of the non-Board representation election in April 1987 independently violated Section 8(a)(1) of the Act. First, it is noted, that the election was conducted against a backdrop of unremedied unfair labor practices adversely affecting every unit employee. Thus, as noted previously, the Company, in violation of Section 8(a)(5), bypassed and undetermined Local 1’s representative standing by unilaterally ceasing its contributions to the Union’s pension fund and reducing the wages of all employees in the amount of \$1.43 per hour. In October 1986, these unilateral changes gave rise to a second consolidated complaint.

In January 1987 the Company’s assault on the incumbent Union’s exclusivity continued even in the face of the aforementioned complaint by its recognition of the Teamsters and concomitant withdrawal of recognition from Local 1. This unlawful action led to still another consolidated complaint dated 9 April 1987 (G.C. Exh. 1(x)).

Additionally, the record disclosed that the Company favored the Teamsters by negotiating with that Union in February 1987 to compensate the employees for the money cost while the paycut was in effect. This advantage by the Teamsters could hardly escape notice from the bargaining unit. In fact, Dry expected the Teamsters committee to advise employees that the Company would restore their lost wages. (Tr. 1021.) Although Dry testified that he had previously offered to return the lost wages during negotiations with Local 1, I find that offer of little consequence in the circumstance of this case. Thus, the record disclosed that Dry’s offer was conditional as part of a broader contract package and only after he had already engaged in certain other unremedied unfair labor practices. In any event, the fact remains that the Teamsters were wrongfully and unlawfully recognized at a time when a question concerning representation could not be raised due to the Company’s unremedied unfair labor practices. The disputed election was held nearly 3 months later while the Teamsters were still wrongfully recognized as the exclusive bargaining representative for the unit employees.

As for the election itself, the Respondent Employer relies, inter alia, that it was conducted by secret ballot under the supervision of an independent accounting firm. I find of greater significance, that the election was conducted in a context of serious unfair labor practices thereby creating a coercive setting. See generally *Struksnes Construction Co.*, 165 NLRB 1062 (1967). As such, I find that the polling served no legitimate purpose or objective basis for determining employee choice of bargaining representative. See also *Louisiana-Pa-*

*cific Corp.*, 283 NLRB 1079 (1987). Accordingly, I find that the Respondent Employer’s role in the conduct of the election violated Section 8(a)(1) as alleged.

## 2. Other allegations

### a. Respondent Employer’s removal of Robert Zozofsky as a day-shift extruder operator in violation of Section 8(a)(3)

It is alleged that in March 1987, the Respondent Employer refused to permit its employee, Robert Zozofsky, to continue to work as a day-shift extruder operator because of his activities as a shop steward for Local 1 and that it thereby violated Section 8(a)(3) of the Act.

The record disclosed that in early 1987, the Respondent Employer shut down its night-shift operations for non-discriminatory reasons. Zozofsky, a night-shift extruder operator asserted his seniority and bumped Mark Cutler, the day-shift extruder operator from that position. For the next 8 weeks Zozofsky worked as a day-shift extruder operator without interruption. On Friday, 13 March, Zozofsky had an argument with Charles McCool, a shop steward for the then recognized Teamsters. The argument related to an event that took place 1 year earlier. Zozofsky asserted that he had just learned that McCool had “passed the word around” that he, Zozofsky, had instructed the maintenance employees not to work on a particular Saturday, a year ago. At that time, Company officials had asked the maintenance employees to work on Saturday to repair the winder in time for the incentive program, which was then scheduled to begin that Monday.

McCool, for his part, denied to Zozofsky, that he had been spreading the word that the latter was responsible for the failure of the maintenance employees to work on the Saturday in question. As noted above, this Zozofsky-McCool argument occurred on Friday, 13 March 1987. The following Monday, Zozofsky was told by Plant Manager William Dougherty, in the presence of McCool and two other Teamsters stewards, that he could not work as a day-shift extruder operator because that had never been his “assigned” job.<sup>35</sup> McCool testified that he called for this meeting with Zozofsky because Cutler told him, that his complaint had not yet been acted on and that he, McCool, wanted to provide Zozofsky with a forum to defend his position.

It is undisputed that Zozofsky had never held the day-shift extruder’s position as an “assigned” job. However, it is also undisputed that on some three other similar occasions when the night shift had been shutdown or laid off, that Zozofsky had exercised his seniority and had bumped into the day-shift extruder position. According to Plant Manager Dougherty, he had wrongly assumed that Zozofsky had once held the extruder operator job on the day shift as “assigned.” The fact that Zozofsky had performed the disputed work on the day shift did not by itself establish that the position was his as an “assigned” job.<sup>36</sup> This time, Cutler, the bumped daytime

<sup>35</sup> Assigned jobs are identified or classified in the Natico-Local collective-bargaining agreement. When a job opening occurs, that opening is posted for 3 days. Interested employees sign for the posted opening and the employee with the greatest seniority is awarded that “assigned” job after 30 days.

<sup>36</sup> Sec. 3.1 of the most recently expired Natico-Local 1 contract states “It is understood and agreed that seniority shall be applied in cases of layoff, callback, promotion, demotion, overtime work, vacation preference, and shift pref-

extruder operator, verbally complained to Dougherty who then investigated and discovered that in fact, all Zozofsky's "assigned" jobs were on the night shift.

The General Counsel noted that the Respondent Employer had demonstrated a preference for the Teamsters over Local 1 and that Local 1 Shop Steward Zozofsky was removed from this job almost immediately after his argument with McCool, a shop steward for the Teamsters. Thus, the General Counsel contends, "a clear inference [of discriminatory motive] is raised" that the Respondent Employer took this disputed action "by a desire to appease the [Teamsters] and to punish Local 1 and its supporters." I find, contrary to the General Counsel, for reasons noted below, that the record falls short of establishing an inference of unlawful motivation.

First, it is noted that Zozofsky was admittedly accused of telling maintenance employees not to cooperate with the Company by working on a particular Saturday a full year before he was removed from the job in question. Even when removed, it is noted that Zozofsky continued to work on the day shift in another capacity with no loss of pay. There is a dearth of evidence on this record of any threats or any other adverse action taken against Zozofsky during the intervening 12 months. Further, it is not alleged nor does the record disclose that the Respondent Employer discriminated against any other official or supporter of Local 1. Some of these officials, such as Ferguson, were clearly more active and influential in Local 1 activities than Zozofsky.

Insofar as relating Zozofsky's disputed removal to his argument with McCool, Zozofsky testified that he (Zozofsky) was "upset" and "very angry" but did not testify regarding McCool's behavior or attitude. McCool characterized the verbal exchange with Zozofsky as more of a misunderstanding than an argument.<sup>37</sup> In any event, Zozofsky did not testify nor does the record disclose that McCool was angry or that he threatened Zozofsky with any adverse action. The timing of Zozofsky's removal, although not free of suspicion, came *after* employee Cutler complained and Dougherty investigated and learned that Zozofsky had not previously worked as a day-shift extruder operator as an "assigned" job.<sup>38</sup>

On the state of this record, I find that the General Counsel's assertion that Zozofsky was discriminated against because of his activities as a shop steward for Local 1 is based

erence." (G.C. Exh. 3, p. 2.) As the section is silent with regard to "assigned" jobs, it does not appear that this provision, relied by the General Counsel, is dispositive of the issue. The only other section (3.7) dealing with the "bumping privilege covers daily or short time changes but no reference to "assigned" jobs. (Id., p. 3.)

<sup>37</sup> Zozofsky had poor recall, was vague, equivocal, not fully responsive and was otherwise an unimpressive witness. Overall, including demeanor factors, I find McCool a more reliable witness and credit his testimony over Zozofsky's in areas of conflict.

<sup>38</sup> Cutler subsequently filed a written grievance on a Teamsters "Grievance Form" for "lost overtime" as a result of being "[u]njustly removed from my job in violation of [the] contract." (R. Emp. Exh. 28.) Dougherty testified that the written grievance was filed *after* Zozofsky had been removed. He may have been mistaken as the grievance itself is dated February 24, 1987, and, if accurate, it would appear to have been filed *before* Zozofsky was removed. Cutler did not testify. As I have no basis for inferring that Cutler was not equally available to the General Counsel, I draw no adverse inference against the Respondent Employer for its failure to call Cutler as a corroborative witness. See *Wayne Construction*, 259 NLRB 571 fn. 1 (1981). Although I cannot discern from this record with confidence when Cutler filed his formal written grievance I do credit Dougherty's uncontroverted testimony that Cutler complained to him verbally *before* Zozofsky was removed, as internally consistent.

largely on suspicion and conjecture or speculation. In sum, I find that the General Counsel has failed, to establish *prima facie*, as required, that an inference of illegal motive for Respondent Employer's disputed action is warranted. *Wright Line*, 251 NLRB 1083, 1089 (1980). Accordingly, I shall recommend that this allegation be dismissed.

b. *Preston Dry's statement to employee Robert Cheesman in violation of Section 8(a)(1)*

Robert Cheesman, a maintenance employee, testified that within 1-1/2 months after the Company had reduced the hourly wage rate, he had a brief exchange with Dry on that subject. According to Cheesman, on that occasion, Dry was passing through the facility and as he came to Cheesman's work station, Cheesman asked him "when [are we] going to get our money back" and Dry responded "when we get rid of the union." Cheesman acknowledged on cross-examination that Dry was laughing at the time he made the statement, as was Cheesman. On the other hand, Cheesman also testified that although Dry had a habit of joking, Cheesman could not tell whether Dry was joking on this occasion. Dry could not recall any such incident.

First, I credit the account provided by Cheesman. In doing so, it is noted that Cheesman was still employed by the Respondent Employer at the time he testified. As such, he testified against his self interest, a factor the Board has long instructed shall not be lightly disregarded. See *Unarco, Inc.*, 197 NLRB 489, 491 (1972); *Gateway Transportation*, 193 NLRB 47, 48 (1972). Further, it is noted that Dry did not deny making the statement ascribed to him by Cheesman; Dry merely testified that he could not recall the incident.

As for the statement itself, although it may have been made in a jocular vein, I find of greater significance that it touched on a most sensitive subject with some lingering ambiguity. The Board has long observed that the coercive and unlawful effect of a threatening statement is not "blunted" merely because said statement is "accompanied by laughter or made in an offhand humorous way." See *Ethyl Corp.*, 231 NLRB 431, 434 (1977); see also *Champion Road Machinery*, 264 NLRB 927, 932 (1982) (statement found to be coercive while supervisor frequently joked and employee testified that he thought the supervisor was joking). Thus, although Cheesman candidly acknowledged that Dry had a tendency to joke around, Cheesman, as noted above, was unsure whether Dry was serious or just kidding at the time in question. Clearly, lost wages was not amusing to employees as the record disclosed that the subject preoccupied their time at the facility. In this regard, even Dry observed that after he had cut wages, the employees were so upset and angry and concomitantly production suffered that he was compelled to later restore those cuts.

Against this backdrop and noting also that the unilateral wage reduction itself was unlawful, I find that it was incumbent on Dry, if he elected to respond to an employee inquiry about lost wages, as here, that his remarks be unambiguous and free of any connection to the Union or other protected concerted activities. Anything less, as in the instant case, in my view, tends to restrain and coerce employees in violation of Section 8(a)(1). Accordingly, I find that the Respondent Employer violated Section 8(a)(1) as alleged.

## CONCLUSIONS OF LAW

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

2. United Independent Union, Local 1 is a labor organization within the meaning of Section 2(5) of the Act.

3. Teamsters Local 676 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

4. The unit as set forth in section 2, article 2.1 of the most recent collective-bargaining agreement between the Respondent Employer and Local 1, effective by its terms for the period December 16, 1982, to December 16, 1985, is, and has been at all times material, appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. At all times relevant to this case, Local 1 has been and is now the exclusive collective-bargaining representative of the employees in the unit referred to in paragraph 4, above, within the meaning of Section 9(a) of the Act.

6. By withdrawing recognition from Local 1 as the exclusive collective-bargaining representative of the employees in the unit noted above on or about 30 January 1987, and refusing to bargain with Local 1 since that date; by unilaterally reducing the wages of its employees by \$1.43 per hour since on or about 7 April 1986 before any unlawful impasse with a corresponding reduction of vacation benefits for employee Robert Ferguson; and by unilaterally ceasing to make pension plan contributions since on or about 20 February 1986 before any unlawful impasse, Respondent Employer engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

7. By recognizing Teamsters Local 676, since on or about 30 January 1987, as the exclusive collective-bargaining representative of its employees in the unit noted in paragraph 4, above; and by providing other assistance to Local 676 in the form of canceling overtime on 22 April 1987 to encourage its employees to attend a union meeting sponsored by Local 676, Respondent Employer engaged in unfair labor practices within the meaning of Section 8(a)(2) and (1) of the Act.

8. By accepting recognition, since on or about 30 January 1987, as the exclusive collective-bargaining representative of Respondent Employer's employees in its unit noted in paragraph 4, above, the Respondent Union violated Section 8(b)(1)(A) of the Act.

9. By polling its employee on 23 April 1987 regarding whether they desired to be represented by Respondent Union or Local 1 and by threatening its employees to continue the wage cut referred to in paragraph 6, above, until unit employees withdrew their support for Local 1, Respondent Employer engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

10. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

11. The General Counsel has not established by a preponderance of the evidence that Respondent Employer otherwise violated Section 8(a)(5) of the Act as alleged.

12. The General Counsel has not established by a preponderance of the credible evidence that Respondent Employer discriminatorily refused to permit its employee, Robert Zozofsky, to work as a day-shift extruder operator because of his activities as a shop steward for Local 1, within the meaning of Section 8(a)(3) of the Act, as alleged.

## THE REMEDY

Having found that the Respondent Employer and the Respondent Union have engaged in certain unfair labor practices, I shall recommend that they be required to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

In particular, having found that the Respondent Employer has unlawfully withdrawn recognition from Local 1 and has failed and refused to bargain with Local 1 as the exclusive representative of the bargaining unit found appropriate here, in violation of Section 8(a)(5), I shall recommend that Respondent Employer recognize and, on request, bargain with Local 1 as the exclusive representative of the employees in the appropriate bargaining unit. Further, having found that the Respondent Employer also violated Section 8(a)(5), by ceasing its contributions to the union pension plan, I shall recommend that the Respondent Employer make the employees whole<sup>39</sup> by making such contributions in the manner noted in *KBMS, Inc.*, supra.

As for Respondent Employer's other unilateral changes in violation of Section 8(a)(5), it appears that the employees have already been made whole thereby obviating the need for further affirmative action in this limited regard.

Still further, having found that the collective-bargaining relationship between Respondent Employer and Teamsters Local 676 for the unit found appropriate here from its inception violated Section 8(a)(2) and (1) and Section 8(b)(1)(A) of the Act, I shall recommend that the parties cease and desist therefrom. However, nothing here shall be construed as requiring or permitting the varying or abandoning of any provision contained in the collective-bargaining agreement between the parties which increased wages, benefits, and or other employees rights and privileges over those which previously existed.<sup>40</sup> See, e.g., *Ana Colon, Inc.*, 266 NLRB 611, 613-614 (1983); *Triangle Sheet Metal Workers*, 237 NLRB 364, 371 (1978).

[Recommended Order omitted from publication.]

<sup>39</sup>The General Counsel acknowledged, and I find, that consistent with Sec. 10(b) of the Act, the cognizable period cannot revert to a time more than 6 months before the filing of the relevant charge on 19 August 1986.

<sup>40</sup>Although the record clearly disclosed that the Respondent Employer and Teamsters Local 676, at some unspecified time, negotiated and executed a collective-bargaining agreement, this agreement was not specifically alleged to be unlawful nor was the matter fully litigated. Further, the record is silent as to whether that agreement contained a union-security provision. In these circumstances, I cannot make any additional 8(a)(2) and (3) findings with regard to the agreement. However, as noted above, I shall recommend that the parties cease and desist from their collective-bargaining relationship covering the unit of employees here, unless and until Teamsters Local 676 is certified as the exclusive collective-bargaining agent for the unit employees.