Apex Investigation & Security Co., Inc. *and* Allied International Union. Case 2–CA–23577

April 30, 1991

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On September 17, 1990, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings, and conclusions, to modify the remedy,[2] and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Apex Investigation & Security Co., Inc., Bronx, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

''(b) Unilaterally ceasing payments into the Union's Allied Security Health and Welfare Fund, as provided by the 1984–1987 collective-bargaining agreement between the Respondent and the Union, as amended in 1985, which expired on May 31, 1987.''

2. Substitute the following for paragraph 2(b).

''(b) Make its employees and the Union's Allied Security Health and Welfare Fund whole by paying to the fund, with interest, the amounts as provided in the 1984–1987 collective-bargaining agreement, as amended in 1985, which expired on May 31, 1987. The obligations shall commence following the last payment which was made in November 1988, which corresponded to the September 1988 obligation, and continue until such time as Respondent negotiates in good faith to a new agreement or to an impasse. Respondent shall also make its employees whole, with interest, for any loss they suffered due to Respondent's unlawful discontinuance of its payments to the Allied Security Health and Welfare Fund commencing in December 1988.''

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

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with Allied International Union, as the exclusive representative of our employees in the appropriate unit described as follows:

> All of the Employer's full-time and part-time employees within the United States and its possessions, excluding executives, supervisors, professional, confidential, clerical and non-guard employees.

WE WILL NOT unilaterally cease payments into the Union's Allied Security Health and Welfare Fund, as provided by the 1984–1987 collective-bargaining agreement between us and the Union, as amended in 1985, which expired on May 31, 1987.

WE WILL NOT refuse to furnish the Union with the names and addresses of all bargaining unit members, their dates of hire and jobsite locations, which are relevant and reasonably necessary to fulfilling its duty to represent said employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.

WE WILL bargain in good faith with the Union as the exclusive representative of our employees in the appropriate unit described above.

WE WILL make our employees and the Union's Allied Security Health and Welfare Fund whole by paying to the fund, with interest, the amounts as provided in the 1984–1987 collective-bargaining agreement, as amended in 1985, which expired on May 31, 1987. The obligations shall commence following the last payment which was made in November 1988, which corresponded to the September 1988 obligation, and continue until such time as we negotiate in good faith to a new agreement or to an impasse. We shall also

[1] The Respondent moved to reopen the record to receive ''newly discovered'' evidence that the Union does not represent a majority of its employees. This motion is denied. Even if the proffered evidence establishes, as the Respondent claims, that the Union has been soliciting authorization cards from employees at various facilities of the Respondent, we agree with the judge that this fact is irrelevant to the issue of majority union support.

[2] Because the provisions of employee benefit fund agreements are variable and complex, we leave to the compliance stage the question of whether the Respondent must pay any additional amounts into the benefit funds in order to satisfy our ''make whole'' remedy. *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

[3] The recommended Order is modified to exclude health and welfare payments for the Respondent's employees at Federal Government facilities. Under a 1985 amendment to the 1984–1987 collective-bargaining agreement, employees at these facilities are excluded from coverage under the Union's Allied Security Health and Welfare Fund.

make our employees whole, with interest, for any loss they suffered due to our unlawful discontinuance of our payments to the Allied Security Health and Welfare Fund commencing in December 1988.

WE WILL open all our corporate books, including, but not limited to, our payroll register, to representatives of the Board, in order to determine the amount we owe the Fund and its employees, due to our nonpayment to the Allied Security Health and Welfare Fund since November 1988.

WE WILL furnish the Union with the information it requested, including the names and addresses of our employees, their dates of hire, and jobsite locations.

APEX INVESTIGATION & SECURITY CO., INC.

Gail Auster, Esq., for the General Counsel.
Richard N. Goldstein, Esq. (Carmody & Goldstein, Esqs.), of New York, New York, for the Respondent.
Gerald V. Dandeneau, Esq., of Melville, New York, and *Ira Cure, Esq. (Lewis, Greenwald, Kennedy, Lewis, Clifton & Schwartz, P.C.)*, of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Pursuant to a charge, and a first amended charge, filed respectively on April 19 and May 2, 1989, by Allied International Union (the Union), a complaint was issued against Apex Investigation & Security Co., Inc. (Respondent) on June 28, 1989.

The complaint, which was amended at the hearing, alleges that Respondent, from about September 1988 through the present, unilaterally failed and refused to make monetary payments to the Allied Security Health and Welfare Fund (Fund), without prior notice and without having afforded the Union an opportunity to negotiate and bargain with the Respondent concerning that change.

The complaint also alleges that Respondent failed and refused to furnish the Union with the names and addresses of bargaining unit members pursuant to the Union's requests.

Respondent's amended answer denied the material allegations of the complaint, and set forth certain affirmative defenses to be discussed, infra. On December 11 and 12, 1989, a hearing was held before me in New York City. Upon the evidence presented in this proceeding, and my observation of the demeanor of the witnesses and after consideration of the briefs by the General Counsel and the Respondent, I make the following[1]

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation having its principal office and place of business at 19 Bruckner Boulevard, Bronx, New York, is engaged in the business of providing security services for commercial and residential enterprises at various sites in the New York City metropolitan area. Annually, Respondent performs services valued in excess of $50,000 for various enterprises located in New York State, each of which enterprises being directly engaged in interstate commerce and meeting a Board standard for the assertion of jurisdiction exclusive of indirect inflow or outflow. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent denied that the Union is a labor organization within the meaning of the Act.

Union President Edward Benvenuto testified that the Union, which represents only security guards, acts in behalf of such employees through grievances and arbitrations. The Union, which has about 3000 members and has a constitution and bylaws, is party to 25 to 30 collective-bargaining agreements with employers, including an expired contract with the Respondent.

Based upon the above facts, I find and conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The Facts

The parties have had a collective-bargaining relationship since the 1970s. Their last collective-bargaining agreement ran from June 1, 1984, to May 31, 1987. The contract provides that the Respondent was obligated to pay to the Fund $32 per month for each full-time employee, and $15 per month for each part-time employee.

The contract's recognition clause states as follows:

> The Employer recognizes and acknowledges the Union as the sole and exclusive Bargaining Agency for all of its full and part-time employees within the United States and its possessions, with respect to wages, hours and conditions of employment; excluding executives, supervisors, professional, confidential, clerical and nonguard employees, and agrees to deal collectively only with this Union for and on behalf of such employees.
>
> This Agreement shall apply to the establishments now owned, maintained, operated and/or controlled by the Employer and/or any new establishments that the Employer may own, maintain, operate and/or control at any time during the term of this Agreement within the City of New York and any place within the United States of America and any of its territories or dependencies.

[1] Following the close of the hearing, Respondent moved to reopen the hearing for the receipt of evidence that a union official had distributed union authorization cards. Respondent claims that the evidence supports its position that the Union does not represent a majority of the Respondent's employees and has abandoned its contract. The General Counsel and the Union opposed the motion to reopen. I denied the motion on the grounds that (a) there was no showing, pursuant to Sec. 102.48(d)(1) of the Board's Rules and Regulations, that the evidence sought to be introduced was ''newly discovered or previously unavailable,'' or that ''extraordinary circumstances'' exist which would justify reopening the hearing; (b) the alleged evidence does not tend to prove Respondent's defense and is irrelevant; and (c) the alleged evidence concerns events which occurred more than 1 year after the violations alleged in the complaint.

The complaint alleges the collective-bargaining unit as:

> All full-time and regular part-time employees excluding executives, supervisors, professional, confidential, clerical and non-guard employees.

On March 5, 1987, the Union gave timely notice to Respondent that it wished to negotiate a renewal collective-bargaining agreement. Not having received any response, Union President Edward Benvenuto wrote again, on April 20, to Respondent. On May 6, Respondent's president, Ramon Rodriguez, wrote to the Union stating that he received only the April 20 letter, and advising that he would meet with the Union on any date convenient to the Union.

Ray Wolff, the Union's business representative and secretary-treasurer, testified that he met with Rodriguez. There was some confusion as to when the meeting was held. Wolff first testified that it was held 1 month before the contract expired, and later testified that it was held after the contract expired. The meeting was short—only 5 or 10 minutes. According to Wolff, they discussed the welfare provision and the uniform allowance fee. Wolff also stated that he asked for a list of employees and the sites they worked at. Another subject of that meeting was the parties' 1985 amendment to the collective-bargaining agreement which applied only to employees employed at Federal Government facilities. That amendment permitted the Respondent to provide its own health and welfare coverage, or reimburse the employee at 32 cents per hour. At this meeting, the Union sought to include those employees in the Union's health and welfare plan. They also discussed the grievance of an employee concerning medical benefits. Wolff conceded that Rodriguez did not agree to anything at that meeting.

The next meeting, after the contract's expiration, and lasting about 30 minutes, was attended by Benvenuto, Wolff, and Rodriguez. Benvenuto testified that he submitted proposals to Rodriguez, but does not recall what the proposals were or if they were in writing. However, he did assert that all the proposals including wages and holidays were accepted by Rodriguez. Benvenuto stated that the proposed contract was returned to his office to be typed. After being typed, Benvenuto called Rodriguez and told him what the new contract contained. Rodriguez refused to meet or sign the contract.

Wolff testified that at that meeting the parties discussed health and welfare and the uniform allowance. Wolff requested but was refused the locations of the sites at which Respondent's employees worked. The meeting ended with the Union saying that it would contact Rodriguez. No date was set as the parties believed that they would be meeting because they would be seeing each other at upcoming court or arbitration appearances.

Thereafter, according to Wolff, he handed Rodriguez a sealed envelope which he told Rodriguez was the draft of the new contract. However, Benvenuto testified that Rodriguez was never shown a copy of the new contract.[2] Another meeting was held which was attended by Wolff and Rodriguez. Rodriguez complained about the requirement that Respondent clean the employees' uniforms, other unspecified matters, and the high cost of health and welfare. Wolff offered to waive the requirement that Respondent make health and welfare contributions for the first 6 months of an employee's employment. Rodriguez said that that offer was a good one, and that he would consider it. Wolff asked him for a list of worksites and the names and addresses of the employees. Rodriguez refused.

Rodriguez testified that the Union did not make any proposals to him for a renewal contract and, in fact, no meetings were held for the purpose of negotiating such a contract. He denied being shown a draft of a proposed collective-bargaining agreement. He stated that after the contract expired in May 1987, the only conversations he had with the union officials concerned an attempt by Local 803, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 803) to organize Respondent's employees employed at LaGuardia Airport.

The parties continued to deal with each other after the contract's expiration. Thus, on April 8, 1988, the Union sent Respondent a list of names of union members and asked it to supply their addresses. Respondent was also asked to distribute letters to the Union's members concerning nomination meetings and union elections. On March 16, 1989, the Union made a written request for a list of all non-Government site employees and their dates of hire. It explained that this information was needed to determine which employees are required to remit dues-checkoff authorization forms pursuant to the collective-bargaining agreement. On June 6, 1989, the Union again sent a letter to Respondent, requesting the names and addresses of Respondent's employees, their jobsites, and dates of hire. The information requested above was never provided to the Union.

The Respondent and the Union continued to deal with each other as to contractual matters after the expiration of their collective-cbargaining agreement. In September 1987, Rodriguez issued a memo to his supervisor, advising that effective September 13, 1987, all employees assigned to Federal sites ''will be union members,'' retroactive to 1985. The amount of dues and initiation fees was set forth in the memo. In November 1987, the Union sent a letter to Respondent advising it of an increase in the initiation fees, effective January 1, 1988. In addition, in May 1988, Wolff discussed a grievance of an employee concerning her request for a vacation with Respondent's controller, who granted the requested vacation. In July and August 1988, Wolff sent letters to Rodriguez concerning employees' grievances that they had not received a raise in pay. In November 1988 and January 1989, Wolff requested that Respondent begin deducting initiation fees and dues from two new employees' salaries. In December 1988, the Union sent a letter to Respondent advising it of a dues increase. In addition, Wolff has visited jobsites where Respondent's employees who are covered by the Union's contract are employed.

Rodriguez testified that when he was awarded the contract to employ guards at LaGuardia Airport, Local 803 made a claim to represent them. Rodriguez then contacted the Union, in about December 1987, and told it about Local 803's attempt to organize the airport guards. Rodriguez stated that he was told by an Allied official to distribute authorization cards for the Union, and he did so. Thereafter, Local 803 filed a charge with the Board concerning Respondent's recognition of Allied for the LaGuardia Airport guards.

[2] After the close of the hearing that document was received in evidence as G.C. Exh. 19.

After the contract expired in May 1987, Respondent continued to honor its contractual obligations to the Union by paying welfare contributions in behalf of its employees, and deducting union dues and initiation fees from its employees, and sending those sums to the Union. Respondent's controller sent a letter to the Union in March 1988, which stated that she was enclosing a list of new employees.

The last payment made by Respondent for welfare contributions was on November 23, 1988, which applied to the September 1988 employer contribution report. Respondent did not offer to bargain and did not communicate with the Union regarding its intention to cease making payments to the Fund, and the Union did not agree to this unilateral change.

In February 1989, the Fund and its attorney sent letters to Respondent asking that it remit the sums owed for November and December 1988 and January 1989. In March 1989, the Fund and its attorney again wrote to Respondent requesting the sums for the above months, and for February 1989. In April 1989, the Union's attorney sent a letter to Respondent advising that it is in arrears in the payment of dues and initiation fees from December 1988 through April 1989.

Respondent did not respond to any of those requests.

Respondent's president, Rodriguez, testified that he received oral and written statements of employees that they were not interested in being represented by the Union. Neither the names of the employees, their numbers compared with the number of employees in the unit, nor the specifics of the statements they allegedly made were set forth by Rodriguez. He further stated that employees complained to him about not being able to receive welfare benefits from the Union, and other workers attempted to obtain medical treatment and were told that their dues and initiation fees were in arrears.

Rodriguez testified that after the collective-bargaining agreement expired, Respondent continued to make payments to the Fund because some of its employees did not have any welfare coverage, and he sought to maintain coverage for them.

Rodriguez also testified that a proceeding in the Board's Region 29 had ''a bearing'' on his discontinuance of payments to the Fund. In Case 29–CA–13193, Local 803 filed a charge against Respondent on August 24, 1987. A complaint was issued on October 29, 1987, against Respondent which named the Union as a party-in-interest. The complaint alleged that on about April 1, 1987, Respondent obtained a contract with the Port Authority of New York and New Jersey to perform security services at LaGuardia Airport. That contract had been previously held by a company which employed employees who were represented by Local 803. The complaint further alleged that Respondent recognized the Union as the bargaining representative of those employees and applied their collective-bargaining agreement to such workers pursuant to the contract's accretion clause. The complaint alleged that such conduct violated the Act because (a) the Union did not represent an uncoerced majority of such employees, (b) the LaGuardia Airport site is not a valid accretion to the locations originally covered by the agreement, and (c) the LaGuardia Airport employees constitute a separate appropriate collective-bargaining unit. The complaint also alleged that Respondent's representative directed those guards to sign authorization cards in behalf of the Union and threatened them with discharge if they failed to do so.

On May 27, 1988, the Respondent's attorney signed the notice which was attached to the settlement agreement proffered by the Board agent in that case. The notice provided that the Respondent would not recognize or bargain with the Union as the representative of any of its employees or give effect to its contract with the Union and would withdraw and withhold recognition of the Union as the representative of any of its employees unless and until it was certified by the Board.

Respondent argues from the above that the Board took the position, in the settlement agreement, that its contract with the Union was invalid, and it was therefore relieved of making any payments to the Fund.

Union Attorney Gerald Dandeneau testified that following the issuance of the complaint in that case, a settlement was reached whereby the Union agreed not to attempt to represent those employees of Respondent who were employed at LaGuardia Airport. He further stated that the settlement agreement was improperly drawn by the Board agent and, as drawn, had the effect of prohibiting the Union from representing any employees—even those employed at locations other than LaGuardia Airport. The Union did not sign this settlement agreement described, and Dandeneau brought the error to the attention of the Board agent, who drafted a new settlement agreement which encompassed the LaGuardia Airport guards only. The Union signed the new settlement agreement. Respondent has not signed it. The case is still open; the settlement agreement not having been approved by the Regional Director.

Respondent's attorney conceded at the hearing that the settlement agreement it signed in May 1988 was not the final settlement agreement in that case, but he stated that it is relevant to show that the Respondent believed that it had no obligation to deal with the Union at the time the settlement agreement was presented to it.

Analysis and Discussion

A. *Respondent's Procedural Defenses*

Respondent alleges that the Union lacks standing to file a charge in behalf of the Fund, and that a court suit is the only appropriate vehicle to enforce an alleged failure to make contributions to the Fund.

Section 102.9 of the Board's Rules and Regulations provides that a charge may be filed ''by any person.'' The term ''person'' is defined in Section 2(1) of the Act as, inter alia, a labor organization. ''The simple fact is that anyone for any reason may file charges with the Board.'' *Operating Engineers Local 39 (Kaiser Foundation)*, 268 NLRB 115, 116 (1983). The corollary to this argument was made in *M. J. Santulli Mail Services*, 281 NLRB 1288, 1296 (1986), where the Board rejected the employer's argument that the fund lacked standing to file a refusal-to-bargain charge.

With respect to Respondent's other contention, the Supreme Court in *NLRB v. Strong Roofing*, 393 U.S. 357, 360–361 (1969), stated:

> Arbitrators and courts are still the principal sources of contract interpretation, but the Board may proscribe conduct which is an unfair labor practice even though

> it is also a breach of contract remediable as such by arbitration and in the courts.

In *Buck Brown Contracting Co.*, 272 NLRB 951, 953 (1984), the Board stated:

> The fact that the unfair labor practice is also a breach of contract for which the injured party might have another remedy, such as a suit for damages under Section 301 of the Act, does not displace the authority of the Board to deal with and remedy the unfair labor practice.

It is thus apparent, and I find and conclude, that the Union had standing to file this charge which alleged that Respondent failed to make contributions to the Fund, and I also find that, although a contractual remedy may exist in court, the Board is the proper forum to determine whether unfair labor practices have been committed by Respondent's failure to make contributions to the Fund after the expiration of the parties' collective-bargaining agreement.

B. *The Refusal to Bargain*

In *Stratford Visiting Nurses Assn.*, 264 NLRB 1026 (1982), the Board stated:

> It is well established that upon expiration of a collective-bargaining agreement a union enjoys a rebuttable presumption that its majority representative status continues. This presumption is rebutted if an employer affirmatively establishes either (1) that its refusal to bargain was predicated on a good-faith doubt, based on objective considerations, of the union's majority status, or (2) that at the time of the refusal to bargain a majority of the unit employees in fact did not wish to have the union as their collective-bargaining representative. The burden of rebutting the presumption rests on the employer.

This, of course, assumes that the prior contract is lawful on its face. Respondent argues that it is not lawful on its face because the expired agreement contains an inappropriate unit description. Respondent contends that the Union is not entitled to a presumption of majority status and the Respondent was therefore entitled to refuse to honor the terms and conditions of the expired agreement because of the allegedly improper collective-bargaining unit set forth in the contract.

The recognition clause of the expired agreement, set forth above, broadly recognizes the Union as the collective-bargaining agent for all of the Respondent's employees within the United States and its possessions, and states that it shall apply to all establishments now owned, and any new establishments that the employer may own during the term of the contract, anywhere in the United States or its territories.

The recognition clause is not unlawful on its face. Respondent argues that the broad clause requiring all establishments owned in the future to be included within the contract's coverage is an illegal accretion clause. The Board rejected an identical contention in *Frazier's Market*, 197 NLRB 1156 (1972), where the employer refused to sign an agreed-upon collective-bargaining contract which stated that the union was recognized as the bargaining agent for employees employed by the employer in ''present and future retail food stores.'' The employer there argued that by signing such a contract it would be forced to accept an illegal and unenforceable contract provision with respect to new stores where the employees in the new stores did not have an opportunity to choose the union freely. The Board stated:

> The Respondent's argument that retention of the phrase ''and future'' will effect an accretion of employees in new stores opened by the respondent without a consideration of the employees' desires does not justify its refusal to sign the contract as negotiated. Whether a group of new employees in a new store operated by the same employer will accrete to the existing unit is a matter to be determined by the Board in light of the circumstances of each individual case. The Board will not compel a group of employees in future stores of the employer who may constitute a separate appropriate unit to be subject to a contract between their employer and a union covering future stores and thus be included in an overall unit under the guise of accretion, without affording them the opportunity of expressing their preference in a secret election or by some other evidence that they wish to authorize that union to represent them. While the phrase ''and future'' by itself cannot effect an accretion of a new group of employees to the unit, it is a factor to be considered by the Board in resolving an issue of accretion. [Citations omitted.]

The Board's Region 29 did consider such an argument with respect to the LaGuardia Airport unit which Respondent attempted to accrete to the overall collective-bargaining unit, and issued a complaint finding that that unit constituted a separate bargaining unit, and not an accretion to the overall unit. It should be noted that no finding has been made that the collective-bargaining unit as set forth in the contract was inappropriate or unenforceable. On the contrary, Region 29 only found that its application to the LaGuardia Airport guards violated the Act.

In this connection, I note that although the initial settlement agreement may have improperly stated that Respondent must withdraw recognition from the Union and cease honoring its collective-bargaining agreement, this was corrected by the Board agent and did not give Respondent license to refuse to continue to make contributions to the Fund. Respondent signed the improper settlement agreement in May 1988, and nevertheless continued to make such fund payments for another 7 months—to November 1988. Accordingly, its argument that it based its refusal to make fund contributions on the May 1988 agreement cannot be accepted.

Moreover, I note that the unit set forth in the expired contract was voluntarily entered into by the Respondent and honored through the contract's life. In addition, by continuing to make fund payments after the contract's expiration, Respondent demonstrated its continued recognition that the collective-bargaining unit set forth therein was appropriate. Respondent raised no issue with respect to the allegedly inappropriate unit until this litigation, and never informed the Union that it was refusing to continue its fund payments because it believed that the unit was inappropriate. *Williams Enterprises*, 212 NLRB 880, 884 (1974); *Nazareth Regional High School v. NLRB*, 549 F.2d 873, 880 (2d Cir. 1977).

Respondent correctly points out that the unit description in the complaint differs from that in the expired collective-bargaining contract. Respondent implies that the General Counsel omitted the words, employed by the Employer ''within the United States and its possessions,'' deliberately in order to ''sanitize'' the allegedly improper unit description in the collective-bargaining agreement. I find no sinister motive in the omission. In effect, the unit set forth in the complaint—''all of the employer's employees'' is the same as ''all of its employees employed in the United States and its possessions.'' I will correct the unit description in my Order herein.

Accordingly, I reject Respondent's contention that the collective-bargaining unit set forth in the expired contract is unlawful or inappropriate.

Respondent also argues that it had a good-faith doubt that the Union represented a majority of the employees in the unit because of (a) the abandonment of the unit and the employees by the Union and its inactivity in seeking a renewal collective-bargaining agreement, and in enforcing the agreement; (b) statements of employee dissatisfaction with the Union; and (c) high turnover among employees.

With respect to the claim that the Union abandoned the unit and its collective-bargaining agreement, the evidence establishes that the Union sent timely notices to Respondent in an attempt to negotiate a renewal collective-bargaining agreement, and that union officials met with Respondent's president, Rodriguez, on three occasions. In this regard, the testimony of Union Officials Benvenuto and Wolff concerning the dates of the meetings, who was present, and what was discussed are somewhat contradictory and confusing. For example, Benvenuto testified that at one meeting Rodriguez agreed to all the Union's proposals, none of which he could recite, but Wolff did not corroborate that testimony. Moreover, at a following meeting, Wolff was still discussing the Union's proposals with Rodriguez, notwithstanding Respondent's alleged agreement to all the terms of the proposed contract at the prior meeting. As another example, Benvenuto testified that Rodriguez was never shown the proposed contract, while Wolff testified that Benvenuto gave him an envelope containing the contract which he handed to Rodriguez. In sum, the testimony of the union officials leaves much to be desired. However, I need not resolve this matter because the facts amply show that the Union did represent the unit employees and did not abandon the contract or the employees, and that Respondent recognized these facts. Thus, after the contract expired, the Union sought the names, addresses, and job locations of unit employees so that it could determine whether dues deduction forms had to be completed. The Union also requested Respondent to distribute letters to union members concerning nomination meetings and union elections. In September 1987, Rodriguez directed that all of Respondent's employees employed at federal sites become union members, and in November of that year the Union advised Respondent of an increase in initiation fees. In December 1987, Rodriguez directed that his employees at LaGuardia Airport sign cards for the Union, and in May 1988, Union Official Wolff discussed a grievance of an employee with Respondent's controller, and he sent letters to Respondent concerning other grievances. In addition, Wolff continued to visit those sites that he was aware of at which Respondent's employees worked. The Union was hampered in its efforts to visit sites and speak with employees because of Respondent's refusal to furnish the information concerning employee names and addresses and jobsites requested. Thereafter, Respondent continued to make fund contributions to its employees, its last payment being made in November 1988.

The evidence does not support a finding that the Union was inactive or abandoned the unit or the employees. It exercised diligence in representing the unit as best it could without the requested information. See *Flex Plastics, Inc.*, 262 NLRB 651, 656 (1982), and cases cited there, including *Pioneer Inn*, 228 NLRB 1263, 1265 (1977), where the Board found that a 4-year period of union inactivity was insufficient to find that the union had abandoned its representative status, where the union reasserted itself as the employees' collective-bargaining representative.

Rodriguez gave vague, nonspecific testimony that employees made oral and written statements that they were not interested in being represented by the Union, and that others complained about not being able to receive welfare benefits from the Union, and that still others attempted to obtain medical treatment and were told that their dues and initiation fees were in arrears. No names of the employees were set forth, except one, and the alleged written statements were not presented at the hearing. The number of employees who allegedly voiced these statements was not set forth at the hearing.

These alleged statements of employees are insufficient to establish a good-faith doubt of the Union's majority status, and even if they did, the testimony did not include the numbers of employees who rejected the Union which would permit a comparison with the total number of employees employed in the collective-bargaining unit, so as to find that a majority of employees had rejected the Union.

> Such conversations were too vague and generalized to establish that the employees did not want the Union to represent them. The remarks of the employees amounted, at most, to criticism or dissatisfaction with the Union but did not indicate a rejection of the Union as collective- bargaining representative. Moreover, assuming, *arguendo*, that such employees did reject the Union as their bargaining representative, rejection and/or criticism of the bargaining representative by a minority of the unit employees is insufficient to support a reasonable doubt of the Union's continued majority status. [*Carmichael Construction Co.*, 258 NLRB 226, 230 (1981).]

See also *Colonna's Shipyard*, 293 NLRB 136, 137 (1989), where the Board held that an expression of lack of interest in union membership does not establish a reasonable doubt of a union majority.

Rodriguez also testified generally that Respondent experienced a ''very high turnover'' of employees. No specifics concerning the number of employees or the period of time within which the turnover occurred was offered. ''The Board has long held that employee turnover standing alone is not enough to establish a reasonable doubt of union majority status because new hires are presumed to support a union in the same ratio as those they replace.'' *Colonna's Shipyard*, supra at 138.

Based on the above, I find and conclude that when Respondent engaged in the conduct alleged in the complaint it

did not have a reasonable doubt based on objective considerations that a majority of the unit employees wanted to be represented by the Union. Accordingly, a discussion of the alleged violations of the Act will now follow.

C. *The Failure to Make Contributions to the Fund*

In *Buck Brown Contracting Co*., 272 NLRB 951, 953 (1984), the Board stated:

> It is well settled that an employer violates Section 8(a)(5) and (1) when it unilaterally changes or discontinues existing terms and conditions of employment—including contributions to contractual fringe benefit Funds—upon the expiration of a collective-bargaining agreement unless: (1) the union has waived bargaining on the issue; or (2) the parties have bargained to impasse and the unilateral change is reasonably encompassed by the employer's preimpasse proposals.

It is further well settled that pension, health, and welfare plans provided for by contract constitute terms and conditions of employment that survive the expiration of the contract and cannot be altered without bargaining. Respondent was required to continue ''in effect all terms and conditions of employment encompassed in its expired contract with the Union until it had negotiated a renewal agreement or bargained to a true impasse.'' *Cascade Painting Co*., 277 NLRB 926, 930 (1985).

There is no dispute that following the contract's expiration in May 1987 Respondent continued to make payments to the Fund. Such payments continued to be made until November 1988, which represented the September 1988 payroll period. Respondent ceased making such contributions in November, 1988, without bargaining with the Union concerning that change, contacting the Union or obtaining any agreement from it that it may do so.

There is no evidence that the Union has waived bargaining on this issue. It has consistently sought to persuade Respondent to continue making contributions to the Fund, and the Fund and its attorney have sent several letters to the Respondent reminding it of its responsibility to continue making such payments. In addition, a lawsuit was brought in Federal District Court to secure payment to the Fund.

Moreover, there is no evidence that the parties have bargained to an impasse. The limited evidence of bargaining seems to suggest that little bargaining took place at all. It can hardly be said that an impasse existed.

> 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 negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed. [*E. I. Du Pont & Co*., 268 NLRB 1075, 1076 (1984).]

Moreover, there is no evidence of any preimpasse proposals presented by Respondent.

Respondent also argues that Respondent is justified in not making contributions to the Fund because it is only required to do so pursuant to a written agreement, in accordance with Section 302(c) of the Labor Management Relations Act. However, ''the Board and the courts have found that the requirement . . . that trust Fund payments be made pursuant to a written agreement are met by a trust Fund agreement underlying an expired contract.'' *KBMS, Inc*., 278 NLRB 826, 849 (1986).

Respondent makes the further contention that the Fund is illegally administered, in that union membership, including the payment of dues and initiation fees is a condition of receiving benefits from the Fund. The alleged evidence concerning this are the facts that (a) the Union and Fund are located in the same office, (b) the president of the Union is a trustee of the Fund, and (c) the employer remittance forms provide columns for initiation fees and dues as well as for fund contributions, which ''strongly suggest that the Fund will not pay benefits until the employee has satisfied initiation fee and dues obligations.'' I cannot make findings upon Respondent's speculations that the Fund is being illegally administered, even if I had the authority, in the context of this unfair labor practice case, to do so. No credible evidence has been presented in support of these allegations.

I accordingly find and conclude that Respondent has not shown that it was lawfully permitted to cease making contributions to the Fund, and I further find that such failure to continue making contributions to the Fund violates Section 8(a)(5) and (1) of the Act.

D. *The Duty to Furnish Information*

The complaint alleges that Respondent failed and refused to furnish the Union with names and addresses of bargaining unit members pursuant to the Union's requests in April 1988 and March 1989.

The evidence establishes that on April 8, 1988, the Union sent Respondent a list of names of members and asked it to supply their addresses, and that on March 16, 1989, the Union, by letter, requested a current list of all non-Government site employees and their dates of hire. Its letter stated that the purpose of the request was to determine which employees are required to remit dues-checkoff authorizations in accordance with the terms of the collective-bargaining agreement. In a letter of June 6, 1989, the Union requested the locations of the jobsites of Respondent's employees.

It is undisputed that Respondent has not furnished the information requested.

These requests, even after the expiration of the contract, constitute requests for information relevant and necessary to the Union in performing its duties as the representative of the unit employees. ''All items requested must be produced because they are 'intrinsic to the core of the employer-employee relationship,' and 'presumptively relevant to the Union's role as bargaining agent.''' *Colonna's Shipyard*, 293 NLRB 136, 141 (1989).

Although the complaint only alleges as violations the failure to furnish the names and addresses of employees, it is obvious that the other information requested, the dates of hire and jobsite locations, are also relevant and necessary to the Union's role as bargaining agent. Inasmuch as these matters were litigated, I will include them in the Order, herein.

I accordingly find and conclude that Respondent's refusal to furnish this information violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent Apex Investigation & Security Co., Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of the Act.

3. All full-time and part-time employees employed by the Respondent within the United States and its possessions, excluding executives, supervisors, professional, confidential, clerical and nonguard employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. The Union is now and has been at all times material herein the exclusive collective-bargaining representative of the employees described above within the meaning of Section 9(a) of the Act.

5. A collective-bargaining agreement between the Respondent and the Union ran from June 1, 1984, to May 31, 1987, and expired on May 31, 1987.

6. By unilaterally ceasing to make payments to the Union's Allied Security Health and Welfare Fund after November 1988, corresponding to the September 1988 obligation, Respondent violated Section 8(a)(5) and (1) of the Act.

7. By refusing, in April 1988, March 1989, and June 1989, to furnish the Union with the names and addresses of all employees in the bargaining unit represented by the Union, their dates of hire and jobsite locations, Respondent violated Section 8(a)(5) and (1) of the Act.

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

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that Respondent cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act. I shall recommend that Respondent make its employees whole by paying all contributions to the Union's Allied Security Health and Welfare Fund, as provided in the expired collective-bargaining agreement between Respondent and the Union which have not been paid and which would have been paid absent Respondent's unlawful unilateral discontinuance of such payments. I shall also recommend that the Respondent furnish the Union with the requested information.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Apex Investigation & Security Co., Inc., Bronx, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with Allied International Union, as the exclusive representative of its employees in the appropriate unit described as follows:

> All of the Employer's full-time and part-time employees within the United States and its possessions, excluding executives, supervisors, professional, confidential, clerical and non-guard employees.

(b) Unilaterally ceasing payments into the Union's Allied Security Health and Welfare Fund, as provided by the collective- bargaining agreement between the Respondent and the Union, which expired on May 31, 1987.

(c) Refusing to furnish the Union with the names and addresses of all bargaining unit members, their dates of hire, and jobsite locations, which are relevant and reasonably necessary to fulfilling its duty to represent said employees.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.

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

(a) Bargain in good faith with the Union as the exclusive representative of its employees in the appropriate unit described above.

(b) Make its employees and the Union's Allied Security Health and Welfare Fund whole by paying to the Fund, with interest, the amounts as provided in the collective-bargaining agreement which expired on May 31, 1987. The obligations shall commence following the last payment which was made in November 1988, which corresponded to the September 1988 obligation, and continue until such time as Respondent negotiates in good faith to a new agreement or to an impasse. Respondent shall also make its employees whole, with interest, for any loss they suffered due to Respondent's unlawful discontinuance of its payments to the Allied Security Health and Welfare Fund commencing in December 1988.

(c) Open all its corporate books, including, but not limited to, its payroll register, to representatives of the Board, in order to determine the amount Respondent owes the Fund and its employees, due to Respondent's nonpayment to the Allied Security Health and Welfare Fund since November 1988.

(d) Furnish the Union with the information it requested, including the names and addresses of its employees, their dates of hire and jobsite locations.

(e) Post at its Bronx, New York facility, copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

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

[4] 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.''