

Alumni Hotel Corporation d/b/a Days Hotel of Southfield and Local No. 24, Hotel Employees and Restaurant Employees International Union, AFL-CIO. Cases 7-CA-30749-1-2 and 7-CA-31019-2-3

March 31, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On September 13, 1991, Administrative Law Judge Michael O. Miller issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed an answering brief.

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

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

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Alumni Hotel Corporation d/b/a Days Hotel of Southfield, Southfield, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(d) and reletter the subsequent paragraphs.

“(d) Make whole all fringe benefit funds for any losses they may have suffered as a result of the Respondent's unilateral modification of terms and conditions of the collective-bargaining agreement.”

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

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

No exceptions were filed to the judge's finding that the Respondent lawfully eliminated the dues-checkoff procedure.

In agreeing with the judge's finding that the parties had not bargained to impasse, we do not rely on the judge's statement that the Respondent's failure to provide the Union with requested financial information was “an additional reason establishing the absence of an impasse.”

²We have modified the judge's recommended Order to include a make-whole remedy for the fringe benefit funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

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 fail and refuse to furnish the Union, on request, with information that is relevant and necessary to the performance of its duties as exclusive collective-bargaining representative of our employees in the following unit which is appropriate for the purposes of collective bargaining:

All employees of Alumni Hotel Corporation, d/b/a Days Hotel of Southfield, excluding maintenance engineers, managerial employees, supervisors, confidential employees, security personnel and other guards, all as defined in the Act.

WE WILL NOT fail and refuse to bargain in good faith with the Union which is the exclusive collective-bargaining representative of our employees in the above-described unit by unilaterally changing the terms and conditions of employment of our employees without complying with the requirements of Section 8(d)(3) and without having first bargained to impasse with respect to the terms and conditions of employment.

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 provide the Union with the information it requested in its letters of May 22 and 29, 1990.

WE WILL restore, to the extent requested by the Union, all terms and conditions of employment which were in effect as of July 31, 1990, before the unilateral changes were made, as embodied in the collective-bargaining agreement.

WE WILL make whole any employees who may have been detrimentally affected by the changes in terms and conditions of employment, with interest on any monetary losses the employees may have suffered.

WE WILL make whole all fringe benefit funds for any losses they may have suffered as a result of our unilateral modification of terms and conditions of the collective-bargaining agreement.

WE WILL, on request, bargain with the Union as the exclusive representative of our employees in the above-described appropriate unit concerning terms and conditions of employment and, if an understanding is

reached, embody the understanding in a signed agreement.

ALUMNI HOTEL CORPORATION D/B/A
DAYS HOTEL OF SOUTHFIELD

Joseph P. Canfield, Esq. and Gary Saltzgeber, Esq., for the General Counsel.
Thomas P. Williams, Esq. (Jaffe, Snider, Raitt & Heuer), for the Respondent.
John G. Adams, Esq. (Miller, Cohen, Martens & Ice), for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This case was heard in Detroit, Michigan, on June 3, 4, and 5, 1991, based on charges filed July 9 and October 2, 1990,¹ as amended, by Local No. 24, Hotel Employees and Restaurant Employees International Union, AFL-CIO (the Union), and a complaint and amended complaint-issued on August 29, October 11, and November 27, by the Regional Director of for Region 7 of the National Labor Relations Board (the Board).

The complaint, as amended, alleges that Alumni Hotel Corporation d/b/a Days Hotel of Southfield (Days Hotel or the Respondent) refused to bargain collectively with the Union by failing to furnish the Union with requested information and by unilaterally changing the terms and conditions of employment of its employees, in violation of Section 8(a)(5) and (1) and Section 8(d) of the Act. Respondent's timely filed answer, as amended at hearing, denies the substantive allegations of the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent, and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Preliminary Conclusions of Law

Days Hotel, a corporation, is engaged in the operation of a hotel and convention center, providing lodging, public restaurant, and other related services at its facility in Southfield, Michigan. Based on a projection of its operations since December 1, 1989, it will annually derive gross revenues in excess of \$500,000 and will annually purchase goods and materials valued in excess of \$50,000 which will be shipped to it directly from points located outside the State of Michigan. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits and I find and conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

¹ All dates are 1990 unless otherwise indicated.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Prior to its acquisition by Respondent, the hotel property had been operated as the Southfield Hilton. Its then owner, Enco, recognized the Union and executed a collective-bargaining agreement effective February 1, 1988, through July 31, 1990. Those covered by that recognition were the employees in the kitchen, bar, housekeeping, service, valet parking, laundry, valet, health club, dining room, banquet, and clerical departments, excluding managerial personnel, supervisors, confidential employees, guards, and other security personnel. Excluded, and represented by a separate labor organization, were the engineers.²

The agreement, as executed by Enco, provided:

102. Duration. This agreement and all schedules attached hereto shall continue and remain in full force and effect until *July 31, 1990*. . . . This agreement shall continue in full force and effect from year to year [after July 31, 1990] unless either party desires to negotiate changes in this agreement and the schedules attached thereto, and serves written notice on the other party by certified mail not less than sixty (60) days prior to *July 31, 1990*. [Emphasis in original.]

At some point, the parties agreed to change the expiration date to January 31, 1990. In inserting that change to section 102, however, the parties neglected to change the first reference to July 31, 1990. Thus, that section continued to read that the contract continued in effect until "July 31, 1990" while the final reference to the date, in the last sentence, was changed to read that notice was required "not less than sixty (60) days prior to January 31, 1990." (R. Exh. 2.)

Shortly after the agreement was executed, the hotel changed hands (due to financial difficulties); M.H.M. Inc. assumed management on behalf of the owner, Prudential Insurance. On February 26, 1988, M.H.M. and the Union executed a memorandum of agreement, recognizing the Union and agreeing to be bound by the existing agreement. The memorandum (G.C. Exh. 18), stated expressly that the contract remained in effect until January 31, 1990, with the parties agreeing to be bound by all of its terms and conditions. Subsequent addendas, dated July 13 and August 8, 1989 (G.C. Exhs. 18 and 19), reiterated the January 31, 1990 expiration date and expressly continued all other terms and conditions of the agreement without modification.

² Respondent denied the appropriateness of this unit but offered no evidence or argument to support its contention. The General Counsel offered some evidence establishing that all of these employees work under common overall supervision and enjoy common terms and conditions of employment. Moreover, the evidence establishes, as noted infra, that Respondent adopted the existing agreement, including the unit description, when it took over operation of the hotel. I find that a unit of all employees, excluding maintenance engineers, managerial employees, supervisors, confidential employees, security personnel and other guards, all as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Sec. 9(b) of the Act. See *Omni International Hotel*, 283 NLRB 475 (1987).

B. Respondent's Dealings with the Union

In late September 1989, Respondent acquired and began operating the hotel property; the name was changed to Days Hotel later in the year. At the time of acquisition, Martin Fine, Respondent's president, received copies of the collective-bargaining agreement, the February 26, 1988 memoranda and the two 1989 addenda; he was aware that the employees were represented by the Union and covered by a collective-bargaining agreement. In a brief meeting with George Landers, the Union's then business representative, he indicated that he would continue recognition. Thereafter, he maintained the status quo, including making required payments on the employees' behalf to the Union's health and welfare funds. Union dues were deducted pursuant to the contract's checkoff provision and submitted to the Union.

On November 22, 1989, the Union sent a letter to Respondent, headed "Contract Expiration—1/31/90." That letter stated the Union's intention to open and negotiate changes in the agreement.³ At the same time, appropriate notices were also sent to the Federal Mediation and Conciliation Service (FMCS) and the Michigan Department of Labor (DOL). Fine, consulting the copy of the agreement which had been provided to him by Prudential, disputed the expiration date. Relying on the first sentence of section 102, he argued that the contract did not expire until July 31, 1990.

Landers wanted a contract and Fine wanted to stabilize his costs. They agreed to an extension of the existing agreement, including the May 10, 1988 memorandum and the 1989 addenda. Their agreement provided that the existing contract remained:

in full force and effect until July 31, 1990, and the parties further agree to be bound by all of the terms and conditions of said collective bargaining agreement, a copy of which is hereby attached; *provided*, however, that nothing in this agreement or any previous agreement or amendment shall create or provide for any retroactivity of pay or economic improvements or changes, and it is hereby expressly understood and agreed that there shall be no retroactive economic improvement or changes in the collective bargaining agreement, to any date earlier than August 1, 1990.

The agreement, effective according to its terms on February 26, was signed on February 28 by Fine and two union officers. Fine retained a copy. Subsequently, however, he received another copy on which the effective date of February 26 had been lined out and a date of December 1, 1989, inserted. Additionally, it bore Landers' signature as a witness. According to Landers, this alteration had been made to conform the document to the period for which Respondent had been making pension and health fund contributions; he sought to avoid the appearance of any break in service which

³The letter also requested the names, classifications, wage rates, and fringe benefits of the unit employees. The complaint alleges that Respondent failed to furnish this information; the record, however, is barren of any evidence regarding that alleged failure, the General Counsel did not brief the point and I shall recommend that this allegation, par. 11(a), be dismissed.

would cause the funds to refuse to accept contributions. Fine, he said, was given this explanation and raised no objections.⁴

According to Fine, it was understood that this agreement would maintain the status quo until July 31; a new agreement would be negotiated to be effective August 1. The contract language requiring notice of termination 60 days prior to January 31, 1990, he was told, was irrelevant because that date was in the past. His testimony in this latter regard is uncontradicted.

After January 1, Respondent continued to submit the required monthly reports concerning required pension, health and welfare fund contributions. However, no payments into the funds were made (until required by a court order) for any period following January 1. Similarly, although Respondent continued to deduct union dues from the employees' pay, after April 1, it failed to timely submit those dues to the Union after April. Thus, although those dues are supposed to be submitted by the 15th of the month in which they are collected, Respondent did not submit April's dues until the end of May. The May and June dues were submitted in late July, and the July, August, and September dues were not submitted until November 5. No dues were deducted or submitted after September.

On May 22, Vickey Presley, Landers' replacement as business agent with responsibility for Days Hotel, wrote Respondent, requesting "a record of the previous company vacation payment pay off." Her letter stated the Union's understanding that M.H.M. had failed to prorate employee vacation payments and demanded "back payment to all employees who were paid vacation payment on a pro rated basis."⁵ The Union received no reply.

On May 29, the Union seeking to determine if two individuals were unit members, requested information on their job classifications, rate of pay, and hours worked. Presley explained, in her testimony but not in the letter, that they were referred to as managers or assistant managers, but, unlike managers excluded from the unit, were sharing the employees' tips. Respondent did not reply until August 2. At that time, the Union was told that one individual had worked irregular hours until May 7, when she resigned and moved from the area. The second, the Union was told, had resigned as a union member and become a full-time management employee; he did not want the Union to obtain any information regarding his status.

In mid-May, the Union held a meeting to discuss the expiration of Respondent's contract. It was decided that they would wait to see if Respondent gave notice of contract ter-

⁴Fine denied that he received this explanation and asserted that he had strenuously protested the alteration, claiming that he was being "ripped off" by a "criminal" backdating of the agreement. To the extent that it makes any difference, I find Landers' testimony to be the more probative. Within the admitted limits of his memory, Landers was a credible and candid witness. Fine was argumentative and unresponsive as a witness, offered no explanation of how this alteration adversely affected Respondent's contractual obligations, and did not purport to have raised his alleged objections with Landers' superiors, the Union's signatories on that agreement.

⁵The request is as confusing as it sounds. Presley's explanation, that some employees thought they had received pro rata vacation payments and others thought they had been paid for a full week, causing her to ask if some of the employees had been paid off by M.H.M. while others had not, does little to clarify the issue.

mination, pursuant to section 102, quoted above. To that point in time, no such notice had been received.

On May 24, according to Fine, he sent the following letter, by first-class mail, to the Union:

As we previously advised you, the undersigned hereby formally advises you that the present Union contract will expire July 31, 1990, and at that time, Alumni Hotel Corporation will enter into negotiations for a new contract.

The present contract will not be continued. As you are well aware, the Hotel is in a serious net operating loss position and must renegotiate a labor contract with specific economic relief for the employer.

Please be guided accordingly.

This letter, Fine claimed, was not intended as an official 60-day notice pursuant to the agreement; that agreement, he testified (contrary to the assertion in this letter), had expired January 31. It was he said, just "a letter that I sent." He claimed that he dictated that letter to his secretary, saw her place it in an envelope, and walked her to the mailbox where he observed her deposit it in the U.S. mails. He further claimed that, at a dinner meeting held in September, Florence Farr, the Union's secretary-treasurer, acknowledged receipt of that letter and told him that it was his tough luck that he had sent it certified, as required by section 102 of the agreement. Vickey Presley, to whom any such letter would normally have been directed, never saw the letter and heard no such remark at the meeting. Neither did Terrance Dorris, a union steward. Neither Farr nor Fine's secretary testified.

Respondent sent no other notice of termination. No 8(d) notices were sent to (FMCS) or DOL.

On July 31, Fine wrote the Union, stating:

This letter will confirm our previous discussions and agreements with respect to the negotiation of a new collective bargaining agreement for the period commencing August 1, 1990. . . .

As you well know and have been previously advised, the current collective bargaining agreement, as extended pursuant to the agreement effective February 26, 1990, expires July 31, 1990.

He suggested 7 days in August for meetings and asked for a prompt reply and a union proposal which would take the hotel's economic situation into account. He made no proposals.

Farr replied on August 8. She stated that, in assuming the current agreement, Respondent had agreed that it would continue the contract "in full force and effect unless either party 'serves written notice on the party by certified mail not less than sixty (60) days prior to July 31, 1990.' No such notice was served." Therefore, she wrote, the current collective-bargaining agreement continues in full force and effect and negotiation dates were unnecessary.

Fine wrote again on August 23, disputing Farr's assertions and accusing her of misquoting the contract. He argued that in the February agreement the parties had specifically agreed "that the collective bargaining agreement would remain in full force and effect *only* until July 31, 1990, and that it would expire on that date." (Emphasis in original.) The con-

tract's automatic renewal clause, he asserted, was no longer of any force or effect.

In this letter, Fine again requested dates for negotiations. Unless the Union attended such a meeting, he stated, "we will have to consider all other legal alternatives." One alternative, he asserted, "is for the Alumni Hotel Corporation to unilaterally implement new terms and conditions of employment which we determine to be fair and consistent with the current situation at the Alumni Hotel Corporation . . . if you refuse to come to the table and initiate negotiations, we will have no acceptable alternative." He gave the Union a September 10 deadline. His letters contained no proposals or specifics regarding what he deemed necessary.

In quoting language requiring a 60-day notice prior to July 31, Farr had referred to the wrong agreement. As noted above, the M.H.M. agreement and addenda assumed by Respondent terminated on January 31 and required a termination notice to be submitted (as it was by the Union) 60 days prior thereto. The February 26 agreement extended that agreement to July 31 but made no reference to any new notification date. While Fine placed no quotation marks around his references to the addenda, he overstated that agreement. It stated that the February 1, 1988 contract and its addenda would "remain in full force and effect until July 31, 1990 and the parties agree to be bound by all the terms and conditions of said collective bargaining agreement." There was no express reference to "only until July 31" or to its "expiration" on that date.

The correspondence continued. On September 6, Farr denied misquoting the contract and disputed his interpretation of their agreement. Section 102, she wrote, "was in force, like all of the other terms . . . at least until July 31, 1990, at which time the agreement renewed by its own terms because of the absence of the notice required by Section 102." She warned against any unilateral implementation of new terms and conditions of employment.

Finally, in September, Fine and Farr spoke with one another, apparently at a dinner meeting. According to Fine's uncontradicted testimony, she told him that he was stuck with the contract because he had failed to send the May 24 letter by certified mail. He told her that this was a ridiculous and self-destructive position. Unless there were negotiations, the hotel would close with a loss of all jobs, he said. Farr gave him the name of the Union's attorney, Bruce Miller, and suggested that they talk.

Within the next few days, Fine and Miller met at a local restaurant. They discussed the hotel's economic problems with Miller indicating that he was well aware that it was having serious problems. He told Fine that, in his opinion, the Union did not have any legal obligation to negotiate a new agreement; Fine, of course, disagreed. Miller told fine that their disagreement on this point was irrelevant, he had been instructed to do whatever was required, within a range of reasonableness, to keep Days Hotel in business. They agreed to put aside their differing legal opinions concerning the status of the agreement. Miller asked Fine to send him the Employer's proposals. Even if they were not required to do so, the Union would listen and discuss those proposals with Fine, Miller said. He warned Fine against taking any unilateral action.

The recollections of these two attorneys, related above, while somewhat colored by the interests of their respective

parties, are not materially different. They do disagree with respect to whether Miller insisted on seeing some financial information. Miller claims that he told Fine that he had no doubt that the hotel was losing money “but had to see the numbers” to see how the money was being spent. Fine, he said, agreed to provide some information. Fine denies both the request and his agreement to provide information. Miller, he said, claimed to know more of the hotel’s woes than did he and did not want to waste the Union’s money on accountants. I find Miller’s recollections more accurate and more probable.⁶

On October 17, Fine sent Miller his proposals, a marked-up copy of the agreement containing extensive changes, both economic and noneconomic in nature. (R. Exh. 11.) Included was a proposal to eliminate checkoff. On that same date, a notice was posted for, or given to, all the employees. That notice (G.C. Exh. 11) stated that the contract had expired on July 31 and:

[a]s a result, all benefits previously provided . . . were eliminated as of July 31. The benefits which are no longer in effect, unfortunately, include health and welfare benefits, salary increases and all other benefits.

We have attempted to meet with the union to negotiate a new contract. The union, so far, has refused to meet with us.

The Union was not sent a copy of this notice by the Employer; an employee faxed Presley a copy. Similarly, Miller received a copy, but not from the Employer.

Among the benefits eliminated effective August 1 was checkoff. Vacation pay, contractually provided pay for an employee’s birthday, personal leave (except on a case-by-case basis), contractual overtime in excess of Federal standards, and all health, welfare, and pension contributions were all terminated between August and October. Similarly, the Employer considered the grievance-and-arbitration provisions to have expired and rejected grievances on that basis. When they asked, employees were told that there was no contract. According to Fine, sometime in September or October he ceased to follow what he considered the extravagant and unaffordable provisions of the contract but not its basic provisions; he reverted to the provisions of Federal law with respect to overtime.

Miller replied to Fine’s proposed changes on October 29 (G.C. Exh. 13). In that letter, he protested the proposal to eliminate checkoff as being unrelated to the hotel’s economic problems; he also protested the unilateral changes and the October 17 announcement, insisted on restoration of all unilaterally terminated benefits, referred to Fine’s offer to open the hotel’s books to the Union and demanded information identifying the employees who suffered losses of the various benefits. He also promised to review the Employer’s proposal while, at the same time, disclaiming any waiver of the Union’s position regarding contract renewal.

Miller and Fine met at Miller’s office on November 1. According to Miller’s credible recollection, they went through the hotel’s proposals, attempting to determine priorities. Mil-

⁶The complaint, as amended, did not allege Respondent’s refusal to furnish information (other than that requested in May) as violative of the Act.

ler repeated his requests for financial statements, indicating that he wanted to determine the cost of the various proposals and the Employer’s break-even point; he told Fine that he could not respond without this information. Fine, he believed, promised to provide financial statements. Miller also repeated his objection to the proposed elimination of checkoff and asked Fine to restore it as a sign of good faith.

On November 5, the employees received another letter (G.C. Exh. 15) informing them that the contract which had provided them with health and welfare benefits had expired on July 31. However, some employees, they were told, still had deductions taken from their pay for these benefits after that date due to an error in data processing. They received refunds.

At Fine’s request, he and Miller met again on November 14. Due to Miller’s schedule, it was expected to be a short meeting. During this meeting, Miller suggested that the Employer consider creative alternatives for the employees’ benefit, including the possible institution of quality of work life (QWL) programs, employee stock option plans (ESOP), and a sliding scale of repayments. He also asked that the terminated benefits be restored. The discussion did not proceed beyond general principles and after about an hour, Miller brought the meeting to an end.⁷

In correspondence and conversations with Miller, Fine has sought additional meetings. Miller has referred him to the Union’s business representative but nothing has been scheduled. On December 21, Respondent served 8(d) contract termination notices upon FMCS and the Michigan DOL, asserting, *inter alia*, that the agreement had expired on July 31, 1990.

C. Analysis

1. Failure to furnish information—pre-July 31, 1990

The complaint alleges that by failing to respond to two information requests, Respondent violated Section 8(a)(5).⁸ The first was Presley’s May 22 request for information concerning vacation benefits which were supposed to be paid by Respondent’s predecessor, M.H.M. Respondent never replied to this request, either to say that it had none of the requested data or that it did not understand the request. On brief, Respondent asserts that this request sought information which the hotel did not have. Therefore, Respondent argues, its failure to respond could not breach its statutory bargaining obligation.

The second involves Presley’s May 29 request for information concerning the classifications, rates of pay, and hours worked of two employees. Respondent did not reply until August 2, 2 months later. Its reply said that one employee had quit on May 7 and that the other had become a full-time manager and did not want information regarding his status revealed to the Union.

It is hornbook law that the bargaining obligation imposes upon an employer the duty to furnish the union with infor-

⁷Fine recalled only one meeting, on November 1, and asserted that Miller ushered him out, ending it after only a brief discussion. Miller’s testimony was corroborated by that of Presley and, for the reasons previously stated, I credit Miller.

⁸The complaint also alleges a June 13 repetition of the earlier requests. No evidence of such a renewed request was proffered and I shall recommend dismissal of this allegation, par. 11(d).

mation needed for the proper performance of its duties, including the processing of grievances. See *NLRB v. Acme Industrial Co.*, 385 U.S. 433 (1967). As the Court there noted, a discovery-type standard applies and information must be furnished if there is a probability that it will be relevant. Employee wage information, such as that requested by Presley, is presumptively relevant. *Marshalltown Trowel Co.*, 293 NLRB 693 (1989).

It is possible that Respondent did not have any information responsive to Presley's first request. On the other hand, where Respondent had taken over M.H.M.'s operation, assuming M.H.M.'s bargaining obligation and agreement, utilizing the same employees to perform the same work, it was reasonable for the Union to assume that it would have information concerning the benefits which M.H.M. had paid out in the recent past. Respondent was obligated to respond, either providing the requested information if in its possession or informing the Union that the information was unavailable to it. See *Blue Diamond Co.*, 295 NLRB 1007 (1989).

Similarly, the information sought in the Union's May 29 request was presumptively relevant. Respondent's reply was both dilatory and unresponsive. To say that one individual worked irregular hours up to a given date (subsequent to the demand for information) and then quit and that the other had become a full-time manager who did not want wage information disclosed does not give the Union any of the information to which it was entitled concerning the job classifications, rates of pay, and hours worked before the termination of one and the promotion of the other.

Accordingly, I find that by failing to properly and timely respond to the Union's May 22 and 29 demands for information, the Respondent has failed to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act. *Bi-County Beverage Assn.*, 291 NLRB 466 (1988).

2. Unilateral action

At the hearing, Respondent asserted, for the first time, that there had never been a meeting of the minds between Fine and Landers with respect to the terms of the February 26 extension agreement. Therefore, it is argued, no collective-bargaining agreement had been entered into, notwithstanding the mutual execution of that agreement. In particular, Respondent's counsel argues that although the Union believed that that agreement incorporated the 60-day notice and automatic renewal provisions of the agreement between Respondent's predecessor and Respondent, Fine's understanding was of an agreement to negotiate a new contract to be effective August 1, "no matter what," without any further notice being required.

Respondent's argument does not withstand scrutiny. Fine verbally and by compliance with the contract terms, adopted the agreement of Respondent's predecessor. The term of that agreement, as made clear by three addenda, concluded on January 31, after the Union served timely notice of termination pursuant to its express language. Thereafter, the Union and Respondent executed a unambiguous extension of all the terms and conditions of the prior agreement, through July 31, with express language precluding retroactivity to satisfy Fine's requirement that he know what his labor costs would be through that date.

Among the provisions adopted by this extension agreement was the provision for automatic renewal absent timely notice.

Through what must be deemed a "quirk in draftsmanship," the 1988 to 1990 agreement (as amended) had specified that timely notice was notice filed "not less than 60 days prior to January 31, 1990," rather than saying, in more frequently used terms, "60 days prior to the date of expiration." However, the clear import and legal effect of the notice provision was that the parties intended that notice, consistent with the provisions of Section 8(d)(1) of the Act, would be given 60 days prior to whatever the expiration date might be. *Farm Crest Bakeries*, 241 NLRB 1191, 1197 (1979).

Fine had purportedly questioned how he could comply with the provision of the extended agreement requiring a termination notice to be served prior to January 31 and was told by Landers, "Don't worry about this because that date is gone and this is now February so its irrelevant." The statement attributed to Landers, *at most*, ambiguous regarding whether a 60-day notice would be required prior to July 31 in order to forestall automatic renewal; Fine, an attorney, was not privileged to rely on it to either vary the express terms of his agreement or to negate statutory notice provisions. *NDK Corp.*, 278 NLRB 1035, 1040-1041 (1986); *Gatliff Coal Co. v. Cox*, 152 F.2d 52 (6th Cir. 1945). Landers' assurance that they would negotiate a new agreement for the post-August 1 period, is not inconsistent with this conclusion. Pursuant to the February extension agreement, the parties were free to insist on negotiating a new agreement but had to provide timely notice if they wished to do so. They were similarly free to seek renewal of the existing terms by withholding notice.

Moreover, I am satisfied that Fine was aware of the contractual notice requirement and endeavored (successfully, I find) to comply with it. Thus, his May 24 letter was more than an insignificant but fortuitously timed missive, as he claimed. It was, by its own terms, a "formal" advisory of contract termination. That it was mailed on May 24, a mere 7 days before the 60-day cutoff, establishes that Fine was aware of, and attempted to comply with, the notice provision.⁹

Accordingly, I conclude that Respondent was party to a collective-bargaining agreement with the Union through July 31; that agreement provided for automatic renewal unless notice was given 60 days prior to that date to terminate or modify that agreement. I further find that Respondent timely gave the requisite notice and the contract was thereby terminated.

Those conclusions, however, do not dispose of this matter. Even before July 31, Respondent began to ignore its contractual obligations. Dues, collected from the employees, were submitted only dilatorily to the Union, notwithstanding that the contract required withholding from the first paycheck of each month and transmission to the Union no later than the 10th of the month. I find that this unilaterally adopted variation from the contractual requirements violated Section 8(a)(5). At some point, Respondent also stopped submitting contractually required contributions to the pension, health and welfare funds. This act became the subject of a suit in

⁹The agreement called for service by certified mail. Fine, admittedly, did not utilize that level of mail service. However, as I have found, the letter was timely mailed and received and its receipt was acknowledged by the Union's president. The failure to strictly comply with this aspect of the contract's notice provisions is therefore immaterial.

Federal court and resulted in an order that Respondent make the required contributions, at least through July 31. In light of that order and my conclusions with respect to the post-July 31 unilateral changes, no further finding with respect to the pre-August failure is warranted here.

Immediately after July 31, Respondent began to eliminate the benefits employees had received under the contract. This may do only when specific conditions have been satisfied. As the Supreme Court recently reiterated:

Sections 8(a)(5) and 8(d) of the NLRA . . . require an employer to bargain “in good faith with respect wages, hours, and other terms and conditions of employment.” The Board has taken the position that it is difficult to bargain if, during negotiations, an employer is free to alter the very terms and conditions that are the subject of those negotiations. The Board has determined with our acceptance, that an employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment. See *NLRB v. Katz*, 369 U.S. 736 (1962). In *Katz*, the union was newly certified and the parties had yet to reach an initial agreement. The *Katz* doctrine has been extended as well to cases where, as here, an existing agreement has expired and negotiations a new one have yet to be completed. See, e.g., *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 544 fn. 6 (1988).

Litton Business Systems v. NLRB, 111 S.Ct. 2215 (1991).

The questions remaining, then, are whether the changes were made unilaterally and prior to the existence of an impasse? Both questions, I must conclude, must be answered in the affirmative.

In *Taft Broadcasting Co.*, 163 NLRB 475, 479 (1967), affd. 395 F.2d 622 (D.C. Cir. 1968), the Board stated:

Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of negotiations, the importance of the issue or issues as to which there is disagreement, and 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.

Respondent’s letters and notices to its employees, dated October 17 and November 5, establish that the contract benefits, including “health and welfare benefits, salary increases and all other benefits provided pursuant to the expired contract . . . were eliminated as of July 3, 1990.” Some miscellaneous fringe benefits, such as premium overtime for sixth and seventh consecutive workdays, birthday and anniversary pay, and personal leave, were eliminated then or at various unspecified time between August 1 and the end of October. At the latest, according to Fine’s testimony, contractual wage rates were terminated “around October, November 1990.”

These benefits, like most mandatory subjects of bargaining, are within the *Katz* prohibition on unilateral changes. See *Litton*, supra at section II; *Cauthorne Trucking*, 256 NLRB 721 (1981). However, in light of my conclusion

regarding the timely notice of termination, it is unnecessary to consider when Respondent ceased dues deductions as dues-checkoff obligations are coextensive with the term of the agreement and the elimination of this contract term after expiration of the agreement does not constitute violative unilateral action. *Litton*, supra; *Indiana & Michigan Electric Co.*, 284 NLRB 53, 55 (1987).

At no time during this period could it be said that the parties were at impasse. Thus, through August and into September, the parties were disputing whether the agreement had automatically renewed itself. Negotiations had not even begun. By the end of September, the Union agreed to meet with Respondent, notwithstanding its colorable argument regarding renewal. Initial meetings were held between Fine and both Farr and Miller during that month. Fine, representing the party seeking substantial changes in the agreement, was invited to submit his proposals. Respondent first submitted those proposals to the Union on the very day that it announced the unilateral elimination of fringe benefits.¹⁰ The parties were only in the preliminary stage of negotiations; there was no evidence of deadlock with which impasse is synonymous. *Providence Medical Center*, 243 NLRB 714 (1979). Having just begun, there could not have existed the requisite exhaustion of the collective-bargaining process which characterizes impasse. *Excavation-Construction*, 248 NLRB 649, 650 (1980).

There exists an additional reason establishing the absence of impasse. I have credited the testimony of Miller regarding his unsatisfied requests for financial data sufficient for the Union to bargain intelligently over proposals to substantially reduce benefits. Until Respondent satisfied this valid request, no impasse such as would justify unilateral action could be reached. *Accurate Die Casting Co.*, 292 NLRB 284, 307 (1989).

Even if it could be said that Respondent had been diligently seeking bargaining in the face of union avoidance or delay, Respondent’s unilateral action was not privileged. Under such circumstances, an employer may implement its proposals without first bargaining to impasse, but only if the changes implemented are consistent with the employer’s previous proposal. Express notice of the specific changes is required to put the union on notice of what it may lose if it fails to bargain. *Tampa Sheet Metal Co.*, 288 NLRB 322, 326 (1988), and cases cited therein.

Fine’s threat, in the letter of August 23, to implement such new terms and conditions of employment as Respondent determined to be consistent with the economic conditions, does not rise to that level of specificity. In *D.C. Liquor Wholesalers*, 292 NLRB 1234 (1989), the employer allegedly announced that they would be seeking substantial wage cuts. The Board held that even if such an announcement had been made, the Union, without knowing what “substantial” might mean, “was not in a position to react intelligently or prepare itself” before Respondent declared impasse. Moreover, Respondent’s threat can hardly be deemed a bona fide proposal on which it expected the Union to negotiate.

¹⁰Even if it could be said that the parties had been at impasse over the question of the automatic renewal, the Union’s agreement to consider Respondent’s proposals, and Respondent’s submission of them, would have broken that impasse. *Union Terminal Warehouse*, 286 NLRB 851, 858 (1987); *Marriott In-Flite Services*, 258 NLRB 755 (1983).

Further negating Respondent's argument is the undisputed evidence that it had begun implementing changes prior to uttering the August 23 threat and continued to do so after the Union had satisfied the condition for its removal by meeting with Respondent for the purpose of collective bargaining.¹¹

Finally, and conclusively, Respondent's failure to comply with its obligations under Section 8(d)(3) mandates a finding of violation based on its unilateral implementation of new terms and conditions of employment after July 31. In *Weathercraft Co. of Topeka*, 276 NLRB 452, 453 (1985), enf. 832 F.2d 1229 (10th Cir. 1987), the employer had, as Respondent did here, served a timely notice of termination on the union. However, that employer, like the Respondent, had failed to send the notices required under Section 8(d)(3) to FMCS and the appropriate state agency. The Board adopted the following language by Administrative Law Judge James L. Rose:

Section 8(d) is unequivocal. It provides that the duty to bargain includes serving written notice upon the other party to a collective-bargaining agreement of one's desire to terminate or modify it, with notice also to the Federal Mediation and Conciliation Service and the appropriate state agency.

Board authority is also unequivocal. Failure of a party desiring to terminate or modify a collective-bargaining agreement to give appropriate notice under Section 8(d)(3) precludes it from altering terms or conditions of the collective-bargaining agreement . . . This proscription exists notwithstanding that the expiration date of the agreement has past. See *Meatcutters Local 576 (Kansas City Chip Steak Co.)*, 140 NLRB 876 (1963); *United Marine Local 333 (General Marine Transportation Corp.)*, 228 NLRB 1107 (1977).

Respondent unilaterally altered the existing terms and conditions of employment after contract expiration, without having proposed those new terms and conditions of employment to the Union, without bargaining to impasse thereon, and without having satisfied the notice requirements of Section 8(d)(3). Based on these findings, I must conclude that it has failed and refused to bargain in good faith with the Union, in violation of Section 8(a)(5).

CONCLUSIONS OF LAW

1. The Union is the exclusive collective-bargaining representative of the employees in the following collective-bargaining unit which is a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees of Alumni Hotel Corporation d/b/a Days Hotel of Southfield, excluding maintenance engineers,

¹¹ The Board cases cited by Respondent for the proposition that a proposal for unilateral discretion is not inconsistent with good-faith bargaining hold just the opposite. For example, in *Alba-Waldensian, Inc.*, 167 NLRB 695, 696 (1967), enf. 404 F.2d 1370 (4th Cir. 1968), the Board stated: "Respondent[']s insistence upon retaining the right unilaterally to control during the contract term an item as vital to an agreement as wages appears to us, moreover, the clearest manifestation of bad faith." See *A-1 King Size Sandwiches*, 265 NLRB 850 (1982), enf. 732 F.2d 872 (11th Cir. 1964).

managerial employees, supervisors, confidential employees, security personnel and other guards, all as defined in the Act.

2. By failing to provide the Union with requested information which is relevant and necessary to the performance of its duties as exclusive collective-bargaining representative of the employees in the above-described unit and by unilaterally changing the terms and conditions of employment of its employees without complying with the requirements of Section 8(d)(3) and without having first bargained to impasse with respect to the terms and conditions of employment which it implemented, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Sections 8(a)(5) and (1) and 8(d) and Section 2(6) and (7) the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully and unilaterally changed the terms and conditions of employment of its employees in an appropriate unit, I find that it must be ordered to restore the terms and conditions of employment which were in effect as of July 31, 1990, and make all employees whole for any loss of earnings, pension credits and other benefits they may have suffered as a result of the unlawful changes, including reimbursement for any medical, dental, or other expenses resulting from Respondent's unlawful failure to make required contributions. *Kraft Plumbing & Heating*, 252 NLRB 891 (1980). Backpay is to be computed as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹²

ORDER

The Respondent, Alumni Hotel Corporation d/b/a Days Hotel of Southfield, Southfield, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith by failing to provide the Union with requested information which is relevant and necessary to the performance of its duties as exclusive collective-bargaining representative of the employees in the appropriate collective-bargaining unit.

(b) Failing and refusing to bargain in good faith with the Union which is the exclusive collective-bargaining representative of its employees in the appropriate collective-bargaining unit by unilaterally changing the terms and conditions of employment of its employees without complying with the requirements of Section 8(d)(3) and without having first bargained to impasse with respect to the terms and conditions of employment which it implemented.

¹² 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.

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

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

(a) Provide the Union with the information which it requested in its letters of May 22 and 29, 1990.

(b) Restore all terms and conditions of employment to the status quo existing as of July 31, 1990, before the unilateral changes were made, to the extent that such changes were detrimental to the employees.

(c) Make whole any employees who may have been detrimentally affected by the changes in terms and conditions of employment, with interest on any monetary losses the employees may have suffered, in the manner set forth in the remedy section of this decision.

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

All employees of Alumni Hotel Corporation d/b/a Days Hotel of Southfield excluding maintenance engineers, managerial employees, supervisors, confidential employees, security personnel and other guards, all as defined in the Act.

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

(f) Post at its hotel in Southfield, Michigan, copies of the attached notice marked "Appendix."¹³ Copies of the notice, on forms provided by the Regional Director for Region 7, 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.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found herein.

¹³If 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."