

Seiler Tank Truck Service, Inc., a Subsidiary of Elkin Company and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, and its Local 1176. Cases 7-CA-29101, 7-CA-29765, 7-CA-30161, and 7-CA-30161(2)

June 30, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

On June 7, 1991, Administrative Law Judge Walter H. Maloney 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,¹ findings,² and conclusions and to adopt the recommended Order.

We agree with the judge that the Respondent violated Section 8(a)(3) and (1) by increasing the amount of shop work it assigned to drivers Chris Myers and Willie Spradlin after the 1987-1988 strike, thereby reducing their regular driving hours. In so doing, we find that the General Counsel established a prima facie case

¹ The 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 363 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We adopt the judge's finding that the Respondent violated Sec. 8(a)(5) by withdrawing recognition from the Union. Member Raudabaugh agrees with the judge's conclusion that the withdrawal of recognition was unlawful because: (1) the March 1989 decertification petition was tainted; (2) the Respondent continued to bargain with the Union for 1 year after the petition was filed; and (3) the Respondent asserted its doubt of the Union's continued majority status in the context of the Respondent's other unfair labor practices. Member Devaney also agrees with the judge that the withdrawal of recognition violates Sec. 8(a)(5) but finds it unnecessary to pass on the judge's finding that the March 1989 petition was tainted by the Respondent's alleged assistance regarding that petition. Member Oviatt agrees that the withdrawal of recognition was unlawful but relies solely on the fact that the Respondent's good-faith doubt of the Union's majority support was based on the March 1989 decertification petition which the Respondent had tainted.

In the absence of exceptions, we adopt the judge's finding that the Respondent did not violate Sec. 8(a)(5) and (1) by instituting a new pension and profit-sharing plan in October 1989.

In sec. I.C.2, par. 7, of his decision, the judge states that, under contract-bar rules, the Union would have blocked the processing of the 1989 decertification petition by executing an agreement with the Respondent. If, however, the decertification petition were reinstated, after the resolution of these proceedings, a contract entered into after its March 22, 1989 filing would not bar the processing of the petition. *City Markets*, 273 NLRB 469 (1984).

under *Wright Line* that the discriminatees' union membership and activities were motivating factors in the Respondent's assigning them increased shop work. *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Thus, Myers and Spradlin were active union adherents and their support was well known to the Respondent; they were the only employees to stay out for the entire strike. Further, they were not reinstated by the Respondent until 10 months after the strike. The reinstatement was part of a settlement of unfair labor practice charges against it. The Respondent also knew that Myers and Spradlin were two of only three drivers who did not sign the 1989 decertification petition, and that the Union designated the discriminatees as its committeemen in August 1989.

Not only was the discriminatees' union adherence well known, but the Respondent also exhibited strong animus against the Union. General Manager Hammontree testified that the strike was a bitter and destructive one. Hammontree candidly admitted that he harbored hard feelings against the Union and always would.

Finally, as found by the judge, the Respondent had assigned driving work by seniority prior to the strike. After the strike, however, when Myers and Spradlin were its most senior drivers, the Respondent discontinued its use of seniority and assigned Myers and Spradlin more minimum-wage shop work than they had performed before the strike. Indeed, the Respondent assigned more shop work to them than to several junior drivers. The effect of assigning Myers and Spradlin more shop work was to decrease their driving work.

Considered in toto, we find that the foregoing evidence establishes a prima facie case that Myers' and Spradlin's union affiliation or activities were motivating factors in the Respondent's assigning them more shop work. We further find that the Respondent failed to rebut this prima facie case by demonstrating that Myers and Spradlin would have received the same shop work assignments regardless of their union affiliation or activities. Despite the records available to it, the Respondent proffered no documentary evidence to rebut testimony establishing that seniority had been followed before the strike. Nor did the Respondent demonstrate that Spradlin and Myers received comparable shop work assignments prior to their reinstatement. Accordingly, we agree with the judge that the Respondent violated the Act by assigning Myers and Spradlin more shop work after the strike, thereby reducing the driving hours assigned to them with a consequent reduction in pay.³

³ Even if there were no 8(a)(3) violation as to Spradlin and Myers, they would be entitled to a make-whole remedy by reason of the

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Seiler Tank Truck Service, Inc., a subsidiary of Elkin Company, Albion, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

8(a)(5) violation which we have found. That is, the unilateral change from a practice of assigning driving work by seniority was unlawful under Sec. 8(a)(5) and that change affected these two employees.

A. *Bradley Howell, Esq.* and *James Rowader, Jr., Esq.*, for the General Counsel.

Donald J. Cairns, Esq. and *Laurie A. Petersen, Esq.*, of Milwaukee, Wisconsin, for the Respondent.

Judith A. Sale, Esq., of Southfield, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WALTER H. MALONEY, Administrative Law Judge. This case came on for hearing before me based on a consolidated unfair labor practice complaint,¹ issued by the Regional Director for Region 7 and amended at the hearing, which alleges that Respondent Seiler Tank Truck Service, Inc.² vio-

¹ The principal docket entries in this case are as follows:

Charge filed by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, and its Local 1176 (the Union) against the Respondent in Case 7-CA-29101, on March 29, 1989; complaint issued against the Respondent by the Regional Director for Region 7 in Case 7-CA-29101 on May 5, 1989; Respondent's answer filed on May 17, 1989; charge filed by the Union against the Respondent in Case 7-CA-29765 on October 10, 1989; consolidated complaint in both cases issued by the Regional Director for Region 7 against the Respondent on December 1, 1989; Respondent's answer filed on December 21, 1989; charge filed by the Union against Respondent in Case 7-CA-30161 on January 26, 1990, and amended charge filed on February 8, 1990; charge filed by the Union against Respondent in Case 7-CA-30161(2) on March 19, 1990; second consolidated complaint issued against the Respondent by the Regional Director for Region 7, on March 30, 1990; amended charge filed by the Union against Respondent in Case 7-CA-30161(2) on April 2, 1990; amended answer to second consolidated complaint filed by the Respondent on April 11, 1990; third amended complaint issued against the Respondent by the Director, Region 7, on May 31, 1990; Respondent's answer filed on June 6, 1990; hearing held in Jackson, Michigan, on January 29-31, 1991; briefs filed with me by the General Counsel, the Charging Party, and the Respondent on or before April 19, 1991.

² Respondent admits, and I find, that it is a Michigan corporation which is engaged at Albion, Michigan, and elsewhere in the hauling of hazardous and nonhazardous liquid industrial waste and related materials. During calendar year 1989, in the course and conduct of its business it performed services valued in excess of \$500,000, of which amount services valued in excess of \$50,000 were performed for various enterprises located in States other than the State of Michigan. Accordingly, the Respondent is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. The Union is a labor organization within the meaning of Sec. 2(5) of the Act.

lated Section 8(a)(1), (3), and (5) of the Act. More particularly, the consolidated complaint alleges that the Respondent discriminated against returning strikers Chris Myers and Willie Spradlin in the assignment of work because of their union activities, unilaterally made changes in working conditions and benefits such as health insurance, bonuses, drug testing, and profit sharing, and refused to provide the Union with requested information relating to its health insurance program. The consolidated complaint also alleges that the Respondent's bargaining representatives violated their duty to bargain in good faith by failing to submit a tentative agreement concluded with the Union to its board of directors for approval. The Respondent denies these allegations and asserts further that it has a good-faith doubt that the Union still represents a majority of the employees in the bargaining unit so it is no longer obligated to bargain with it. On these contentions the issues were drawn.³

FINDINGS OF FACT

I. BACKGROUND

A. *The Unfair Labor Practices Alleged*

At its Albion, Michigan facility the Respondent operates a fleet of trucks of various sizes which haul crude oil and hot oil to refineries from oil wells in and about Albion. Respondent also hauls brine and other contaminated water produced in the course of oil drilling either to approved dumpsites or, during summer months, to dirt and gravel roads in the area where the water is sprayed on road beds for purposes of dust control.⁴ Since 1979, the Respondent corporation has been owned by eight stockholders—all brothers and sisters who belong to the Meinerz family. It is managed from Brookfield, Wisconsin, by the Elkin Company, a partnership composed of the same eight individuals. The Elkin Company also manages several Meinerz family holdings in various industries which are located in several different States. Management control of the Elkin partnership, and hence of the Respondent corporation, is vested in a management committee of six individuals who live in or about Milwaukee and its suburbs. The membership of this committee rotates from time to time among the members of the Meinerz family and their spouses. It is the Elkin management committee that is frequently referred to in the record and in this decision as the directors or the board of directors of the Respondent. William Hammontree, a former driver for the Respondent, is the general manager of the Albion facility. He reports to the management committee in Wisconsin and specifically to management committee member Tim Meinerz.

On April 29, 1985, as a result of a Board election, the Charging Party was certified as the bargaining representative of about 12 to 15 truckdrivers and mechanics who work out of the Respondent's Albion terminal. After many months of fruitless bargaining a strike occurred on November 17, 1987. It ended when the Union made an unconditional offer to return to work on January 11, 1988. During the strike, two drivers, Ed Jarosz and Ron Huzarik, crossed the picket line

³ Certain errors in the transcript are noted and corrected.

⁴ The Respondent also has a similar operation at Clare, Michigan, about 100 miles away, but the two operations are not interchangeable and the Clare facility is not involved in this dispute.

and went back to work. After the strike ended, only two drivers, discriminatees Chris Myers and Willie Spradlin,⁵ actually returned. The others found employment elsewhere. During the strike the Respondent maintained its operation by hiring replacements, most of whom continued to work after the strike ended, although, through attrition, many are no longer employed.

When the Respondent refused to reinstate Myers and Spradlin, an unfair labor practice charge was filed on their behalf as well as on behalf of other strikers (Case 7-CA-27829, et al.). This case was settled at a hearing which took place on November 30, 1988. As a result of the settlement, Myers and Spradlin, as well as other strikers, were placed on a preferential rehire list and were awarded various amounts of backpay. The Company also agreed to resume bargaining. Myers returned to work on December 5, 1988, and Spradlin returned on December 19, 1988. Bargaining sessions were held on January 13 and February 7, 1989. The General Counsel did not move to set aside the agreement on account of noncompliance so it remains undisturbed.

Most but not all of the relevant events in this aging case took place in 1989 following the settlement of the earlier Board case. The various alleged violations present separate strands of fact which have to be individually examined but ultimately tied into a single fabric.

Regarding the bargaining, the parties had already come to a tentative understanding as to a profit-sharing proposal before any face-to-face negotiations resumed. Just after the Board settlement was concluded, Respondent's general corporate attorney, Robert Sharkey, wrote a letter, dated December 16, 1988, to Union Attorney Judith Sale informing her that the Company wished to adopt a profit-sharing plan. He expressed the Company's desire that, for tax purposes, the plan be adopted before December 31, 1988, and sent her a copy of a proposed trust indenture which was 42 pages in length. He asked the Union to waive the necessity of negotiating the terms of the plan since there would not be enough time to complete such negotiations and allow the Company to submit a plan to the Internal Revenue Service before the end of the year. He offered to leave the general question of retirement and pension benefits open for further negotiations should the Union wish to negotiate different pension and retirement benefits. Sale responded by letter, dated December 21, 1988, stating that union negotiators would be prepared to recommend to its membership the acceptance of an entire contract consisting of the proposed pension plan which had just been forwarded to her and the Company's prestrike August 20, 1987 contract proposal, with five stated revisions. There was no immediate response to this counterproposal.

Formal bargaining resumed on January 13, 1989, in the Battle Creek law office of Attorney Robert Sharkey, who had represented the Respondent in prestrike negotiations. At this meeting the Respondent had a bargaining committee which also consisted of Jack Sherman, vice president of Elkin, Tim Meinerz, Frank Verito, a member of the Elkin management committee, and Hammontree. The Union was represented by International Representative Gary Klein, Sale, an employee committeeman, and the president of Local 1176. After an ex-

change of somewhat acrimonious remarks, the parties began to go over the text of the Company's August 20, 1987 contract proposal. They all read it together line by line and paragraph by paragraph to determine if anyone still had any disagreement with the text. For the most part, the parties agreed on both the concept and the language of the August 1987, proposal but there were some specific exceptions. Whenever they reached a clause or paragraph which presented a disagreement, they simply noted the disagreement and proceeded to the rest of the proposal. The two areas which presented problems were checkoff and health insurance. As to other items, company representatives agreed to insert a provision protecting the handicapped in the nondiscrimination clause and the Union agreed to delete certain verbiage in the general purposes clause.

By the end of the January 13 meeting the parties had completed a review of the entire August 20, 1987 proposal which had served as the matrix for their discussions. The health insurance issue was again raised and the Union asked the Company to put together a proposal on this subject. The Union also stated that it would review the Company's insistence that there be no checking off of dues. As it was getting late in the evening, Sherman told union representatives that they needed more time to prepare a health insurance proposal. Klein said that he would not give the Company a reply on the subject of checkoff until it had received a health insurance proposal. Klein then asked company representatives whether there were any outstanding disagreements other than on the checkoff and health insurance questions and was assured that there were none. Sale suggested that all parties initial the portions of the written proposal on which there was agreement, but Meinerz refused, saying that he would only sign a final agreement. Klein then repeated his earlier question as to whether there was a tentative agreement on all subjects other than checkoff and health insurance. He was again assured that there was agreement except on those items. However, Meinerz added that any final agreement would have to be taken to the board of directors for approval.

On January 18, Sherman wrote Klein a letter in which he stated:

Enclosed is the information you requested on our insurance program that covers our employees at Seiler Tank Truck Service, Inc.

The premium increase of 25% in 1988 was totally absorbed by Seiler with no increase in cost to the employees.

Per our discussion at our January 13th meeting, we will consider any recommendations you have that might reduce or minimize future increases in the cost of our insurance. On January 1st, 1988 this program covered 168 employees in six different operations and locations. The breakdown consists of 66 single coverage and 102 family coverage.⁶

He attached a copy of the existing plan to the letter.

On January 30, Sale wrote Sharkey a letter in which she stated, in part:

⁵ After the consolidated complaint was issued in this case, Spradlin was discharged but his discharge has never become part of any unfair labor practice proceeding and it is not part of this one.

⁶ This reference was not only to Seiler employees but employees of other enterprises controlled by Elkin who were part of its health insurance program.

We urge you to have the Company's proposal on health insurance prepared and available for discussion at the [forthcoming February 7] meeting, if not before. We also urge you to secure authority for the people at the bargaining table to enter into an agreement at that meeting. There is no dispute between the company and the union as to all matters in the contract that we discussed apart from dues checkoff and insurance. We should be able to signify our tentative agreement as to all of these other items while the insurance and dues check-off matters are being resolved.

At the February 7 meeting, the parties began negotiations by discussing health insurance. Meinerz asked Klein if he had obtained any insurance quotes from other insurance companies. Klein replied that he had sent copies of the Respondent's level of health insurance benefits to two or three companies and they were going to provide him with premium quotes but none had done so as yet. Klein then asked the Company if it had any specific proposal on that topic. They replied that they did not, whereupon Klein proposed that article 12, as it appeared in the old August 1987 proposal, be adopted. Company negotiators recessed briefly and returned with a statement that the Company wanted to reserve the right either to revise present level of health insurance benefits, if it felt it necessary in the light of changed insurance costs, or to pass along a premium increase to employees. Sale wrote out a proposed clause along that line on a piece of paper and handed it to company negotiators. They returned with another handwritten proposal, whereupon the Union made a third proposal. Company negotiators said they liked the Union's counterproposal, but needed time to recast it into language which would conform to their program. However, they voiced agreement with the concept contained in the handwritten documents and agreed to mail the Union a copy of their own proposed health insurance language. Klein insisted that he would not agree on the issue of dues checkoff until he saw the copy of the Company's insurance language.

As the meeting broke up, Klein again asked if the parties had an agreement provided that the health insurance and checkoff problems were resolved. Meinerz and Verito acknowledged that, if those problems were resolved, there was a complete agreement, but Meinerz reiterated that he would have to take the agreement to the Elkin board of directors or management committee for final approval. Klein then stated that he felt that there was a tentative agreement which he would recommend to his membership. The draft proposal from which the parties were working contained nothing about a no-strike/no-lockout agreement nor did its appendix set forth any classification or wage rate for a category of employee known as a crude oil driver. I credit union witnesses that neither of these questions was mentioned during either meeting in January and February.⁷

⁷ Among the evidence on this point is Meinerz' testimony that, at the time of the February 7 meeting, there were only two open items, health insurance language and checkoff. Moreover, in a letter to Sale, *infra*, dated March 27, Sharkey, in discussing the no-strike/no-lockout provision, makes no reference to any negotiations on the point at the two sessions which took place in his office in January and February. He restricts his justification for inserting this article in the contract to prestrike discussions reported to him by Verito.

On February 15, Sharkey mailed to Sale a copy of the language of a management proposal on health insurance to be used as article 12 of the contract. He asked for a union response. He also faxed the document to her at the same time. On February 20, Sale replied to Sharkey by letter, stating that the Union accepted the proposed article 12 language and withdrew its demand for checkoff. In her letter she also stated:

With these two agreements, all outstanding matters are resolved. Accordingly, Mr. Meinerz may proceed with the preparation of the entire contract, as he offered to do at our last meeting. You said that you believed that could be done in the next few days. As soon as we receive the document we will review it. Assuming that it is consistent with our agreements, we will present it for ratification by the membership at once.

Before Sale wrote the letter of February 20 letter, she and Sharkey had also come to these conclusions during a telephone conversation. While these matters were under discussion by company and union representatives, a decertification petition was being signed by employees at the Albion facility with full knowledge on the part of Hammontree.

On February 22, a management committee meeting took place at the Elkin office in Brookfield, Wisconsin, a suburb of Milwaukee. At this time contract negotiations at the Albion facility were discussed. Tim Meinerz, a member of the management committee, testified that they recommended to the committee that the contract which had been agreed on with union negotiators be adopted. There were some dissents. Scott Meinerz wanted the provision of the nondiscrimination clause relating to handicapped employees stricken because he felt it might cause some trouble with the Department of Transportation. Tim Meinerz voiced the opinion that he did not feel that there would be any problem in getting the Union to agree with this change. Another board member wanted to insert a no-strike/no-lockout provision. The board then agreed to adopt the contract with those two changes. Later on, Hammontree, who was not at the meeting, received the proposal and noted that there was no provision in its appendix for a job classification and wage rate pertaining to a new classification of driver—crude oil hauler—that had been utilized since the previous summer after the Respondent bought out another company and took over customers for whom the Respondent was employing crude oil haulers. Although nothing was said at the February 22 board meeting on this subject, Hammontree asked his superiors to include in their contract draft an item containing this classification together with the Respondent's existing pay rate.

In mid-March, a 19-page contract proposal, generated from the computer at the Respondent's Brookfield office, was prepared and sent to Sharkey in Battle Creek for transmission to the Union. The draft which was transmitted had the three changes requested by members of the management committee and Hammontree. Despite the fact that several company representatives had reviewed it before transmission, it also omitted the text of the pension plan to which the parties had already agreed in December or any reference to the plan.

By letter, dated March 17, Sharkey transmitted the proposal to Sale with a cover letter, which read:

This is the draft contract that we have revised and we will present to the Board of Directors of Seiler Tank Truck Service, Inc. If there are any changes, please get back to us by the first part of next week.

The letter and revised proposal evoked an angry response on the part of Sale. She tried to phone Sharkey to speak with him about the changes but he was not available and did not return her calls. In a letter, dated March 22, 1989, she noted that the draft contained three changes which were not agreed to during collective bargaining. She stated:

The first of these [the omission of handicap language in the nondiscrimination clause] may have been an oversight. The last two [insertion of a no-strike/no-lockout provision and the crude oil hauler classification] obviously were intentionally added despite the fact that they were never proposed at the bargaining table and, accordingly, were never discussed by the parties. The document which was to have been prepared by you for our review was to have been merely an incorporation of the changes in the contract to which we agreed. It was not to have been a document which contained new provisions. Unless you remove this new material, i.e. Article VI "No Strikes or Lockouts" and the "Crude Oil Hauling" classification in Appendix A, and add "handicap to Article II," we will have no choice but to pursue our remedies before the National Labor Relations Board.

Frankly, I am outraged that you could have unilaterally made such significant changes in the document. Your doing so signals your intention not to enter into a collective bargaining agreement with the UAW. I will wait until Monday, March 27, for your response to this request to make the contract document conform with our agreement. If I do not hear from you by that time we will file unfair labor practice charges.

On this same date, Calbert England, a driver at the Albion operation, filed a decertification petition in Case 7-RD-2350. The petition was dated March 15 but was not docketed until the March 22.⁸ In a reply letter to Sale dated March 27, Sharkey said:

Thank you for pointing out the inadvertent omission of the "handicap" matter in Article II of the proposed contract. I'll make certain the proper language is inserted in the proposed contract.

The matter involving no strike/no lockout is one that Mr. Verito advises me has been discussed with the Union in the past. The employees were very upset and

⁸Sharkey was aware of the petition on March 15 before it was docketed at the Regional Office. On that date, he wrote the Regional Director a letter which read, in pertinent part:

The Employer has recently become aware and has reasonable grounds to believe that the employees no longer wish to be represented by the United Auto Workers. In fact, we understand that the majority of the employees have petitioned the NLRB requesting that an election be conducted.

In the interest of fairness to the employees and the Company, we request that such an election be conducted.

On March 30, the Regional Director dismissed the decertification petition because of the pendency of the blocking charge in this case.

claimed they had been locked out while the employer . . . asserted the position that the strike was ongoing.

As a result we had a rather extensive and expensive NLRB administrative proceeding. To prevent that type of harm to the employees and the employer we have proposed that a no strike/no lockout agreement be included in any contract. If you review the matter you will see that there is a provision for an expedited arbitration process to quickly resolve any disputed matters.

The new classification you mentioned of "Crude Oil Hauling" is one that has been around for months. By the Appendix we are simply attempting to state what presently exists. During the time the UAW has been representing the employees additional lines of business have been developed by the company and additional employees added. This was information which was made known to you and the members of Local 1176 some time ago.

Since I was not able to discuss this matter by telephone with you by the deadline you imposed, I have taken the liberty of dictating this letter and having it telefaxed to your office. Hopefully we will be able to discuss the matter soon.

Turning to other matters, the employer presently has reasonable cause to believe that Local 1176 of the UAW does not represent the majority of its employees within the certified class. We have been contacted by the National Labor Relations Board indicating that the employees have petitioned to decertify the Union. We believe the employees should be permitted to choose whether they will continue to be represented by the UAW and will so indicate to the National Labor Relations Board.

The next communication between the parties was the unfair labor practice charge which the Union filed in this case on March 29.

Sharkey wrote Sale on March 31, saying that the omission of the language relating to handicap discrimination was a clerical error and expressed the opinion that he did not think the other two changes were significant. He said he would give her a call to see if they could resolve the matter informally. It should be noted that the Union made no mention of the omission of the pension plan from the Respondent's contract proposal. At the hearing, Klein testified that their failure to do so was an oversight on the Union's part. It had simply not noticed that this provision was missing from the document.

On April 4, after receiving the charge filed by the Union, the Respondent held another management committee meeting in Brookfield. The committee voted to delete from its contract proposal the earlier changes which the Union found objectionable. It inserted these revisions in the data bank in its word processor. A new contract proposal embodying these deletions (and the addition of "handicap") was prepared and sent to Sharkey for transmission to the Union. On April 13, Sharkey sent the revised contract to Sale and followed it up with a letter, dated April 19, which read:

On April 13, 1989, we sent you by fax transmission and by regular mail a revised contract. We would appreciate the benefit of your client's position at your earliest convenience.

As I indicated earlier, Seiler Tank Truck Service, Inc., would like to resolve these matters without the need for further protracted litigation.

Please contact me at your earliest convenience.

Sale never responded to this letter. Although the parties had communications with each other from time to time in the months to come, the matter of the contract was never again discussed, either orally or in writing, in any meaningful way. The revised proposal transmitted in April again omitted any reference to the agreed-upon pension plan. The Company explained at the hearing that this omission—its second—was again an oversight and insisted that it has never receded from its position of including this matter in a final agreement. Klein testified that the Union never responded to this proposal because it felt that, by omitting any mention of the pension plan from the proposal for the second time, the Respondent was evidencing the fact that it really did not want to conclude a collective-bargaining agreement.

While the first Board case was still pending and before the settlement took place on November 30, 1988, a decertification effort was taking place at the Respondent's plant under the general direction of driver Calbert England.⁹ England's testimony is somewhat confused about which events in the decertification effort took place during the first petition filing and which took place during the second one. The first petition was filed in the fall of 1988. England obtained from a friend who worked in a foundry the number of the Board office in Detroit, phoned the office, and spoke with a Board agent. The Board agent sent him RD petition forms and suggested language which should appear on a petition to be circulated among employees together with a showing of interest necessary to support an RD petition. According to England, the Board agent told him that he had to have seven copies of the signatures. He also suggested that England check to see when an open period might exist under the contract bar rules.¹⁰

In order to fill out the Board form, England had to get some information from Hammontree. Specifically, he needed to know the identity of the current collective-bargaining agent in order to complete an item found on the form. When this discussion took place, Hammontree asked for a copy of the signatures which would be collected. England furnished him the list after they were collected. England filled out the petition in his own handwriting but obtained the services of the company secretary (known in the record only as Mary Jo) to type out the sheet which was circulated for employee signatures. He dictated to her the language which appeared at the top of the sheet. Mary Jo obtained Hammontree's permission before providing this clerical assistance.

Signatures were collected by laying the supporting petition form on a table in the driver's room next to the office so that drivers could sign before or after they went out on runs. The decertification question was regularly and repeatedly discussed among the drivers and England asked some drivers to sign. When he collected a sufficient number on the sheet, he

had a copy xeroxed for Hammontree, attached the list to the Board petition form, and sent it in to the Regional Office. The RD petition filed in the fall of 1988 was dismissed because of the pendency of the charge in the earlier Board case.

In February 1989, while negotiations were in progress in pursuance of the settlement agreement of the first Board case, England revived the decertification effort. Hammontree admits that he was aware of this effort, asked for a copy of the completed signature page, and received it from England. Again signatures were collected from drivers by leaving the petition page on the table in the drivers room so that they could sign before or after going out on runs. The petition form was left on the table for nearly a week. Anyone passing the table could look at the form and determine who had signed and who had not done so. A total of 11 employees out of an estimated 14-man bargaining unit signed. All the dates of the signatures were either February 20 or 22, 1989. For reasons unexplained in the record, the petition and the accompanying showing of interest were not filed with the Board until March 22, 1989. On receipt of the charges in this case, the petition was dismissed because the petition was blocked.

As noted previously, Myers went back to work on December 5, 1988, and Spradlin returned on December 19. In terms of tenure, both men ranked far above all the other drivers, with the exception of two who had returned during the strike, because the remaining employees in the bargaining unit had been hired either during or after the strike. Spradlin had first come to work for the Respondent in May 1984, and Myers started in November 1979.

Spradlin did not haul crude oil. He drove a transport truck that hauled waste water from wellsites either to approved disposals or to county roads for dust spraying during summer months. He was a union member and went on strike when the strike began on November 17, 1987. He was discharged on February 10, 1990. Myers hauled both oil and water. For the most part he drove a straight one-piece unit which could transport 55 barrels. On occasion he drove a tractor trailer but this was an exceptional situation. He also went out on strike at its inception and stayed out until the Union called it off. On August 4, 1989, about 8 months after Spradlin and Myers had returned to work following the settlement agreement, the Union notified the Respondent that both men had been appointed union committeemen. In the period of time at issue in this case, they were the only employees on the Respondent's payroll who had absented themselves from employment during the entire period of the strike.

From the Respondent's point of view, the strike was a bitter and destructive one. In his testimony, Hammontree claimed that strikers tried to torch company trucks, pulled replacement drivers out of trucks, threatened the families of replacement drivers, broke car windows, tore out the radio tower of the Company's intercom system, spied on replacement drivers, flattened tires of company trucks, broke windows on trucks, and caused the Company to lose customers to the point where it was on the verge of bankruptcy. He did not allege, nor did any other company witnesses, that either Myers or Spradlin had personally engaged in such activity. However, Hammontree admitted on the stand that he still harbored hard feelings toward the Union and always would.

⁹England no longer works for the Respondent. He was hired after the strike ended as a driver. In June 1989, shortly after the second decertification petition was filed, he was promoted to a supervisory position known as pusher. He quit in June 1990.

¹⁰Since there was no contract, there could be no bar and this matter was irrelevant.

Respondent's drivers report each morning at 7:30 a.m. and are dispatched from the Albion facility based on requests from oil producers which have been received the previous evening or early the same morning. In many instances, the Respondent has ongoing orders for drivers and equipment that extend beyond a single call. One of the functions of its pushers is to go out in the field and solicit business each day after they have finished dispatching drivers. The Respondent operates on an on-call basis and may receive requests for trucks and drivers at any time of the day or night. If a driver is in the field on another call and becomes available, he may be dispatched by radio. It is not unusual for a driver to be summoned from home, either in the evening or on a weekend, to respond to a customer's call. Because the Respondent must have drivers available for emergency calls, it permits drivers who have not been dispatched in the morning to remain at the terminal doing other work. They may be performing routine maintenance or cleaning on their trucks or they may only be assigned to make-work projects, such as sweeping up the garage. When on call, a driver receives whatever pay rate is assigned to the work in question, whether it be water hauling, hot oil work, or crude oil hauling. When working in the shop on what are essentially make-work projects, he receives only the minimum wage which, in every instance, is far less than one half the rate for any driving assignment.

Spradlin testified credibly that before the strike he was regularly dispatched as a driver and that when work was slow seniority among drivers controlled assignments.¹¹ He complained that when he returned to work after the strike he was last to be dispatched. He testified, and the Respondent agreed, that after the strike when he was second in seniority there were no assignments based on seniority. It was the Respondent's contention that it never observed seniority in making daily assignments. Respondent's witnesses said that it was often difficult to assign work to Spradlin because he did no oil hauling and was limited in his capabilities to hauling water and also because, in one or two instances, customers had complained about Spradlin and had insisted that the Company refrain from sending him to their jobsites.

Myers had a wider repertoire than Spradlin. He was the senior driver in the facility. He testified credibly that, before the strike, he generally had his own area and was assigned to make deliveries or to haul oil in that area everyday. He was among the first to be assigned and, if there was not enough work on a particular day in his area, he would be sent to another one. He corroborated Spradlin's statement that, before the strike, the Company observed seniority in making assignments. He also testified that there was only one pay class at that time and that any variations in rates

¹¹ When a driver is assigned shop work at the minimum wage, he has the option of accepting it or punching out and going home. Sometimes Spradlin took the latter option, since he often felt it was not worth his while to work for \$3.35 an hour. Respondent's drivers can also be assigned to runs on which they can "make time," i.e., get paid for hours in excess of those actually worked. The Respondent has certain contracts with customers who call for the performance of specified tasks in a stated period of time. Billing is handled on the basis of the number of hours the contract calls for. If a driver assigned to these premium runs can finish the job in fewer hours than the contract calls for, he is still entitled to full compensation based on the contract time.

paid to drivers were based on seniority, not upon the type of commodities they hauled.

During the strike, the Respondent acquired four multiaxle trucks of a type which they never had before. Myers complained that he has never been assigned to drive one or to train to drive one. He also testified that, after the strike, he often did not receive an assignment until midday and would be receiving minimum wage for shop time until being dispatched. He complained that, after the strike, he was assigned to more scut work—cleaning up oil spills, cleaning out truck tanks, and "pulling bottoms," i.e., removing water and sludge from crude oil tanks.

Based on the voluminous pay and assignment records which were placed in the record, both the General Counsel and the Respondent submitted statistical charts showing the comparative hours worked by Myers and Spradlin vis-a-vis other drivers. The General Counsel limited his chart to those drivers who performed comparable tasks to the ones performed by the two discriminatees. Respondent's chart, prepared on a weekly basis for 1989, shows that in comparing both total hours and chargeable hours worked by Myers and Spradlin against those worked by other drivers, the names of the two discriminatees fell at various rankings for each week throughout the year. Some weeks Myers or Spradlin would rank high among the total driver complement in hours worked and in other weeks one or both would be in the middle or at the bottom. The tables were prepared on the basis of hours worked, not income derived.

The chart prepared by the General Counsel compared the two discriminatees against five other employees—Neil England, Klemanski, Obenour, Ratliff, and Wolfe—who drove similar runs. It was broken down by calendar quarters. It showed that, of these seven employees (including Myers and Spradlin), the two discriminatees had a lower average number of hours worked per week in 1989 than any of the others did. Neil England had the highest average hours worked—64 per week. Of the five drivers on the chart who are not parties to this case, the lowest average weekly number of hours worked was 63. However, Spradlin averaged only 51 hours a week and Myers averaged just under 58.

The General Counsel also introduced a chart which focused on shop pay, the gravamen of the complaints by Spradlin and Myers. Their income from shop pay in 1989, computed at the minimum wage, was markedly higher than that of any other employee—\$490 for Spradlin and \$480 for Myers—as compared with \$380 for the next highest recipient. From these statistics I conclude that Spradlin and Myers had markedly more shop hours assigned to them than any of the other employees in the bargaining unit during the first year of their reemployment following the settlement agreement.

Despite the fact that Sharkey had questioned the Union's status in his letter to the Regional Director and again to Sale, the Respondent continued to communicate with the Union from time to time. As Sharkey put it in his testimony:

Things were going back and forth. We were in the strange predicament of trying to negotiate people on the one hand [sic] but not knowing whether or not they really represented their people on the other, and this non-representation issue had been going on for a long time.

As he put it, "we were engaged in a little fence straddling." Even as late as January of the following year, the Respondent was willing to meet with the Union because, as Sharkey testified, "things may well have worked out."

In August 1989, the Respondent treated its employees to a steak fry which took place in the garage at the Albion facility. When Myers arrived at the party, Hammontree called him over, thanked him for doing a good job, and handed him an envelope containing two \$50 bills. Other employees also received cash payments at the party, ranging from \$20 to \$100. These sums were reported as income to the Internal Revenue Service on the W-2 forms of each employee. In previous years, the Respondent has given cash bonuses to employees at Christmas parties but it has never done so on any other occasion. There is no contention that the Union was notified in advance of the distribution of this bonus or that it was given an opportunity to bargain about it.

In the late fall of 1989, the Respondent instituted a substance abuse program for all of its employee drivers and contract drivers. The program was designed by an organization known as Bridgeway Center, Inc., which made an hour-long presentation at an employee meeting on November 30, 1980. The Respondent distributed to its employees a document entitled "Substance Abuse Policy Manual" which outlined the provisions of its plan in question-and-answer form. The plan took effect December 1, 1989. It stated in pertinent part:

- (a) No driver shall be on duty if the driver uses any controlled substances.
- (b) No driver shall be on duty if he tests positive for use of a controlled substance.
- (c) Any person who tests positive for use of a controlled substance is medically unfit to operate a commercial vehicle.
- (d) Any person's refusal to be tested for use of a controlled substance is deemed a positive test.

The new policy manual provision stated that a driver could exempt himself from the provisions of the policy if he could demonstrate that he was taking drugs pursuant to a prescription of a doctor.

The new policy then went on to outline a program of pre-employment drug testing, testing of a driver when there was reasonable cause to believe that he might be using drugs, a mandatory drug test for all drivers at their next regular medical examinations, and random testing thereafter. The policy statement went on to say that the Company had established an employee assistance program which was essentially a booklet concerning the effect and consequences of controlled dangerous substances. The notice informed employees that this information could be found in a booklet which was being made available in the office. However, the Company announced that it did not have a rehabilitation program and any driver who either tested positive or refused to take a drug test could be terminated immediately.

As in the case of the August bonus, there is no contention that the Union was notified in advance of the establishment of this program nor was it offered an opportunity to bargain concerning its provisions. The Respondent insists that the program was being instituted at that time as a result of regulations imposed on it by the U.S. Department of Transpor-

tation and submitted a copy of those regulations as an appendix to its brief.

Until June 30, 1989, the Respondent offered its employees a comprehensive health and dental insurance plan through the Lincoln National Life Insurance Corporation of Ft. Wayne, Indiana. This plan covered not only the Respondent's employees but many other individuals employed by various Elkin subsidiaries. Two basic changes occurred in health insurance coverage on that date. The dental portion of the Lincoln National plan was removed and coverage was changed to another carrier, EBC. There is no contention in the brief of the General Counsel or the Charging Party that this change in dental insurance carriers resulted in a change in benefits, although this allegation was made in the third consolidated complaint. With respect to accidental injury benefits, the former Lincoln National plan provided full coverage. The new plan provided that accidental injuries of less than \$300 would be covered only on an 80-20-percent basis, with the employee picking up 20 percent of the bill.

On August 4, 1989, Klein wrote to Hammontree asking for an updated copy of the Company's health, life, and dental insurance policies. His letter was referred to Meinerz, who replied on September 26, as follows:

Enclosed herewith are booklets explaining our health and dental plans.

We are awaiting new health booklets from Lincoln National which should be available within the next 30 days. The changes reflected in these booklets would be: (1) dental coverage is now being handled through EBC (coverage is exactly the same as what we offered through Lincoln National) and (2) the \$300 full pay accident benefit is now handled as any other claim. Everything else within the plan remains the same.

I am sorry for the delay in providing the health booklets. I will forward you a copy as soon as they become available.

The information contained in Meinerz' September 26 letter was the first notification which Klein had received of any change in insurance carriers or benefits.

There was no bargaining on either of these topics. When the issue of coinsurance arose in this trial, the Respondent stated that, upon noticing the change in its new accident benefit coverage, it researched its claims for accidental injuries under \$300 and found that there had been none. Accordingly, it decided to coinsure this amount and pay the 20-percent employer share of any claim which might be filed under this amount. However, it did not notify the Union of its decision until the time of the trial and admitted that there have been no minor accident claims since the onset of the new policy which had required such payments. On November 2, 1989, Meinerz forwarded to Klein a copy of the new Lincoln National health plan booklet that he had received on October 31, 1989. Klein's response was a letter, dated November 6, contending that any changes in employee insurance benefits would be viewed by the Union as a violation of the law.

Hammontree testified that, in August 1989, an employee named Ed Rose told him that the Respondent's drivers were interested in having a profit-sharing plan. He added that, if the Company did not begin to offer such a plan, he would quit. In fact, he did quit. In October 1989, the Respondent

implemented a pension/profit-sharing plan which the Respondent asserts, without contradiction, is the same plan which the parties agreed upon in December 1988.

Sometime late in 1989 or early in 1990, the Respondent retained the assistance of labor counsel to assist it in the defense of the pending unfair labor practice complaint. However, it continued to employ Sharkey as well. On November 16, 1989, Sale wrote Sharkey, suggesting that the parties return to the bargaining table and attempt to resolve "their many differences." She informed him that the UAW was prepared to meet as soon as possible. Two months later, on January 19, 1990, Sharkey replied:

In follow-up to your recent letters suggesting a meeting between labor and management we ask that you specify several dates in the near future when UAW representatives would be available to meet with management representatives. As you know, the holiday time is always difficult for planning meetings when management's representatives are located from Wisconsin to Florida. However, we look forward to the opportunity to meet now.

P.S. Please note that by this letter management does not waive any position it has taken concerning its obligation or duty to meet with and negotiate with representatives of the UAW.

To this letter, Sale responded on February 6 that union representatives would be available any time after February 23.

Early in February 1990, Willie Spradlin was fired after a sharp verbal exchange with Hammontree. On February 12, 1990, Klein wrote the following letter to Hammontree:

It has been brought to my attention that there was a verbal altercation between you and Willie Spradlin on Friday or Saturday.

I am requesting that you inform me in writing of any action you took against Mr. Spradlin. This is to include his current status, his entire employment record (including disciplinary record), and a detailed explanation of the Company's position of the above incident.

The reply to Klein's letter was supplied by Respondent's labor counsel, Donald J. Cairns on March 16, 1990. It read:

Seiler Tank Truck Service, Inc., will not provide you with the requested information. Moreover, the Company will not provide the United Automobile, Aerospace, Agricultural Implement Workers of America (UAW) with any other information nor will it recognize and bargain with the UAW over wages, hours, and conditions of employment covering Seiler Tank Truck Service employees at Albion, Michigan. Whatever "majority status" may have existed prior to 1989, it is clear that as of February 20, 1989, and continuing to present date, the UAW has not enjoyed support among a majority of the unit employees.

B. Analysis and Conclusions

General background

Before addressing the specifics of the third consolidated complaint which was issued by the General Counsel, it would be well to advert to an overarching inconsistency in the Respondent's position which affects its defense to all the allegations levelled against it. Throughout the relationship with the Union which was litigated in this proceeding, the Respondent took the position, on the one hand, that it had satisfied its duty to bargain with the Union, as required in the settlement it entered into in the initial Board case in 1988, and that it continued in good faith to bargain until March 1990 when, for the first time, it categorically refused to bargain by refusing a demand for information relating to the February 1990, discharge of Spradlin.

On the other hand, the Respondent told both the Board and the Union, as early as March and April 1989, that it entertained a good-faith doubt as to the Union's continued majority status. It reiterated this position on several subsequent occasions. Their asserted doubt was occasioned, in principal part, by a collection of employee signatures in support of a decertification petition filed with the Board on March 22, 1989. In one statement in this record the Respondent asserted that it began to harbor its doubt of the Union's majority status as early as February 22, 1989, when it was furnished with a copy of the signatures which accompanied the form that England filed with the Board. Sharkey, the Respondent's attorney, called the Respondent's position "fence straddling," admitting that the Respondent still continued to deal with the Union for nearly a year after coming to the conclusion that the Union no longer represented its drivers and mechanics at Albion. It did so because it felt that something worth while still might come from continued negotiations. In other words, the Respondent was willing to put aside its doubts on the representation question if it could get a contract to its liking with a minority union.

"Fence straddling" is the one position the Respondent was not entitled to take. *Bolton-Emerson, Inc.*, 293 NLRB 1124 (1989), *enfd.* 899 F.2d 104 (1st Cir. 1990). An employer may negotiate a collective-bargaining agreement only with the majority representative of its employees. If it comes to the conclusion that a bargaining representative with whom it is dealing no longer represents its employees, it must break off those negotiations and let the processes of the Board determine if its assessment is correct. When an employer continues to carry water on both shoulders, negotiating at times and acting at other times as if there were no union in the shop, it undermines any assertion of good faith on two fronts. Its bargaining effort becomes tainted and so does its refusal to bargain.

While the Respondent was assertedly attempting to work out a contract at the bargaining table to comply with the settlement agreement in the previous Board case, it was also actively assisting an effort, undertaken by employees who had been hired during or after the strike, to get rid of the Union entirely. While the initial spark for these decertification efforts came from driver and later Supervisor Calbert England, that spark was fanned into a lambent flame by Hammontree

on two different occasions. Company clerical personnel and facilities were made available by Hammontree for the typing of petitions which were needed to accompany the filing of the decertification forms. Hammontree asked England during both signature campaigns for copies of the petitions after they were signed. The collection of signatures lasted, in each instance, for a number of days, as blank sheets were placed in the open in the driver's room next to the company office where the identities of signers (and nonsigners) could be easily ascertained by anyone passing through the area. While the General Counsel did not allege the sponsorship of decertification petitions as separate violations of the Act, such sponsorship was readily demonstrated in the record and is further indication of the lack of good faith with which the Respondent went about performing its duty to bargain.

Lastly, the specific allegations in the third consolidated complaint must be viewed against a background of the intense antiunion animus on the part of an employer who had emerged, bloody but unbowed, from a bitter 2-month strike. Hammontree minced no words when he testified that the strike was seriously damaging to the Company and that he would never forget the physical and economic deprivations that he felt the Union was responsible for causing. He was the Respondent's principal supervisor, so his attitude and outlook are significant, if not controlling, background factors in evaluating the several violations, both of Section 8(a)(3) and (5), which the General Counsel has alleged.

II. THE REFUSAL OF THE RESPONDENT TO BARGAIN IN GOOD FAITH

The Respondent is charged with making several unilateral changes in working conditions, none of which is dependent upon specific proof of subjective bad faith, as well as a flat refusal to recognize the Union any further when it declined to furnish Klein with information regarding Spradlin's discharge. It is also charged with refusing to submit a tentative agreement arrived at through negotiations to the Respondent's board of directors for final approval. For these violations the General Counsel requests a remedy directing the Respondent's negotiators to submit their agreement with the Union to the directors for their approval and to recommend that it be approved. The General Counsel specifically disclaimed any intention of pursuing a theory which would require the Respondent to execute the collective-bargaining agreement negotiated with the Union at the two final sessions which took place in January and February 1989.

In addressing the last-recited allegation first, it should be noted that all parties seem to agree that the Respondent's negotiators had arrived at only a conditional or tentative agreement at the bargaining table and that they had informed the Union that any final agreement was dependent on approval by the Elkin management committee or board of directors which met periodically at Elkin headquarters in Wisconsin. Some but not all of the members at the Elkin management committee were also members of the Respondent's bargaining team.

If the agreement hammered out during negotiations was only a tentative one, then either party had the right to reject it after presentation to its principal. Certainly, if the agreement were rejected by the union membership when it was presented by union representatives, no unfair labor practice would have occurred, provided negotiators on the other side

were apprised in advance of this internal requirement. The General Counsel and the Charging Party seem to believe that the tentative agreement was never presented to the board of directors and that company negotiators should be forced to present it. The record simply does not bear out this contention. The terms and conditions of the agreement were in fact presented to the directors and, in some particulars, were rejected.

Certain counterproposals along the lines of a no-strike/no-lockout clause and the deletion of "handicap" as a basis for a contractual claim of discrimination were made, as was Hammontree's later request for insertion of a job classification and pay rate for crude oil haulers. The Company had every right to go back to the Union with these requested modifications. It is understandable that the Union may have felt that it had been "sandbagged" by these counterproposals, inasmuch as it had already withdrawn its proposal for checkoff on receipt of company language on health insurance. However, Meinerz' reservation of the right to submit the entire package to the Elkin board of directors for final approval preserved the Company's position in this regard.

Notwithstanding these obstacles, the parties to this proceeding did in fact reach a final and complete understanding with respect to a contract. Following the filing of the unfair labor practice charge, the Respondent prepared yet another written proposal which deleted the provisions to which Sale had objected. Sharkey forwarded this draft to her on April 4. With the sole exception of the pension and profit-sharing clause, this document constituted the complete agreement which had been reached by the parties. See *Cowles Publishing Co.*, 280 NLRB 903 (1986).

The Respondent claims that the omission of the pension and profit-sharing section from its April 4 submission to the Union was again an oversight. This explanation is highly suspect. It can acquire credence only in light of the fact that the Union also failed to note the omission of this provision from the earlier draft and did not bring the matter to Sharkey's attention earlier. However, the Union could have done so, either in writing or by telephone, after receiving the April 4 draft but it did not. The validity of the Respondent's explanation need not be resolved because the Company strongly maintains that it never withdrew the pension and profit-sharing proposal to which the parties had noted their assent in December, long before the January and February negotiating sessions took place, and stood ready throughout its dealings with the Union to include such a provision in its contract. Accordingly, while the April 4 document itself does not fully represent the complete agreement between the parties, that document, plus the earlier agreement on pension and profit sharing, does constitute a complete agreement.

Respondent argues in its brief that the Union really did not want a contract in the first place and that it is only complaining now about the Respondent's actions during negotiations so that it can keep alive an unfair labor practice case and block the processing of a decertification petition. This argument misses the mark, since the same result could be achieved by the Union with a signed contract under the Board's contract-bar rules. Closer to the mark is the problem which the Union might have in getting this contract or any contract ratified by the members of a bargaining unit who have soured on it. However, the Board has frequently held that a requirement for contract ratification is one which a

union takes upon itself voluntarily, so when or whether ratification ever takes place is a matter into which neither the Board nor this employer may inquire. *North Country Motors*, 146 NLRB 671 (1964); *Houchins Market of Elizabethtown*, 155 NLRB 729 (1965); *M & M Oldsmobile, Inc.*, 156 NLRB 903 (1966), enfd. 377 F.2d 712 (2d Cir. 1967); *London Chop House*, 264 NLRB 638 (1982).

When, in March 1990, the Respondent's labor counsel wrote to the Union stating that it had withdrawn recognition, it was guilty of a violation of Section 8(a)(1) and (5) of the Act. An employer cannot withdraw recognition on the basis of a good-faith doubt of the Union's continued majority status when it has contributed to the undermining of the Union's majority status. While its actions in so doing were not alleged in this case as an unfair labor practice, these actions may be assessed in determining the existence vel non of a defense of good-faith doubt. Moreover, whenever good-faith doubt of the continuing majority status of a labor organization is asserted, it must be done in a context free and clear of collateral unfair labor practices. *Abby Medical/Abby Rents*, 264 NLRB 969 (1982); *Cypress Lawn Cemetery Assn.*, 300 NLRB 609 (1990). As discussed infra, the Respondent committed a series of unfair labor practices from the time it agreed in a Board proceeding to bargain in good faith until the day it formally refused to bargain at all. Accordingly, it was not privileged to discontinue its relationship with the Union by withdrawing recognition but was under a continuing obligation to continue trying to work out a contract.

Throughout the year which followed the settlement agreement in the earlier Board case, the Respondent often conducted its personnel relations as if there were no union in the shop with which it was obligated to bargain. It made several unilateral changes in wages and working conditions without going through any pretense of bargaining.

(a) It has long been held that the implementation of a health insurance plan is a mandatory subject of bargaining. *General Motors Corp.*, 89 NLRB 779 (1950); *W. W. Cross & Co.*, 77 NLRB 1162 (1948), enfd. 174 F.2d 875 (1st Cir. 1949). The identity of the health insurance carrier is as much a mandatory subject of bargaining as is the level of benefits to be enjoyed by employees. *Connecticut Light Co.*, 196 NLRB 967 (1972), rev. 476 F.2d 1079 (2d Cir. 1973); *Aztec Bus Lines*, 289 NLRB 1021, 1036 (1988). In the case at hand, the Respondent changed its dental plan from Lincoln National to EBC without bargaining with the Union about the change. This omission on its part was a violation of Section 8(a)(1) and (5) of the Act.

Regarding the accidental injury provision of its medical plan, a change without bargaining also occurred. Under the new plan, employees were required to pay 20 percent of the cost of the first \$300 of an accidental injury benefit, whereas previously the entire cost was insured by Lincoln National. On the face of it, this would appear to be a change in benefits which violated the Act because it had not been the subject of collective bargaining before it was effectuated. The Respondent claims that there was no change at all because it decided to pick up the difference. In a letter to Klein of September 26, 1989, in which he forwarded a copy of the new health and dental plan booklets, Meinerz explained that "(2) the \$300 full pay accident benefit is now handled as any other claim. Everything else within the plan remains the

same." Its belated statement that it was going to pick up the difference was never put in writing and never actually implemented in any actual case. This was simply a defense, conjured up out of whole cloth, to provide cover in an unfair labor practice proceeding. Nor is it a defense to the Respondent that Lincoln National made the change on a systemwide basis without consulting the Respondent. The Respondent could have paid an additional premium to the carrier and retained the former coverage. It was not a helpless pawn in the hands of its insurance carrier. Of course, it could have notified the Union and bargained about the change. It did none of these things, and because of its omission, it violated Section 8(a)(1) and (5) of the Act.

(b) On December 1, 1989, the Respondent instituted a sweeping program of drug testing which provided, among other things, that any employee who refused to cooperate by not taking a drug test could be summarily discharged. It did not even go through the motions of bargaining about this revision in its personnel practices. Its defense was similar to the one advanced with respect to its unilateral change of insurance coverage, namely that it was obligated to adopt this plan because of new Department of Transportation (DOT) regulations and had no lawful choice but to do what it did whether the Union liked it or not.

Alcohol and drug testing plans are mandatory subjects of bargaining. *Johnson-Bateman Co.*, 295 NLRB 180 (1989). At the time the Respondent implemented its drug testing plan in December 1989, there were many discretionary matters involved in its plan which were not mandated in the requirements of the DOT Regulations. The Respondent implemented its drug testing plan a year before the regulations required it to do so. The regulations relied upon by the Respondent and submitted as an appendix to its brief apply only to drivers who operate interstate vehicles which have a gross vehicle weight rating or a gross combination weight rating of 26,001 or more pounds. The Respondent operates trucks of various sizes and descriptions, and it is not at all clear from the record that all of them, or indeed any of them, fall within the weight categories covered by the DOT regulations. The Respondent's plan does not provide for a rehabilitation program but could have, and an experienced negotiator in this area of industrial relations might well find other deficiencies and other possibilities which could be talked about during a meaningful bargaining session. Moreover, the plan at issue calls for possible dismissal for a violation, something the regulations do not require. This matter as well could have been discussed in negotiations but it was not because the Respondent elected to implement the entire plan unilaterally. Accordingly, by instituting its drug testing program on December 1, 1989, without notifying the Union and offering to bargain with it concerning the provisions of the plan, the Respondent again violated Section 8(a)(1) and (5) of the Act.

(c) In August 1989, the Respondent held a steak fry for its Albion employees and rewarded each one who attended the event with cash bonuses ranging from \$20 to \$100. There is no suggestion that these bonuses were discussed with the Union or that the Union even knew about them until after they were distributed. The Respondent seeks to justify its action by pointing out that, in previous years, it had a practice of distributing cash bonuses to employees at its annual Christmas party and that the action complained of by the General Counsel was just another part of its standard, ongo-

ing practice. Christmas did not take place in August at the Respondent's shop in any year before 1989. Accordingly, by distributing cash bonuses to employees without bargaining about the matter with the Union, the Respondent here violated Section 8(a)(1) and (5) of the Act. *Koenig Iron Works*, 282 NLRB 717 (1987), enfd. 681 F.2d 130 (2d Cir. 1988).

(d) It is a violation of Section 8(a)(1) and (5) of the Act for an employer to refuse to furnish to a union any information which is relevant and necessary for the Union to have in order to fulfill its duty as bargaining representative. It is also an unfair labor practice for an employer to furnish such information on a timely basis. *American Model & Pattern Co.*, 277 NLRB 176 (1985); *Advertiser's Mfg.*, 294 NLRB 740 (1989). In early August, Klein requested a copy of the Respondent's dental and medical plans. He received nothing until September 26 and was then furnished only a copy of the old medical plan and the new dental plan. The Respondent did not send him a copy of the new medical plan. While the Respondent may have had an excuse for not providing the new Lincoln National plan because it had not received a copy from its insurance carrier, there was no excuse for taking more than 7 weeks to provide the other information. By its delay in furnishing such information, the Respondent violated Section 8(a)(1) and (5) of the Act. The information requested of the Respondent in February 1990, relating to Spradlin's discharge was certainly relevant to the Union's responsibility to represent Spradlin in pressing a grievance or protesting a discharge. Since there was no contract in effect at the time, the matter was critical to the negotiation of a grievance on an extracontractual basis. The Respondent's only justification for denying the Union this information was that it felt that the Union was no longer the bargaining representative of unit employees. Since, as found above, that contention is without merit, the defense asserted by the Respondent which follows from its faulty premise is equally without merit. Accordingly, by refusing to furnish the Union with requested information pertaining to Spradlin's discharge, the Respondent herein violated Section 8(a)(1) and (5) of the Act.

(e) At or about the time of the August 1989, steak fry, Hammontree had a private conversation with driver Ed Rose, at which time Rose complained that the Company did not have a pension or profit-sharing plan and that he would eventually quit if the Company did not put one into effect. The question of the adoption of such a plan had been the subject of an exchange of correspondence between Sharkey and Sale the previous December, at which time Sharkey told Sale that, for tax purposes, the Company wanted to have an immediate answer from the Union as to the acceptability of its proposed plan so that IRS could be notified and the plan put into effect before the close of 1988. Sale agreed to the plan but apparently it was not implemented, since Rose complained 9 months later about the absence of any plan in the Company's fringe benefit package.

Hammontree admitted at the hearing on cross-examination that, in October 1989, the Company put a pension and profit-sharing plan into effect. Whether it was the same plan negotiated with the Union the previous December or some other plan is unclear from the record. What is clear is that there was no discussion with the Union in the fall of 1989 concerning the plan or its implementation. Respondent claims that it was entitled to take this action unilaterally since the

parties were then at impasse and it was privileged to act unilaterally in such circumstances. However, the Respondent was, at that time, guilty of committing several serious unfair labor practices and the implementation of the plan took place in that context. A party may not declare or invoke the existence of an impasse to justify its unilateral actions when it has committed unfair labor practices leading up to the alleged impasse. *Nu-Southern Dyeing & Finishing*, 179 NLRB 573 (1969); *Cypress Lawn Cemetery Assn.*, supra.

However, an alternative defense is available to the Respondent. In December, the Union actually consented to the adoption of the plan so its implementation, however tardy, can hardly be said to have taken place without either bargaining or agreement. Accordingly, I will recommend the dismissal of so much of the amended consolidated complaint which alleges that the Respondent here violated the Act by unilaterally implementing a pension and profit-sharing plan in the fall of 1989.

(f) The General Counsel alleges that the Respondent was guilty of an unlawful refusal to bargain when, in January 1989, as Spradlin and Myers were returning to work, it changed its prestrike method of assigning work to drivers from using seniority as a criteria for dispatch to a policy of ignoring seniority for assignment purposes. There is no dispute that, since January 1989, the Respondent has ignored time in grade or seniority as a basis for making daily work assignments. This is one of the major complaints asserted by Myers and Spradlin, and Hammontree and others agree with them on this point as to the Respondent's postsettlement operations. The factual issue is what the Respondent did before the strike began in 1987.

Both Spradlin and Myers were emphatic that daily assignments were made each morning by the pushers on a seniority basis before the strike. Since they were among the most senior drivers, they were regularly dispatched early in the day and had little shop time at which they worked the minimum wage. Hammontree is equally emphatic that the Respondent never used seniority as a factor in job assignments, either before or after the strike, and he was backed up in his contention by driver Edward N. Jarosz, a former striker, who returned to work during the strike and was later promoted to pusher.

In this conflict of views, I discredit Hammontree, whose obvious and intense bitterness colored all of his testimony. Myers impressed me as a particularly reliable witness, both on the basis of the internal consistency of his testimony, the high repute in which he was and is held even by the Respondent's supervisors, and his demeanor. Accordingly, I conclude that the Respondent did alter its hiring practice following the strike after Spradlin and Myers returned to work by ignoring seniority as a factor governing daily dispatch. The net effect of this change was to deprive Myers and Spradlin of assignments which they otherwise might have. By altering working conditions in this regard without bargaining about them with the Union, the Respondent here violated Section 8(a)(1) and (5) of the Act.

The reduction of hours of regular driving work assigned to Spradlin and Myers in violation of Section 8(a)(3) of the Act

The General Counsel alleges that the Respondent discriminated against returning strikers Spradlin and Myers, reducing

their wages by reducing the number of regular hours worked by each of them. As noted above, all drivers are compensated on the basis of two different wage rates. While driving on an assignment, they receive the rate attached to the type of assignment they are given, whether it be hauling brine, hauling crude oil, or doing "hot oil" work. When there is no driving work available, they are allowed to stay in the shop and perform routine maintenance chores for which they are paid the Federal minimum wage. This disparity—between the minimum wage and the regular driving rates—has always been quite pronounced.

The Respondent placed summaries in the record, drawn from weekly payroll sheets, showing that Spradlin and Myers worked hours comparable to those worked by other drivers, some weeks working a little less and some weeks working a little more than others. This contention misses the point of the General Counsel's argument. While Spradlin and Myers may have worked comparable hours with other drivers, they were not paid comparable wages because a significant proportion of those hours was compensated only at a low shop rate.

The summaries placed in the record by the General Counsel bear out the existence of significant disparities in shop hours between Spradlin and Myers, on the one hand, and the shop hours worked by other employees. These disparities necessarily had a marked impact on earnings. According to Hammontree and others, Myers was a good driver and a versatile one so there was no excuse for such disparity in his assignments. Spradlin was assertedly a poor driver who drove only water trucks and was persona non grata at a couple of jobsites, so, according to the Respondent, he did not get as many assignments as he might otherwise have received because of his own limitations as an employee. Moreover, Hammontree complained that both Spradlin and Myers refused overtime and weekend work and that Spradlin often went home during the day rather than continue to work at the minimum wage, something he was privileged to do under the Respondent's policy but which apparently Hammontree did not like. The latter allegations, even if factually true, have no bearing on the nub of the General Counsel's argument, which is that both drivers received an excessive amount of low paid shop time in lieu of driving assignments.

Such demonstrable facts, introduced into the record in this case from the pay records of both discriminatees, occurred against a background of intense animus. Spradlin and Myers were the only employees on the Respondent's payroll who stayed out during the entire period of the strike. They had not been reinstated until an unfair labor practice case was settled some months after the strike ended. Both were Union committeemen and both were among a handful of drivers in the shop who did not sign the decertification petitions, a fact well known to Hammontree, who had been furnished with lists of drivers who had signed in support of the two decertification efforts. Moreover, both discriminatees were senior employees in the shop at a time when the Respondent's assignment practices had been changed to do away with seniority as a factor in making daily assignments, a personnel change which accommodated the end which the Respondent set about to achieve. Accordingly, I conclude that, by reducing the number of regular driving hours assigned to Spradlin and Myers because of their membership in and activities on

behalf of the Union, the Respondent violated Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Respondent Seiler Tank Service, Inc., a subsidiary of the Elkin Company, is now and at all times material here has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, and its Local 1176, and each of them, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time truckdrivers, helpers, mechanics, and hot oilers employed by the Respondent at or out of its Albion, Michigan facility, excluding all office clerical employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material, the Union has been and is the exclusive collective-bargaining representative of all of the employees in the unit found appropriate in Conclusion of Law 3 for the purpose of collective bargaining, within the meaning of Section 9(a) of the Act.

5. By withdrawing recognition from the Union as the exclusive collective-bargaining representative of the employees employed in the unit set forth above; by refusing to furnish the Union with certain information which is necessary and relevant to the performance of its function as bargaining representative and by undue and unjustified delay in furnishing other information; by unilaterally discontinuing its former work assignment practice of using seniority as a factor in making daily assignments; by unilaterally changing health insurance carriers and by unilaterally changing the coverage of its accidental injury insurance program; by unilaterally instituting a drug testing policy; and by paying cash bonuses to employees without first notifying the Union and offering to bargain over the subject of cash bonuses, the Respondent violated Section 8(a)(5) of the Act.

6. By reducing the driving hours of Willie Spradlin and Chris Myers because of their membership in and activities on behalf of the Union, the Respondent herein violated Section 8(a)(3) of the Act.

7. The aforesaid unfair labor practices also constitute violations of Section 8(a)(1) of the Act and have a close, intimate, and adverse effect on the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent herein has engaged in certain unfair labor practices, I will recommend to the Board that it be required to cease and desist therefrom and to take certain affirmative actions designed to effectuate the purposes and policies of the Act. I will recommend that the Respondent be required to make whole Willie Spradlin and Chris Myers for any loss of earnings which they may have sustained by reason of the discriminations practiced against them, in accordance with the *Woolworth* formula,¹² with interest thereon at the rate prescribed by the Tax Reform Act of 1986 for the overpayment and underpayment of income taxes. *New Horizons for the Retarded*, 283 NLRB 1173

¹²*F. W. Woolworth Co.*, 90 NLRB 289 (1950).

(1987). I will also recommend that the Respondent be required to recognize the Union and to bargain collectively in good faith with it as the exclusive collective-bargaining representative of its employees, and, if agreement is reached, to embody the terms and conditions of the agreement into a signed, written document. But for the concession on the record by the General Counsel that this is not an 8(d) case, I would have recommended to the Board that the Respondent now be required to sign a contract containing the agreement that it had reached with the Union in April 1989. I will recommend that the Respondent be required to cease and desist from making unilateral changes in the wages, hours, and terms and conditions of employment of its employees and that it reinstate working conditions that it unilaterally discontinued in 1989. I will also recommend to the Board that the Respondent be required to post the usual notice, informing its employees of their rights and of the results in this case.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹³

ORDER

The Respondent, Seiler Tank Truck Service, Inc., a subsidiary of Elkin Company, Albion, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) AFL-CIO and its Local 1176, as the exclusive collective-bargaining representative of its full-time and regular part-time drivers and mechanics employed at its Albion, Michigan facility.

(b) Failing and refusing to provide the Union, in a timely fashion, with all of the information that the Union requests which is relevant to the Union's responsibility to act as the exclusive collective-bargaining representative of the Respondent's Albion, Michigan truckdrivers and mechanics.

(c) Unilaterally discontinuing its practice of utilizing seniority as a factor in making daily assignments, or unilaterally changing any work assignment practice.

(d) Unilaterally changing its health insurance carrier or unilaterally changing any term of its health insurance program.

(e) Unilaterally instituting a drug or alcohol abuse testing program.

(f) Unilaterally paying bonuses or implementing any other change in wages, hours, or terms and conditions of employment; provided that nothing herein shall be construed to require the Respondent to discontinue the payment of any wage or benefit or to recoup the payment of any wage, bonus, or benefit heretofore given to its employees.

¹³ 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.

(g) Discouraging membership in or activities on behalf of International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, or its Local 1176, or any other labor organization, by reducing the driving hours of employees or otherwise discriminating against them in their hire or tenure.

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

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

(a) Recognize and bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of its full-time and regular part-time drivers and mechanics employed at its Albion, Michigan facility, and, if agreement is reached, embody the same in a written, signed document.

(b) Furnish the Union forthwith all of the information it requested concerning the discipline and discharge of Willie Spradlin, and any other information it may request which is relevant to its statutory duty as bargaining representative of the Respondent's drivers and mechanics.

(c) Restore the practice of utilizing seniority as a factor in the daily assignment of drivers and maintain that practice in effect until the Union agrees to a discontinuance of the practice or the Respondent has bargained to impasse in good faith with the Union concerning that practice.

(d) Make whole Willie Spradlin and Chris Myers for any loss of pay or benefits suffered by them by reason of the discriminations found here, with interest, in the manner described above in the remedy section.

(e) Preserve and, on request, make available to the Board and its agents for examination and copying all payroll and other records necessary to analyze the amounts of backpay due under the terms of this Order.

(f) Post at the Respondent's Albion, Michigan facility copies of the attached notice, marked "Appendix."¹⁴ 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.

Insofar as the consolidated amended complaint alleges matters which have not been found to be unfair labor practices, the consolidated amended complaint is hereby dismissed.

¹⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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 the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO and its Local 1176, as the exclusive collective-bargaining representative of the full-time and regular part-time drivers and mechanics employed at our Albion, Michigan facility.

WE WILL NOT fail or refuse to provide the Union, in a timely fashion, with all of the information that the Union requests which is relevant to the Union's responsibility to act as the exclusive collective-bargaining representative of the full-time and regular part-time drivers and mechanics employed at our Albion, Michigan facility.

WE WILL NOT unilaterally discontinue our practice of utilizing seniority in making daily work assignments or unilaterally change any work assignment practice.

WE WILL NOT unilaterally change health insurance carriers or the terms of our health insurance program.

WE WILL NOT unilaterally institute a drug or alcohol abuse testing program.

WE WILL NOT unilaterally pay bonuses or implement any other changes in wages, hours, or terms and conditions of employment.

WE WILL NOT discourage membership in or activities on behalf of International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, or its Local 1176, or any other labor organization, by reducing the driving hours of employees or otherwise discriminating against them in their hire or tenure.

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

WE WILL recognize and bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of our full-time and regular part-time drivers and mechanics employed at our Albion, Michigan facility and, if agreement is reached, embody the same in a signed, written document.

WE WILL furnish the Union forthwith all of the information it requested concerning the discipline and discharge of Willie Spradlin and any other information it may request which is relevant to its statutory duty as bargaining representative of the full-time and regular part-time drivers and mechanics at our Albion, Michigan facility.

WE WILL restore the practice of utilizing seniority as a factor in the daily assignment of drivers and maintain that practice in effect until the Union agrees to a discontinuance or we have bargained to impasse in good faith with the Union concerning that practice.

WE WILL make whole Willie Spradlin and Chris Myers for any loss of pay or benefits which they may have suffered by reason of the discriminations found in this case, with interest.

SEILER TANK TRUCK SERVICE, INC., A SUBSIDIARY OF ELKIN COMPANY