

Tennessee Construction Company and International Union, United Mine Workers of America.
Cases 9-CA-27708 and 9-CA-28090-1

September 10, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

On September 20, 1991, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed limited cross-exceptions and a brief in support.

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

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

The judge found and we agree that the Respondent violated Section 8(a)(5) and (1) by engaging in surface bargaining without any intention of reaching agreement with the Union. In making this finding, the judge relied on, inter alia, statements made by the Respondent's president and negotiator, Todd Kiscaden, indicating that: (1) he was not interested in giving up any of his rights and that he had agreed only to talk with the Union and that he had done so; (2) during the negotiations he was trying to lease the property without the employees; and (3) he was getting out of the labor business because his labor costs were too high. Additionally the judge found that the Respondent's insistence that the Union post a \$10-million performance bond, a nonmandatory subject of bargaining, and that the Respondent be paid \$2 million by the Union before the Respondent would sign a contract, also a nonmandatory subject of bargaining, demonstrated bad faith.

We agree with the judge that these factors demonstrate that the Respondent engaged in surface bargaining. We also rely on the additional fact that the Respondent conditioned its acceptance of an arbitration clause on having its general manager, Johnny Shumate, designated as the arbitrator as further evidence that the Respondent engaged in surface bargaining.² In so find-

ing, we note that the demand that the general manager be the arbitrator was essentially a rejection of the principle of neutral independent arbitration. Simultaneously, the Respondent was taking the position that any union interruption of business activities would result in a forfeiture of part or all of a \$10-million performance bond. Thus, under the Respondent's proposals, the Union could not take a grievance to neutral arbitration and the Union could not strike (without substantial penalty). In such circumstances, we find that the Respondent's bargaining tactics through these proposals are indicia of bad-faith bargaining.³

The Respondent excepts to the judge's finding that it violated Section 8(a)(3) and (1) in the circumstances of this case by subcontracting unit jobs without giving the Union notice and an opportunity to bargain and without any business justification while engaged in surface bargaining. The record shows that General Manager Shumate told the Respondent's president, Kiscaden, that he needed additional employees to perform the work. Kiscaden conceded that additional labor was needed but refused to hire additional employees on the Respondent's payroll, stating that "he was going to have to get out of the labor business that his labor costs were much too high." Shumate, in addition to serving as the Respondent's general manager, owned his own company, Mountain Engineering.

to agree to a work jurisdiction clause are evidence of surface bargaining. The Respondent provided the Union with a seniority list but refused to agree to a seniority clause mandating the order of layoffs. Kiscaden testified that the Respondent wanted to retain the option of being able to employ the employees who could perform the work. This position does not indicate an intent to avoid reaching agreement but represents the Respondent's reluctance to agree to a clause which could possibly be contrary to its interest in maintaining productivity during difficult times.

Kiscaden also testified that it was his understanding that the work jurisdiction proposal—requiring that all preparation, processing, cleaning, and repair and maintenance work be performed by members of the bargaining unit—would eliminate his ability to contract out work. In our view, the Respondent's refusal to agree to this work jurisdiction clause reflected nothing more than hard bargaining over management's discretion to assign the work, and cannot be relied on to show that the Respondent was engaged in surface bargaining.

The Respondent contends that Sec. 10(b) bars the 8(a)(5) complaint allegation because only the June 22, 1990 bargaining session was held during the 10(b) period and at that session the Union withdrew its previous proposals and started "from scratch." We disagree. The June 22 session was a continuation of the previous bargaining. At the June 22 session the Respondent insisted, among other things, that the Union pay it \$2 million in compensation for the Respondent's adopting the Union's proposals and post a \$10-million performance bond to protect the Respondent in the event of a wildcat strike, and reiterated that the Respondent would agree to arbitration only if General Manager Shumate was the sole arbitrator to hear and decide contract disputes. Accordingly, we are entitled to consider the earlier bargaining as background in elucidating the nature of the Respondent's conduct at the table on June 22. See *Machinists Local Lodge 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411, 416 (1960).

³See *Modern Mfg. Co.*, 292 NLRB 10, 11 (1988).

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

²We do not agree with the judge's finding that the Respondent's refusal to agree to lay off employees only by seniority and its refusal

Kiscaden asked Shumate if he had any Mountain Engineering people that he could use at the Respondent's plant. Shumate assured him that he could supply the men, but he would charge the Respondent \$18.10 per man-hour.⁴ The Respondent orally contracted with its general manager to meet its labor needs. In June 1990, Dan Hylton and Johnny Rowe, who were already employed by Shumate at another plant, were assigned to work at the Respondent's plant. Shumate also contacted Mallie Robinson, a former employee of the Respondent's predecessor, and offered him a job working at the Respondent's plant. In November 1990, Robinson asked Shumate if he could be placed on the Respondent's payroll, but was told by Shumate that Kiscaden would not allow it.

The judge found that Robinson's hiring—but not that of Hylton and Rowe—was part of a scheme by Kiscaden to avoid the Respondent's obligations under the Act. The judge focused on the fact that Robinson was not hired until June 1990, when there was a need for his services at the Respondent's plant. The judge concluded that employee Robinson was entitled to be hired directly by the Respondent and to be made whole for any loss of earnings or other benefits he may have suffered as a result of the Respondent's unlawful action against him.

The judge observed that Hylton and Rowe, on the other hand, had already been on Shumate's payroll prior to June 1990 and had been working for Shumate's company at another plant. They continued to be employed by Shumate and were merely transferred to the Respondent's plant in June. Thus, the judge reasoned that their initial hiring was not part of a scheme to avoid the Respondent's obligations under the Act. Neither Hylton nor Rowe sought to be placed on the Respondent's payroll directly. Accordingly, the judge did not, as requested by the General Counsel, order that Hylton and Rowe be placed on the Respondent's payroll at the unit rate and made whole at that rate.

The Respondent filed exceptions to the granting of any make-whole remedy as to Robinson and the General Counsel filed limited cross-exceptions to the judge's failure also to grant a make-whole remedy as to Hylton and Rowe. The General Counsel argues that the facts relied on by the judge are insufficient to distinguish the employment of Hylton and Rowe from that of Robinson or to preclude a remedy in their favor.

⁴The Respondent's employees were also paid approximately \$18 per hour. Thus, we note, that at least in terms of wages, the Respondent was not realizing any direct economic gain by its use of this subcontracting arrangement. In rejecting the Respondent's economic defense, we further note, as did the judge, that Kiscaden did not testify about the Respondent's economic situation with respect to the costs of subcontracting.

We agree with the judge that the June 1990 subcontracting arrangement violated Section 8(a)(3).⁵ We also agree that there is a legally significant difference in the employment circumstances of Hylton and Rowe as compared to those of Robinson that is sufficient to deny Hylton and Rowe a make-whole remedy. Thus, although the subcontracting was unlawful, Hylton and Rowe suffered no compensable loss as a result despite being instruments of the unlawful subcontracting. They retained their status as Shumate's employees at their existing pay rate and did not seek, and were not unlawfully denied, as was Robinson, employment with the Respondent.

Like the judge, we find that Robinson is entitled to be made whole, but we do not rely on the same rationale. Hylton, Rowe, and Robinson were all hired by Shumate to work for his company. Only Robinson, however, was hired in furtherance of the Respondent's unlawful scheme and only Robinson specifically asked to be hired by the Respondent. In November 1990, Robinson asked Shumate, in Shumate's capacity as the Respondent's general manager, to be placed on the Respondent's payroll. Shumate denied the request, responding, "Todd [Kiscaden] won't let me." At this point, the Respondent, through its general manager, Shumate, denied Robinson's application for employment as a unit member in furtherance of the Respondent's attempt to avoid its obligations under the Act. Thus Robinson, unlike Hylton and Rowe, was denied employment for unlawful reasons and the usual remedial considerations apply.

AMENDED REMEDY

Having found that the Respondent unlawfully contracted out unit work, we shall order that it cease and desist doing so, restore the status quo ante as it existed prior to the unlawful subcontracting of unit work in June 1990 by terminating the contract for unit work, hire Mallie Robinson as an employee of the Respondent, and make him whole for any loss of earnings or other benefits he may have suffered as a result of the Respondent's unlawful action in November 1990.⁶

⁵We also agree with the judge's finding that the subcontracting violated Sec. 8(a)(5) and (1).

With respect to the 8(a)(3) allegation, Member Raudabaugh notes that there is no finding that the subcontracting was unlawfully motivated. The judge, affirmed by the Board, finds the 8(a)(3) violation solely on the basis that the subcontracting was "inherently destructive" of employee rights. Member Raudabaugh finds it unnecessary to pass on this issue, inasmuch as an 8(a)(3) conclusion would not add to the restoration and backpay remedy attendant to the 8(a)(5) violation. That is, but for the unilateral subcontracting in violation of Sec. 8(a)(5), employee Robinson would have been hired by the Respondent. Thus, as a remedial matter, he should be hired by the Respondent and made whole.

⁶We shall leave to compliance the determination of the exact date in November that General Manager Shumate told Robinson that he could not be placed on the Respondent's payroll.

Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Tennessee Construction Company, Nelse, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

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

“(b) Offer Mallie Robinson direct employment with the Respondent and make him whole for any loss of earnings and other benefits suffered as a result of the Respondent’s unlawful action in refusing to hire him in November 1990, in the manner set forth in the remedy section of this decision.”

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

APPENDIX

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

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

WE WILL NOT refuse to bargain collectively in good faith concerning terms and conditions of employment with the International Union, United Mine Workers of America as the exclusive representative of our employees in the following unit appropriate for the purposes of collective bargaining:

All production and maintenance employees of Tennessee Construction Company working in or about Tennessee Construction Company’s Nelse, Kentucky coal preparation plant, but excluding all professional employees, guards and supervisors as defined in the Act.

WE WILL NOT refuse or fail to bargain in good faith with the International Union, United Mine Workers of America by unilaterally contracting out unit work without notice to and bargaining with the Union as the exclusive representative of our employees in the appropriate unit.

WE WILL NOT discourage membership in the Union by unilaterally contracting out unit work while engaging in surface bargaining when such contracting out is done without any demonstrated business justification and is done without notice to and bargaining with the

Union as the exclusive representative of our employees in the appropriate unit.

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 stop unilaterally contracting out bargaining unit work.

WE WILL offer Mallie Robinson direct employment with us and make him whole for any loss of earnings and other benefits suffered as a result of our refusing to hire him directly in November 1990, with interest.

WE WILL, on request, bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of our employees in the unit set forth above with respect to rates of pay, wages, hours, and other terms and conditions of employment.

TENNESSEE CONSTRUCTION COMPANY

Andrew L. Lang, Esq., for the General Counsel.
Barbara L. Krause, Esq. (Smith, Heenan & Althen), of Washington, D.C., for the Respondent.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. A charge was filed in Case 9–CA–27708 on July 23, 1990, by International Union, United Mine Workers of America (Union) against Tennessee Construction Company (Respondent). And the Union filed the charge in Case 9–CA–28090–1 against Respondent on December 4, 1990. As here pertinent, an amended complaint was issued on May 14, 1991, by the Acting Regional Director of Region 9 of the National Labor Relations Board (Board) alleging that, collectively, Respondent violated Section 8(a)(1) and (3) and 8(a)(1) and (5) of the National Labor Relations Act (Act) by (1) causing certain employees¹ to be hired and placed on the payroll of Coalfield Construction, Inc. (Coalfield) performing unit work, at wage rates less than those paid and with benefits less than those provided by Respondent for other unit employees² because these employees supported or assisted the Union and engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection, (2) refusing, during the period from July 1987 through June 1990 and more particularly on June 22, 1990, to negotiate with the Union for the purposes of reaching agreement with respect to various terms and conditions of employment of the unit,³

¹ The complaint, as amended at the hearing, specifies three employees, namely, Dan Hylton, Mallie Robinson, and Johnny Rowe, and indicates that there are other employees but that their names are unknown to the Acting Regional Director.

² The unit is described as follows:

All production and maintenance employees of [Respondent] working in or about [Respondent’s] Nelse, Kentucky coal preparation plant, but excluding all professional employees, guards and supervisors as defined in the Act.

³ Including work breaks, lunchbreaks, holidays, vacations, overtime pay, bereavement leave, seniority, eating facilities, parking facilities,

Continued

and (3) subcontracting unit work since June 20, 1990, to Mountain Engineering and Coalfield without notifying and bargaining with the Union concerning the subcontracting. Respondent denies violating the Act.

A hearing was held in Prestonsburg, Kentucky, on May 21 and 22, 1991. On the entire record⁴ in this case, including my observation of the demeanor of the witnesses and consideration of the briefs filed by General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, has been engaged in the operation of a coal preparation plant at Nelse. The complaint alleges, the Respondent admits, and I find that at all times material, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

In July 1987 Respondent purchased, as here pertinent, a coal preparation plant from TCH Coal Company (TCH). Under the purchase agreement Respondent promised to hire those of TCH's employees who were working when it closed and to recognize and bargain with the Union, as the collective-bargaining representative of the involved employees.

Donald Todd Kiscaden, president of Respondent, testified that Respondent hired all of its initial complement of employees from the former TCH work force, and that Respondent initially paid the employees the same wage rates that TCH had been paying.⁵

On July 7, 1987, the day Respondent commenced operating the involved plant, Kiscaden and the co-owner of Respondent, Keith Van Hooser, met with union representatives which included James Hampton, an attorney who represented the Union, Corbett Brewer, who was the involved Local Union president, and Eddie Ratliff, president of the Union's District 30. Kiscaden testified that he had never himself sat at a bargaining table. According to Kiscaden, Hampton asked him if he would sign the 1984 National Bituminous Coal Wage Agreement (NBCWA) and Kiscaden said that he would not. Instead he gave Hampton a counterproposal, General Counsel's Exhibit 2.⁶ Hampton testified that he told Respondent's representatives that he was not there to negotiate a contract, he had no authority to do so and his purpose in being there was to find out what Respondent's intentions were regarding former TCH employees; that Respondent's

the right of employees to remove themselves from dangerous working conditions and arbitration and grievances.

⁴ Respondent's unopposed motion to correct the transcript is hereby granted. Errors have been noted and corrected.

⁵ They ranged from \$13.51 to \$14.11 per hour.

⁶ Kiscaden's proposal specifies (1) wages of \$15 an hour for electrician and diesel mechanics, \$12 for skilled labor and \$8 for unskilled labor, (2) overtime pay after 40 hours a week, (3) holiday pay on Christmas Day, New Year's Day, Fourth of July, and Thanksgiving Day, (4) 5 unpaid sick days a year, and (5) an 80-percent/20-percent contribution medical insurance plan.

representatives gave the union representatives a one-page proposal, General Counsel's Exhibit 2; and that he was told that Respondent paid \$2 million for the plant.

Van Hooser testified that on July 7, 1987, Hampton asked if Respondent would bargain a contract with him and Kiscaden answered yes; that Hampton gave the 1984 contract to Kiscaden who gave his proposals to Hampton; that Kiscaden said that he would not recognize TCH's panel "[w]e would bring anybody that wanted in, contractors, hire anybody we needed to make the job go"; and that Kiscaden also said that "we would run it to keep control over the operation, keep it going. Do whatever was necessary." On cross-examination, Van Hooser testified that he did not remember Hampton saying anything when he gave the 1984 contract to Kiscaden; that the outside contractors that Kiscaden referred to during this meeting would do "[s]tuff that they [Respondent's employees] wouldn't [sic] qualified to do"; and that the meeting lasted for an hour and a half to a couple of hours and he could not recall beyond this exactly what was discussed.

When called by Respondent,⁷ Kiscaden testified that on July 7, 1987, Hampton asked him if Respondent would recognize and bargain with the Union and when it would bargain; that when he met with just the union representatives after the employee meeting, he stated that he was willing to pay the same wage rate as when TCH shut down "but everything else was out"; that he told Hampton and the others that "[i]f we need to bring outside people in here to do some work we're going to bring them in here"; that somebody—he could not swear it was Hampton—handed him an 1984 contract and said would you sign this and he laughed and said no rather I have some proposals for you to look at; that he thought they were bargaining; that his initial proposal had wages and benefits which Respondent could have taken "just about anywhere we wanted to get work"; and that he was looking for "portability" in a contract, that is, a contract which is not site specific so that he could go to any former union job and operate it. On cross-examination Kiscaden testified that the agreement he had with TCH called for Respondent to employ all hourly paid employees then employed by TCH upon the same terms and conditions then applicable at TCH; that he did provide that same benefit levels of medical insurance as TCH to the involved employees; that he assumed that if he had a contract and went to another location, if it was not a national agreement, that the employees in that local group would have the right to ratify the terms of their contract; that he did not know anybody who had such a contract; that ABC contractors which do nothing but construction work, which he thought about the night before the second day of the hearing herein, were similar in that they get their contract and they could go anywhere they want to: and that he was not familiar with whether the ABC contract was a national agreement and he did not know whether the employees that are covered by the ABC agreement ratified the agreement.

With a cover letter dated July 9, 1987 (R. Exh. 1), Kiscaden forwarded certain information to the Union. And with a cover letter dated July 11, 1987 (R. Exh. 2), Kiscaden forwarded additional information, including its proposed seniority list (R. Exh. 3), to the Union.

⁷ Kiscaden was initially called by General Counsel.

On July 23, 1987, Kiscaden and Van Hooser met with Cecil Roberts, who was the vice president of the Union, and Rusty Franklin from the Union. Kiscaden testified that the meeting took place in Charleston, West Virginia; that he told Roberts that Respondent was looking for a portable contract so that it could go to shut down union jobs and put them back to work; and that Roberts said that there would be a big political problem with that.

By letter dated October 1, 1987 (R. Exh. 4), Roberts advised Kiscaden that there were possibilities of meaningful negotiations over the various proposals Kiscaden made, and that the Union has appointed a negotiating team to continue the collective bargaining in Pikeville, Kentucky, which should be more convenient for Kiscaden.

On August 9, 1988, Kiscaden met with Hampton. Regarding this meeting, Hampton testified that he had been authorized by the Union to negotiate a contract with Respondent sometime prior to this meeting; that Respondent was not responsible for the hiatus of almost a year between negotiating sessions; that he was the chief spokesman for the Union in the involved negotiations; that while Respondent's general manager, Johnny Shumate, spoke frequently during negotiations and Van Hooser spoke occasionally, Kiscaden was the chief spokesman for the Respondent; that at the time he was aware that Respondent was paying the rates in effect under TCH's contract, namely, the NBCWA; that he was also aware that Respondent was providing health insurance, life insurance, sick and accident insurance, 2 weeks of vacation with 1 week of pay and one or two holidays; that at the commencement of the meeting the Union presented the 1988 NBCWA to the Respondent and Kiscaden said that it was "AIDS" and he was not at all interested in that agreement; that he asked Kiscaden about recognizing seniority and Kiscaden indicated that he had submitted his proposed seniority list stating that he had hired the employees in the reverse order that he would lay them off, in that he hired the most skilled first; that the Union proposed that discharge be for just cause only but Kiscaden indicated that he wanted it to be employment at will; that the Union asked about dues checkoff and Kiscaden stated that he wanted the Union to bear the cost of dues checkoff; that subcontracting was discussed in that the Union had discovered that during the vacation period preceding this session outside employees were working at the facility; that Kiscaden stated that any work his employees were capable of doing and had the equipment to perform they would do; that Kiscaden indicated that he used the outside employees to do some sandblasting and to cut brush; that normally sandblasting equipment is not required equipment at a preparation plant; and that no agreements were reached at this meeting. When called by Respondent, Kiscaden, on cross-examination, testified that he did not remember telling the Union that anything Respondent's men had the ability to do and Respondent had the equipment to do it would not be done by any contractor.

On September 30, 1988, another negotiating session was held. Kiscaden testified that Respondent had not withdrawn its initial offer. Regarding this meeting, Hampton testified that an attempt was made to define work jurisdiction and the Union proposed that supervisors not perform bargaining unit work, except in cases of an emergency or for training purposes; that this proposal was rejected; that he asked Kiscaden if Respondent would agree to limit itself to having 25 super-

visors⁸ and Kiscaden agreed; that Kiscaden refused to reduce the number of supervisors to 20: that he asked Kiscaden if he would agree to 30 uninterrupted minutes for lunch and Kiscaden would not agree but he did indicate that if he required an employee to work through lunch he would pay the employee for the 30 minutes; that Kiscaden indicated that if Respondent checked off dues it wanted a percentage of the dues; that he believed that the Union asked if Respondent would pay double time or time-and-one-half for Sunday work and Kiscaden rejected both; and that there may have been a discussion of discharge for just cause only at this session.

On either January 5 or 6, 1989, there was another negotiating session. According to Kiscaden, the Union proposed discharge only for just cause and Respondent proposed employment at will. No agreement was reached. Kiscaden testified, regarding a grievance procedure, that Respondent took the position that grievances could be arbitrated if Respondent could designate Shumate, as the arbitrator. The Union proposed work jurisdiction which essentially included all coal preparation, processing, repair, and maintenance work. Respondent rejected this proposal. Kiscaden testified that he told the union representative that Respondent needed to bring in contractors to do maintenance work when it did not have employees with the skill required or the necessary equipment.⁹ According to Kiscaden, Respondent also rejected the Union's proposal to (1) restrict supervisors from doing classified work, (2) give employees a \$100-a-year clothing allowance, (3) give employees 5 paid sick days a year, (4) give employees 10 paid holidays a year,¹⁰ (5) give employees 2 weeks' paid vacation, (6) give employees a paid pension plan,¹¹ (7) recognize the former TCH seniority list,¹² (8) continue to provide employees with a clean and warm lunchroom, (9) continue to provide adequate parking facilities for the employees,¹³ (10) use Respondent's bath house for union meetings,¹⁴ (11) have a dues checkoff,¹⁵ (12) have a union-security clause requiring all employees to belong to the Union, (13) give employees 10-minute work breaks, (14) have a successorship clause in the collective-bargaining agreement, (15) have a monthly meeting with the Mine

⁸ At the time Respondent had about 18 employees.

⁹ Kiscaden initially testified that he told the union representative that Respondent wanted to be able to contract work out if it was cheaper than Respondent doing the work itself.

¹⁰ Respondent, at this meeting, reduced its original proposal from four paid holidays to two, namely, Thanksgiving Day and Christmas Day. Kiscaden testified that he told the Union that if a train had to be loaded on either or both of these days he would require employees to work and they would receive no additional pay for the work.

¹¹ Respondent made a counteroffer to pay for the formation and administration of a 401-K plan with the employees making all the contributions.

¹² Respondent proposed its own seniority list.

¹³ During the meeting Shumate stated that Respondent may have to change the parking lot into a coal pile.

¹⁴ Kiscaden testified that he indicated that the employees could use the bath house but union officials in the involved Local could not use it if they were not employees of Respondent. Brewer did not work for Respondent.

¹⁵ Kiscaden testified that he expressed his concern about deducting money from someone's paycheck when he did not know what the purpose would be. Also, Kiscaden testified that he told Hampton that Respondent would make the deduction if it was compensated for the service or if Hampton would do all of Respondent's legal work for free.

Health and Safety Committee,¹⁶ (16) allow the Union's district and International representatives access to the job, (17) give employees the right to immediately remove themselves from a dangerous job situation,¹⁷ (18) pay double time for Sunday work, and (19) give employees 3 days' paid bereavement leave. Hampton testified that the Union's proposal for discharge for just cause only was taken under advisement; and that the following union proposals were rejected by Respondent: (1) work jurisdiction, (2) limiting supervisors doing unit work to emergencies, training and de minimis amounts, (3) a \$100 annual clothing allowance, (4) maintain the current wage rates,¹⁸ (5) 5 sick or personal leave days with pay, (6) a package of 10 holidays, (7) individually named holidays, except Thanksgiving Day and Christmas, and even with these two holidays Kiscaden indicated that he wanted to retain the ability to have the employees work at straight time pay rates if necessary, (8) 2 weeks' vacation with 2 weeks' pay, (9) 2 floating vacation days with pay, (10) Respondent contributing to a pension plan, (11) some form of grievance procedure or arbitration, (12) successorship clause, (13) to have no more supervisors than were necessary to perform supervisory functions, (14) a prohibition from leasing for the purpose of avoiding the collective-bargaining agreement, (15) the establishment of a mine, health and safety committee which would meet monthly with the Company, (16) specifically agree to hold a weekly safety meeting,¹⁹ (17) union representatives access to Respondent's property upon reasonable notice,²⁰ (18) employees being permitted to remove themselves from imminent danger,²¹ (19) double time for Sunday work, (20) time-and-one-half for Sunday work regardless of whether it was over 40 hours for the week, (21) 3 days' bereavement leave with 1 day being paid,²² (22) seniority be defined on the basis of length of service and ability to step in and perform the job, (23) seniority be established on the basis of TCH's list,²³ (24) that

¹⁶ Kiscaden testified that he told Hampton that he preferred Respondent's weekly meetings on Monday mornings.

¹⁷ Kiscaden testified that he refused because Federal law already provides for this.

¹⁸ When the Union indicated that they were proposing it as a bargaining rate, Kiscaden indicated that without a definite term he would not agree. On cross-examination Hampton testified that the Union's proposal was only a partial wage proposal because the Union would have proposed interim increases during the term of the agreement.

¹⁹ Hampton testified that Kiscaden, at the last session, agreed to a weekly meeting with pay but at this meeting he was not agreeable to that.

²⁰ Hampton testified that Kiscaden or Shumate said that they had problems with whether Respondent has insurance coverage for these nonemployees when they are on Respondent's property. Hampton asked whether Respondent's insurance covered vendors and other people who come onto the property. Respondent did not answer.

²¹ Shumate said that he would be the one to tell the employee if he was in a dangerous situation and not vice versa.

²² Hampton testified that Shumate said that Respondent would "agree that if a man's wife dies, he can have the day off without pay but we won't go beyond that in a written contract"; and that Kiscaden then said "you're going to get very little in the contract."

²³ Hampton testified that Kiscaden said that seniority should be based on his earlier proposed seniority list.

the Company provide a clean and warm eating place,²⁴ (25) sanitary ventilated toilets which should be kept clean,²⁵ (26) adequate parking facilities,²⁶ and (27) use of Respondent's bath house as a meeting place of the Local except when all of those in attendance were employees of Respondent. Hampton testified that at the end of the meeting Kiscaden said that he would take discharge only for just cause under advisement and that some of the proposals may be acceptable with modifications. When called by Respondent, Kiscaden testified that he was personally responsible for the \$2 million and he did not want an arbitrator who did not understand his business or did not care telling him how to run his business; that he rejected the proposal to restrict supervisors from doing classified work because in 1984 a grievance was filed over the fact that he gave an employee a hand hanging a 150-pound, 8-inch valve; that he rejected the Union's proposal for a clothing allowance and for paid sick days purely for economic reasons, namely, he did not want to spend the money; that at four named mine companies the Union agreed to have no security clause in the contract; that a successorship clause reduces the value of the property; that it was his understanding that the Union's proposed work jurisdiction clause would eliminate his ability to contract out work; and that he rejected the Union's proposal against leasing out to avoid the terms of the agreement because he was, at that time and the time of the hearing herein, in negotiations with some people who want to lease the property, less the employees.

By letter dated January 30, 1989, Kiscaden advised Hampton that Respondent had contacted its attorney and it was still rejecting the Union's proposal regarding discharge for just cause only. (G.C. Exh. 3.)

Another negotiating session was held on March 4, 1989. Discharge for just cause only was discussed at length with Respondent sticking to its position of employment at will. During this meeting Kiscaden asked Hampton if the involved property was worth more or less with a union contract and Hampton indicated that it would be worth less. Kiscaden proposed that the Union write him a check for \$1 million and write the other stockholder in Respondent, Van Hooser, a check for the same amount to pay off the loan which was taken out when Respondent was formed to purchase TCH. In the alternative, Kiscaden suggested that the Union give Respondent a low-cost, portable collective-bargaining agreement which he could use to reopen other preparation plants which had been shut down and which he was negotiating apparently to purchase.²⁷ With respect to pending Federal legislation dealing with doublebreasting, Kiscaden testified that he told Hampton that if such legislation became law, the involved collective-bargaining agreement would have to become null and void. During this meeting Kiscaden told Hampton that

²⁴ Hampton testified that Shumate said that he did not have a problem with having it but rather he had a problem with being forced to have it, and Kiscaden said "that's right."

²⁵ Assertedly state law requires the providing of sanitary toilets.

²⁶ After a discussion regarding what was adequate, Shumate said that Respondent might want to turn the existing parking lot into a coal stockpile. Respondent agreed to give the employees 10-minutes notification if this occurred.

²⁷ Kiscaden testified that he did not know of anyone who had such a portable contract. He conceded that such an agreement would be a novel contract.

he wanted the collective-bargaining agreement to be a page or two at most. At the end of the meeting Kiscaden told Hampton that he, Kiscaden, would put together some alternative economic proposals. Kiscaden testified that he attempted to explain to the union representative that if the hourly wage was reduced, the taxes and the workmen's compensation payments would be lower and there would be more money to put into a pension plan.

Regarding the March 4, 1989 session, Hampton testified that Kiscaden started the meeting by reiterating Respondent's rejection of the Union's proposal for discharge only for just cause; that Kiscaden did not indicate what modifications would make the Union's proposals acceptable; that Kiscaden said that he was not willing to tie wages down in a written contract without a provision which would allow a reduction in wages in the event of increases in costs such as workmen's compensation or health benefits; that Kiscaden stated that he would talk to an insurance agent, Leon Wolford, about a 401-K plan and what the administrative costs would be; that Kiscaden proposed an open shop while the Union proposed that membership in the Union be required as a condition of employment; that the Union's proposed 10-minute break every 4 hours with pay was rejected even though it is required by state law;²⁸ that when he asked Kiscaden for his proposal Kiscaden said that "he wasn't interested in having employees wave any book in his face"; that he then told Kiscaden that it did not appear that he was interested in signing a contract to which Kiscaden replied "I'm not interested in giving up any of my rights"; that Kiscaden said that when he bought the company he agreed with the predecessor to talk to the Union and he had done that; that when Hampton said it looked like the Union was going to have to file an unfair labor practice charge alleging that Respondent was not bargaining in good faith Kiscaden said "well you're not giving me anything, you're not giving me anything"; that Kiscaden then talked about a portable contract which he could take and use for other operations then maybe Respondent and the Union could reach an agreement; and that Kiscaden, at the end of the meeting, said that he would work out some economic packages²⁹ and look at just cause again and look at arbitration.

Hampton met with Leon Wolford, the insurance agent, on March 13, 1989, and discussed a pension plan.

The next negotiating session took place on May 31, 1989. Discharge for just cause only was discussed with Kiscaden stating that he would prefer to have the courts resolve discharge cases. Kiscaden again asked the union representative if he did not believe that it was necessary for the Union to compensate Respondent in order to get a contract. Kiscaden told the union representative "[i]f you're not gonna give me some contract I can go out here and make some money with, you know, what's your proposal to compensate me." Kiscaden also repeated his proposal that in the event of double breasting legislation the collective-bargaining agreement with the Union would become null and void. Regarding this meeting, Hampton testified that rather than going through

one proposal at a time, the Union was trying to find out what things could be agreed on or not agreed on; that the Union made a package proposal of 12 items and indicated that some language on work jurisdiction would have to be worked out; that the 12 items were (1) wages of \$12 an hour, (2) \$1.50 in pension contributions into a defined plan which would be vested on day one, (3) 2 weeks' vacation with 10 days' pay, (4) 6 paid holidays, (5) no termination except for just cause, (6) 5 unpaid sick and personal leave days, (7) the continuation of the employees' present health insurance, life insurance, and sick and accident insurance,³⁰ (8) 30 minutes of uninterrupted lunch, (9) 3 days of bereavement with 1 day paid in the event of death in the immediate family, (10) arbitration, (11) dues checkoff, and (12) a closed shop;³¹ that Kiscaden made some calculations and stated that this package amounted to \$20.24 an hour; that Kiscaden then proposed a package consisting of \$10 in wages, \$2.50 contribution into a pension plan, with the same insurance and corresponding reductions of taxes in compensation because they are based on the wage, which meant no holidays, no vacation days and no other paid days off; that Kiscaden stated that his package had an hourly value of \$17.66 and it was proposed with the understanding that it would be a 3-year agreement and any workers' compensation increases or insurance increases would come out of wages; that Hampton then asked Kiscaden about a wage package which totaled \$18.50 an hour and included just cause for discharge with the understanding that Kiscaden could include the five things he was concerned about with respect to reasons for discharge;³² that Kiscaden then stated that he would give the Union the items in his proposal adding up to \$17.66 but before the Union could get anything to address its concerns about work jurisdiction, just cause, dues checkoff, union security, or arbitration he wanted \$2 million; that Hampton asked Kiscaden if he was serious and he said that he was absolutely serious; that Kiscaden stated that in the event that double-breasting legislation passed, the contract would be void and any obligation to the Union ceased but he would have to check with his attorney about the legality of that proposal; that Kiscaden stated that he was going to have to be compensated for any right he gave up; and that Kiscaden stated that he was going to get in touch with his attorney and try to get his proposal in some kind of written form. On cross-examination, Hampton testified that the 12 items were the entire bargaining proposal, except for work jurisdiction and provisions such as would prevent Respondent from contracting out work of the entire operation. When called by Respondent, Kiscaden testified that he did not recognize Hampton's May 31, 1989 proposal as a package; that Hampton's proposal did not have a term; that he still had a problem with termination for just cause, arbitration, closed shop, and work jurisdiction; that the insurance on the employees had been increasing in cost about 20 percent a year; that he told Hampton that he could pay Kiscaden and Van Hooser each \$1 million or the Union could give Respondent a portable contract; and that he did

²⁸ Hampton testified that Respondent took the position that while its employees get breaks, if an emergency situation came up it did not want its employees saying that they were going on break.

²⁹ Hampton testified that this may have been the meeting when Kiscaden stated that he would contact his attorney, Barbara Krause, to put together some proposals and get back to Hampton.

³⁰ With the elimination of certain language in the policy which provided that if an employee did not work 30 hours in a week, his insurance is not effective.

³¹ Hampton testified that he meant employment conditioned on becoming a union member within the first 30 days.

³² Namely drugs or alcohol on the job, "AWOL," abuse of equipment, refusal to comply with an order to do work or theft.

not contact his attorney after this meeting as promised because shortly thereafter he and Hampton became engaged in a situation where they were adversaries and they were attempting to have each others people put in jail. On cross-examination, Kiscaden testified that before the first day of the hearing herein he did not recognize the Union's May 31 proposal as a package; and that his August 15, 1990 affidavit to the Board refers to the May 31 meeting and states "[t]hat day the Union made a package proposal which included wages of \$12.00 per hour and other economic benefits which totalled \$20.24 per hour." On rebuttal, Hampton testified that the dispute that Kiscaden referred to did not arise until October 1989, although there was testimony in the lawsuit which was filed in October 1989 that 1 or 2 days of picketing occurred at the involved site in June or July 1989.

According to Kiscaden's testimony, about a year before the hearing herein, or, in other words, in May 1990 Respondent began to contract out some of the work formerly done by its employees. When some of Respondent's employees retired, it contracted with Mountain Engineering to provide three individuals to work at the preparation plant.³³ Shumate owns Mountain Engineering. Kiscaden testified that these three individuals are not doing work different than Respondent's employees. Respondent pays \$18 an hour for the service of these three individuals.

Robinson testified that he worked at the involved preparation plant when TCH operated it; that he was a member of the Union when he worked at the plant for TCH; that he was laid off sometime before TCH sold the plant; that he never received a letter from Respondent requesting him to submit an employment application; that upon his return from Florida in June 1990, his brother told him that Shumate wanted to see him; that Shumate offered him a job working at the involved plant for \$8 an hour with no benefits; that he told Shumate that he would not go to work there if he had to cross a picket line and Shumate said that he would not have to cross any picket line; that he started working at the job on June 20, 1990; that he does not do work which is different than other employees; that he receives his paycheck from Coalfield Construction; and that Hylton and Rowe also work at the plant but receive their paycheck from Coalfield Construction.

Shumate testified that he has an arrangement with Kiscaden to furnish labor to Respondent through one of his companies, "Coalfield—or Mountain Engineering"; that he began furnishing labor to Respondent on June 14, 1990, when he sent Hylton to the plant; that on June 16, 1990, he sent Rowe to the plant and on June 21, 1990, he sent Robinson to the involved plant; that at the time of the hearing herein all three were still working at the plant doing the same kind of duties as the other people who work there for Respondent; that he pays the three above-named individuals \$8 per hour and Respondent pays him \$18.10 per man hour for these laborers; that when an employee or two retired or quit at Respondent's involved plant he asked Kiscaden for more people to run the operation and Kiscaden refused to hire any more people stating that "he was going to have to get out of the labor business that his labor costs were much too high"; that Kiscaden asked him if he had any Mountain Engineering people that he could use at the involved plant;

³³ Hylton, Rowe, and Robinson.

that he told Kiscaden that he did and that it would cost \$18.10 per man hour and Kiscaden agreed; that neither Hylton nor Rowe were former TCH employees and they were moved from a Pittston job to the involved plant; that Robinson came to him looking for a job and when Shumate mentioned working for Mountain Engineering at the involved plant, Robinson said that he would not cross a picket line; that when Respondent shuts down for vacation Respondent brings in contractors to do work including maintenance and other work, including welding; that he worked for TCH under a union contract and the type of welding involved was the type covered under that union contract; that of the contractors used, Wayne Supply installs transmissions on dozers and they weld up the "motor—the blades" on a dozer and do whatever is necessary on the mobile equipment; that Respondent's employees don't get involved too much in installing transmissions in dozers; that Wayne Supply might be at the plant 3 days at a time; that another contractor, Cumberland, installs stainless steel, rebuilds shoots and crushers, and repairs pumps; that the reason Respondent uses contractors like that is because Respondent does not have the expensive air compressors and sandblasters; that outside contractors are used to repair power lines because it is dangerous work and Respondent does not have the men qualified to do it; and that Stepp Construction is used when Respondent has a lot of work and it does not have the time to do it.

The last negotiating session was held on June 22, 1990. Kiscaden told the Union that he would need some protection in the event of a wildcat strike. Specifically, he told the Union that Respondent would need a \$10-million performance bond to protect Respondent in the event of a wildcat strike. According to Kiscaden's affidavit to the Board he said at this meeting that the Union could have the contract it wanted if they could compensate Respondent with a \$2-million payment. Once again Kiscaden rejected the Union's proposal for arbitration stating that he was personally liable on money borrowed to fund Respondent and he wanted to maintain control of the facility and so he would only agree to arbitration if Shumate was the arbitrator. Kiscaden testified that he probably again refused to agree to any work breaks or lunchbreak provisions in the contract notwithstanding the fact that Respondent had consistently given Respondent's employees breaks because Respondent did not want to be held to specific times in case of emergencies or equipment problems. At this meeting, Respondent also rejected the Union's proposal to (1) restrict supervisors from doing classified or bargaining work, (2) have a work jurisdiction clause, (3) have sick or personal days in the contract,³⁴ (4) have any holidays,³⁵ (5) have a provision for vacations in the contract,³⁶ (6) have a successorship clause in the contract, (7)

³⁴ Kiscaden during this meeting said that he always allowed the men to be off if they needed to be off, but he would not agree to this proposal.

³⁵ Kiscaden pointed out that when a power company sends a train to be loaded with coal Respondent has 24 hours to load it. The loading occurs sometimes on holidays and on Sundays. Kiscaden testified that Respondent tries to give its employees off 2 days at Thanksgiving and 2 days at Christmas.

³⁶ Kiscaden pointed out that while Respondent had given its employees 1 week paid vacation each year it had been in business, it was not able to allow its employees to take their vacations as scheduled last summer because its customer, which historically shuts

have a restriction on leasing the plant to avoid a union contract,³⁷ (8) have an overtime provision,³⁸ (9) have a set number of days or pay for bereavement leave, (10) be bound by Respondent's seniority list,³⁹ (11) have a provision in the contract referring to a clean and warm eating place, (12) have a provision in the agreement referring to an adequate parking lot, (13) allow union representatives who were not employees of Respondent to post anything on the employee bulletin board,⁴⁰ (13) allow union representatives who were not employees of Respondent to attend union meetings in Respondent's bath house, and (14) allow employees to remove themselves from dangerous work situations.⁴¹

Regarding the June 22, 1990 session, Hampton testified that the hiatus from the last session was the result of frustration since the Union was not going to give Respondent \$2 million; that Hampton asked Kiscaden if he still recognized the Union as the bargaining representative and Kiscaden said yes; that he told Kiscaden that the Union was withdrawing all of its previous proposals; that the Union then made another series of proposals, one at a time, to see if the parties could reach some common ground; that the union proposals included (1) discharge for just cause only which Respondent rejected in favor of employment at will, (2) arbitration which Respondent would accept only if Shumate was the sole arbitrator, (3) closed shop which was rejected, (4) 10-minute break for every 4 hours with which Respondent refused to agree, (5) 30 minutes of uninterrupted lunch with which Respondent refused to agree, (6) supervisors not be permitted to do classified work where it resulted in a layoff with Kiscaden indicating that he would not agree to any restriction on supervisors working, (7) work jurisdiction with Respondent's representative saying that they would not agree to a clause defining work jurisdiction, (8) \$100 a year clothing allowance with Respondent indicating that they furnished gloves, safety belts and glasses but they would not agree to furnish them, (9) the wage rates in the 1981 contract at the end of the National Agreement with Respondent stating that was what it was paying but it would not agree to it, (10) 5 sick leave days with pay which was rejected with the explanation that if a man needs off, Respondent would let him take off but it would not agree to do so, (11) 12 holidays proposed separately with each one rejected,⁴² (12) 2 weeks' vacation with pay which was rejected, (13) 1 week of vacation with pay and 1 week of vacation without pay which was rejected, (14) 1 week of vacation with pay which was re-

jected, (15) 1 week of vacation without pay which was rejected, (16) floating vacation days with an unspecified number with pay which was rejected,⁴³ (17) successorship which was rejected, (18) no leasing of the plant to avoid the contract which was rejected, (19) doubletime for Sunday which was rejected, (20) time-and-a-half for Sunday which was rejected with Respondent's representatives indicating that they now paid this but they would not agree to it, (21) union access to the property on reasonable notice which was rejected,⁴⁴ (22) bereavement leave which was rejected with Respondent indicating that the men take off for death but Respondent would not agree to it, (23) recognize the concept of seniority with Respondent indicating that it had given the Union a seniority list but Respondent would not be bound by it, (24) a clean and warm eating place which was rejected, (25) sanitary toilets which was rejected, (26) adequate parking which was rejected,⁴⁵ (27) permission to use the bulletin board with the Respondent agreeing to let the employees have access to the bulletin board, (28) the employees not have to bring tools to work with Respondent indicating that it supplies tools but it would not agree to this in a contract, (29) use the bath house for a meeting place which the Respondent limited to employees only and Respondent would put this in writing, (30) dues checkoff with Respondent indicating that it would do this provided the Union paid for the costs and Respondent would agree to put that in writing provided it was properly authorized, (31) the establishment of a pension plan with Respondent indicating that it would not contribute to any union multiemployer plan but rather wanted some form of transfer of wages into a pension plan, (32) that Respondent continue the then current level of insurance benefits which was rejected by Respondent, (33) the elimination of the 30-hour-a-week requirement for coverage which was rejected with Respondent indicating that was an insurance company requirement,⁴⁶ (34) a monthly mine, health and safety meeting with Respondent indicating that it now had weekly meetings and it would agree to that, (35) that an employee be permitted to remove himself from what he perceived to be a dangerous work setting or imminent danger which was rejected by Respondent with the indication that the employee would be expected to remove himself from a dangerous condition but Respondent would not agree to it; that Kiscaden then stated that he had a major problem with what happens to the value of his property if he signs a union contract and he stated that he had to have \$2 million before he would sign a contract; that Kiscaden also indicated that he had to have a \$10-million protection or performance bond to guarantee that his operations would not be interrupted by any union activities before he would sign a contract with the Union; that even the things he agreed to in this session were contingent on the \$2-million payment; that Kiscaden stated

down the end of June and the first week of July, did not shut down as anticipated.

³⁷ Kiscaden did not remember this as being part of the June 22, 1990 proposal.

³⁸ Kiscaden refused to agree to any overtime provision other than required by law. He testified that Respondent pays its employees time-and-a-half for all work over 7-1/4 hours per day pursuant to the initial agreement when it started the involved operation.

³⁹ Kiscaden pointed out that if things got bad and Respondent needed only three people it would have to employ the people who could do the things which needed to be done.

⁴⁰ Kiscaden testified that he rejected this proposal because the Union would not define adequate.

⁴¹ Kiscaden testified that he rejected this because Federal law covered this situation.

⁴² Respondent indicated that when possible it gave Labor Day, 2 days for Thanksgiving, and 2 days for Christmas but that it may not be able to continue to do this so it would not agree to it.

⁴³ Respondent indicated that the employees were on vacation at the time of this meeting but it would not agree to provide the employees a vacation.

⁴⁴ Hampton testified that Respondent did not give him an answer to his question propounded earlier concerning insurance coverage for vendors and suppliers.

⁴⁵ Respondent indicated that it had this and the two preceding items but it would not agree to furnish them.

⁴⁶ Hampton testified that the policy indicates that if the employee becomes disabled this week, he has no insurance the next week because he is no longer working.

that if he got the \$2 million plus the \$10-million performance or protection bond then he might agree to the other proposals; that he advised Kiscaden at this point that the Union thought that it might be necessary to file a charge with the Board based on the Union's belief that Respondent was not bargaining in good faith; and that Kiscaden stated that he would contact his attorney to see what needed to be done to decertify the Union and "before he would allow the Government to extort a contract from him . . . he would have . . . Shumate take torches and cut the plant off . . . to the ground." On cross-examination, Hampton testified that Kiscaden had been responsive in terms of setting up a meeting with the Union; that on June 22, 1990, the Union essentially started over with bargaining in that it withdrew its prior proposal and started bargaining at "square one"; and that that was the only bargaining session within 6 months of the date the charge was filed herein.

When called by Respondent, Kiscaden testified regarding the June 22, 1990 meeting that for the first time Tunis Smith and Charles Dixon attended a session; that these people are known as participants in violence on picket lines; that he computed the cost of the Union's June 22, 1990 proposal to be \$24.26 an hour with no overtime and no provision for breaks; that the reason he asked for the performance bond was that he was afraid of a wildcat strike even though he did not believe that his employees themselves would go out on strike;⁴⁷ that he did not insist on the performance bond; that he did not condition further bargaining on the performance bond; that he insisted on the \$2-million payment in the context of either pay the money or give me a portable contract; that he did not condition further bargaining on the payment of the \$2 million; that his original proposal is still there, except that it no longer includes all of the holidays listed; that he did say that when it got to the point that the government told him how to run his business he would do away with the place; that he did tell Hampton that he wanted an agreement which was either one or two pages; that in the past he had not been willing to bargain but rather sat in the back room and told the bargainers what to do; and that the reason he did not want to agree to give the Union access to his property was because he objected to a couple of personalities he did not trust being on his property. On cross-examination Kiscaden testified that the first time he actually costed out the Union's June 22 proposal was the morning of the second day of the hearing herein; that he used the current costs and not the 1990 costs in computing the figures; that in 1990 the health insurance would have been \$400 plus versus the 1991 cost of \$532; that at the time of the hearing herein Respondent was paying its employees a dollar per hour figure of "in the 20's" which did not include any paid days off but includes overtime; that he never proposed a no-strike clause to the Union; and that he was told that Smith was the local union president at the time and that Dixon at that time was the International executive board member from the district.

Robinson testified that in November 1990 he asked Shumate if he, Robinson, could be placed on Respondent's payroll; and that Shumate said "no . . . Todd won't let me" and then he drove off.

⁴⁷ Kiscaden later explained that it was the outsiders he was afraid of.

Hampton testified that he first became aware that Respondent was contracting out normal bargaining unit work when Robinson telephoned him expressing his concern that he was working at the involved plant doing the same work as Respondent's employees but only making \$8 an hour; and that there were no proposals made by Respondent during negotiations or other meetings concerning the right to contract out bargaining unit work.

Contentions

General Counsel, on brief, contends that to bargain in good faith requires more than the simple willingness to meet and talk; that as the U.S. Supreme Court stated in *NLRB v. Insurance Agents*, 361 U.S. 477, 485 (1960):

Collective bargaining, then, is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of "take it or leave it"; it presupposes a desire to reach ultimate agreement, to enter into a collective-bargaining contract [.]

that failure to do little more than reject union proposals is not bargaining in good faith; that there is an affirmative obligation to make meaningful counterproposals; that particularly indicative of bad-faith bargaining is an adamant refusal to incorporate a unit description in a proposed collective-bargaining agreement, proposals less favorable than those previously offered or below current levels of benefits, and insistence upon the posting of a performance bond as a condition precedent to entering into a collective-bargaining agreement; that Respondent was paying its employees wages substantially higher than those offered the Union during negotiations; that while Respondent paid its employees for work in excess of 7-1/4 hours a day, it refused to agree to pay any more than the bare legal requirement of overtime pay for hours in excess of 40 hours a week; that Respondent frustrated the negotiation process by simply refusing to make a contractual commitment and some of the reasons proffered by Respondent for such refusals appeared either petty and/or silly or contrived and shifting; that even when Respondent's proffered reason for rejection may have had merit, Respondent made virtually no counterproposals; that Respondent's only apparent proposal, which was given to the Union on July 7, 1987, is so limited that it did not encompass the then terms and conditions of employment or meet any reasonable concept of a complete collective-bargaining agreement; that Respondent's original proposal was thereafter altered only to the extent that Respondent subsequently refused to agree to any sick day provision and ultimately eliminated all assurances of any paid holidays; that as if to add insult to injury, Respondent proposed to the Union that it would agree to a contract if the Union would essentially reimburse the Respondent's principals the total cost of its business enterprise and post a \$10-million performance bond; that Respondent utterly precluded the Union from reaching any agreement with Respondent; and that Respondent made it clear that the involved employees would enjoy better wages and benefits than Respondent would ever agree to in a contract. Regarding the subcontracting issue, General Counsel contends that it is well settled that the contracting away of bargaining unit work, absent notice and opportunity to bargain afforded the

representative of the unit, violates Section 8(a)(5) of the Act; that in certain circumstances such contracting away may also violate Section 8(a)(3) and (5) of the Act; that the Union had no notice of the contracting out of three bargaining unit jobs until the last individual who was brought to the plant complained to the Union; that during negotiations Respondent repeatedly represented its intent to contract work only in those instances where it did not have the requisite equipment or employees with needed skills for the performance of that work and such was Respondent's practice up until June 1990; and that inasmuch as Respondent demonstrated to employees by this contracting out that any future positions of employment in Respondent's operation would be conditioned upon the acceptance of status less than union represented employees, Respondent effectively discouraged union membership in violation of Section 8(a)(3) of the Act.

On brief, Respondent argues that the Union's attitude and bargaining approach are factors which should be taken into account when assessing a company's position taken in negotiations; that here the Union started from scratch on June 22, 1990, and, therefore, exactly as in *Artiste Permanent Wave Co.*, 172 NLRB 1922, (1968) "the Union's attempt . . . to start 'from scratch' by repudiating all previous progress . . . all of which tended to prolong the negotiations," is grounds for dismissal of the complaint against the employer for bad-faith bargaining; that examining the totality of circumstances, it is clear that Respondent bargained in good faith; that proposals made by Respondent, such as portability, no arbitration and no union security, were in many instances, analogous to those agreed to by the Union with other employers and, thus, demonstrably not extreme or providing evidence of an intent to frustrate agreement; that Respondent engaged in no conduct away from the bargaining table that was questionable or demonstrates any intent to avoid reaching an agreement; that the insistence by the Union on minutia such as whether the lunch room would always exist, toilets would always be provided, and the bath house would always be heated is symptomatic of the Union's penchant for formalities; that Kiscaden was not a sophisticated bargainer and, "[i]n fact, he had never bargained before"; that while some of Kiscaden's proposals were not conventional, unconventional does not equate with superficial; that Respondent is not operated in a standard way or by typical management; that the Board has taken the position that the substance of a party's bargaining position must be unreasonable or extreme before it may be considered as providing some evidence of bad-faith intent to frustrate agreement, 88 *Transit Lines*, 300 NLRB 177 (1990); that the bad-faith bargaining charge is barred by Section 10(b) of the Act; that the parties only had one bargaining session within the 10(b) period and at that session the Union withdrew its earlier proposal and presented a regressive one; that the allegation regarding contracting out is time barred since Respondent repudiated any obligation it may have had to limit contracting out in July 1987; that as a labor law successor, Respondent unilaterally established new terms and conditions of employment, including unlimited contracting out, in July 1987, and the Union waived any right it had to bargain about terms of active employees at that time; that the contracting to Mountain Engineering was consistent with prior practice and custom and carried with it no duty to bargain over either the decision or

the effects; that in any event Respondent and the Union bargained to impasse over the issue of contracting out and the Respondent was entitled to implement its proposal; and that the contracting out was not inherently destructive of the employees' Section 7 rights and did not violate Section 8(a)(3) of the Act since there was no showing of union animus and the uncontradicted testimony of the record is to the effect that economics were the sole reason for the decision to sub-contract.

Analysis

As noted above, Respondent, on brief, contends that the complaint should be dismissed assertedly because the Union did not bargain in good faith on June 22, 1990, when it started from scratch. In support of this contention, certain language of an administrative law judge is cited. The full quote of the involved findings of the administrative law judge in *Artiste Permanent Wave Co.*, supra at 1945, is as follows:

In addition, I have already considered the union's attempt at meetings 13 and 14 to start "from scratch" by repudiating all previous progress and tentative agreements on issues and clauses on which Respondent reluctantly yielded and rehashed much of the negotiations which had gone before, all of which tended to prolong negotiations.

Here there were no tentative agreements at the end of the May 31, 1989 session, the last session held before the June 22, 1990 session. Here Respondent did not reluctantly yield on or before May 31, 1989. And whether there was any progress would have to be viewed in the light of Kiscaden's statement on May 31, 1989, that he wanted \$2 million from the Union.

The Board stated in *North Coast Cleaning Service*, 272 NLRB 1343, 1344 (1984):

The duty to meet for the purpose of bargaining is imposed by Section 8(d) of the Act which requires, inter alia, that the parties "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement" The determination of whether an employer has met its obligation to bargain must be based on the "totality" of its conduct.⁵ Although the duty to bargain does not compel a party to make concessions or agree to any proposals,⁶ it does require certain actions such as entering "into discussion with an open and fair mind, and a *sincere purpose* to find a basis of agreement."⁷ As the Supreme Court has ruled:

Collective bargaining, then, is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of "take it or leave it"; it presupposes a desire to reach ultimate agreement to enter into a collective-bargaining contract.⁸

Consistent with this, a party's "failure to do little more than reject (demands)" has been found "indicative of

a failure to comply with [the] statutory requirement to bargain in good faith.”⁹ [Emphasis added.]

⁵*NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134 (1st Cir. 1953, cert denied 346 U.S. 887 (1954)); *Hospitality Motor Inn*, 249 NLRB 1036, 1039 (1980), enf. 667 F.2d 562 (6th Cir. 1982).

⁶*NLRB v. American National Insurance Co.*, 343 U.S. 395, 404 (1952).

⁷*NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960); *Hospitality Motor Inn*, supra at 1039.

⁸*NLRB v. Insurance Agents' International Union, AFL-CIO*, 361 U.S. 477, 485 (1960).

⁹*NLRB v. Century Cement Mfg. Co.*, 208 F.2d 84, 86 (2d Cir. 1954); *My Store, Inc.*, 147 NLRB 145, 155-156 (1964) enf. 345 F.2d 494 (7th Cir. 1965).

In my opinion, as demonstrated by the posture Kiscaden took on June 22, 1990, Respondent did not bargain in good faith but rather engaged in surface bargaining. Kiscaden pointed out that he was personally liable for the money borrowed to fund Respondent. It appears that this obligation affected Kiscaden's ability to be candid regarding the matters involved herein.

Referring strictly to credibility, it is noted that with respect to the August 9, 1988 session, Kiscaden did not deny telling the Union that anything Respondent's men had the ability to do and Respondent had the equipment to do it would not be done by any contractor. Rather, Kiscaden sought refuge in his testimony that he did not remember making the statement. With respect to the January 1989 session, Kiscaden changed his testimony from telling the Union that Respondent wanted to be able to contract work out if it was cheaper than Respondent doing the work itself to telling the Union that Respondent needed to bring in contractors to do maintenance work when it did not have employees with the skills required or the necessary equipment. With respect to the May 31, 1989 session, Kiscaden testified that he did not contact his attorney after this meeting as promised to get his proposal in written form because shortly thereafter he and Hampton became engaged in a situation where they were adversaries and they were attempting to have each others people put in jail. Kiscaden did not deny Hampton's subsequent testimony that the involved lawsuit was filed in October 1989.⁴⁸ And finally, with respect to the June 22, 1989 session, Kiscaden testified that he did not insist on the performance bond; that he insisted on the \$2-million payment in the context of either pay the money or give me the portable contract; and that he did not condition further bargaining on the payment of the \$2 million. Taking the last first, Kiscaden effectively conditioned further bargaining on the payment of the \$2 million when he conditioned the signing of any contract on the payment of the \$2 million at this last bargaining session. Previously Kiscaden did speak in terms of an alternative, namely, a portable contract. Kiscaden was well aware, however, that such a proposal was novel. Indeed, he did not know of any other company in Respondent's situation which had such a contract. And he knew that the Union would not take this approach. Apparently it was not practical or perhaps even feasible in view of the ratification question which would arise if a company attempted to utilize its portability aspect. Kiscaden also conditioned the signing of a contract

⁴⁸ Hampton pointed out that the lawsuit did refer to 1 or 2 days of picketing in June or July 1989. It would appear, however, that the involved legal proceeding did not commence until October 1989.

on the \$10-million performance bond. Kiscaden never explained his reasoning for taking the position at the hearing herein that he did not insist on the performance bond. He does not deny bringing it up during this session. On the other hand, he does not divulge what language he is relying on to demonstrate that he was not insisting on it.

While Respondent's counsel attempts to portray Kiscaden as a neophyte bargainer, Kiscaden himself testified that in past he contented himself with sitting in a back room and telling the bargainers what to do.

Although Respondent met with the Union, it did not do so with the intention of reaching an agreement. One of the indicia of unlawful bargaining is whether the employer adopted a purposeful strategy to ensure that bargaining would be futile or would fail. *NLRB v. Herman Sausage Co.*, 275 F.2d 229 (5th Cir. 1960); *Cable Vision*, 249 NLRB 412 (1980). On June 22, 1990, Kiscaden told the Union that he had to have \$2 million and a \$10-million performance bond from the Union before he would sign a contract; and that he would not agree to, among other things, a work jurisdiction clause nor would he agree to be bound by Respondent's own seniority list. Perhaps certain of the testimony divulges his true intent. It is noted that Kiscaden stated that (1) he was not interested in giving up any of his rights and when he bought the company he agreed with the predecessor to talk with the Union and he had done that, (2) during negotiations and at the time of the hearing herein he was negotiating to lease the involved property less the employees, and (3) he was going to get out of the labor business, his labor costs were too high.

Respondent's insistence on the posting of a \$10 million performance bond, a nonmandatory subject of bargaining, constituted a per se violation of the Act. *Betra Mfg. Co.*, 233 NLRB 1126 (1977).

Regarding Respondent's insistence that it be paid \$2 million by the Union before it would sign a contract, it appears that the court in *NLRB v. Reed & Prince Mfg. Co.*, supra, spoke to such a situation when it concluded:

It is difficult to believe that the Company with a straight face and in good faith could have supposed that this proposal had the slightest chance of acceptance by a self respecting union, or even that it might advance the negotiations by affording a basis of discussion; rather, it looks more like a stalling tactic by a party bent upon maintaining the pretense of bargaining.

The situation here was worse in that the proposal was actually insulting to the process itself. Kiscaden felt that he could play with the union representatives and this was his way of saying so. When they were unwilling to let him play, he made his threats to look into decertification and, if necessary, torch the business. In other words, he was telling them, in his less than subtle manner, that he would try to see that either they would not be in the game or there would be nothing to play for.

Also Respondent's outright rejection of any seniority clause, a mandatory subject of bargaining, and a work jurisdiction clause, especially in view of Kiscaden's refusal to accept any meaningful proposal regarding whether supervisors could do unit work, further demonstrates that Respondent was refusing to bargain in good faith. This was not a case

of hard bargaining as the Respondent urges. Rather, Respondent failed to engage in good-faith bargaining and thereby violated Section 8(a)(5) and (1) of the Act.

Respondent also violated the Act when it contracted out bargaining unit work without giving notice and an opportunity to bargain to the Union. Contrary to the assertions of Respondent on brief, the credible evidence of record does not support its assertion that Respondent repudiated any obligation it may have had to limit contracting out in July 1987. In fact when the union representatives brought up the fact that Respondent was using a contractor during the 1988 summer vacation Kiscaden assured the Union that anything Respondent's men had the ability to do and Respondent had the equipment to do it would not be done by any contractor. Also contrary to the assertion of Respondent on brief, the contracting with Shumate's company for the three employees was not consistent with prior practice and custom. In the past contractors were used when Respondent's employees did not have the capability, the equipment or the time to perform the task involved. Since there was no bargaining over the contracting out of unit work, Respondent and the Union had not bargained to impasse over this issue. In this regard, Respondent violated Section 8(a)(5) and (1) of the Act. Since the Union did not receive notice of Respondent's actions until Robinson spoke out, there is no 10(b) question.

In my opinion, by contracting out unit work without first giving notice to the Union and giving it an opportunity to bargain, in the circumstances existing here, Respondent also violated Section 8(a)(3) of the Act. On brief, Respondent asserts that the uncontradicted testimony of the record is to the effect that economics were the sole reason for the decision to subcontract and it was not inherently destructive of the employees' Section 7 rights and did not violate Section 8(a)(3) of the Act since there was no showing of union animus. Apparently the asserted uncontradicted testimony of record that economics were the sole reason for the decision to subcontract unit work is Shumate's testimony that Kiscaden said that "he was going to have to get out of the labor business that his labor costs were much to high." Kiscaden then assertedly pays \$18.10 per man hour to Shumate's company for the use of three men who are paid \$8 an hour, with no benefits, by Shumate's company. Kiscaden does not testify about Respondent's economic situation with respect to cost for these three men. It has not been demonstrated that economics were the sole reason for the decision to subcontract these three unit jobs. In my opinion, no adequate business justification has been advanced by Respondent for this action. In view of what was going on between Respondent and the Union, Respondent's action in this regard cannot be considered in a vacuum. Respondent's prior and subsequent unlawful conduct provides background which must also be considered. The contracting out of the three unit jobs in this situation was inherently destructive of the employees' Section 7 rights in that, as General Counsel points out, Respondent was demonstrating to the employees that any future positions of employment in Respondent's operation would be conditioned upon the acceptance of status less than union represented employees and thereby Respondent effectively discouraged union membership in violation of Section 8(a)(3) and (1) of the Act.

Paragraph 5(a) of the amended complaint issued on May 14, 1991, alleges that Respondent caused Hylton, Robinson,

and Rowe to be hired and placed on the payroll of Coalfield performing unit work at wage rates less than those paid and with benefits less than those provided by Respondent for other unit employees. Coalfield is no longer a Respondent in this proceeding. The amended complaint seeks an order requiring Respondent, inter alia, to reinstate direct employment of all employees performing unit work, at wage rates and with benefits in effect for other employees performing similar unit work and to make whole Hylton, Robinson, and Rowe. Shumate testified that Hylton and Rowe were already employed by his company at another company's jobsite when he had them begin work at Respondent's plant. This was not the case with Robinson. Shumate's testimony that Robinson came to him looking for a job is not credited. Shumate did not impress me as being a credible witness. Shumate, as the general manager of Respondent, told Kiscaden that he needed additional employees. Assertedly, Kiscaden agreed, provided they were not carried on the payroll of Respondent. At that time, as noted above, Hylton and Rowe were on the payroll of Shumate's company. Robinson was not. Also, Robinson, unlike Hylton and Rowe, worked for Respondent's predecessor and was on lay off when the involved facility was sold to the Respondent. Shumate sought out Robinson and offered him a job. He would work at Respondent's plant but he would be paid with a Coalfield check. In November 1990 Robinson asked Shumate if he, Robinson, could be placed on Respondent's payroll but he was told by Shumate that Kiscaden would not allow him, Shumate, to do this. Neither Rowe nor Hylton asked to become direct employees of the Respondent. In view of all of this, it appears that Robinson was an employee of Respondent notwithstanding the machinations engaged in by Kiscaden and Shumate. The method of his hiring was part of a scheme by Kiscaden to avoid Respondent's obligations under the Act. He was not hired until there was a need for his service at Respondent's plant. This is not the situation with Hylton and Rowe. Accordingly, Respondent will only be required to make Robinson whole and maintain him as a member of the unit.⁴⁹

CONCLUSIONS OF LAW

1. Respondent Tennessee Construction Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees of [Respondent] working in or about [Respondent's] Nelse, Kentucky coal preparation plant, but excluding all professional 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 the exclusive bargaining representative of the employees in the appropriate unit within the meaning of Section 9(b) of the Act.

⁴⁹ Perhaps Kiscaden and his general manager, Shumate, can work out how to come up with the difference in what they paid Robinson per hour and what Respondent should have paid Robinson in view of their assertions that Kiscaden has already given Shumate \$18.10 per every hour Robinson worked. In the final analysis, however, it is Respondent's responsibility to see that Robinson is made whole.

5. By bargaining in bad faith in collective-bargaining negotiations and by contracting out unit work without notifying the Union and according it an opportunity to negotiate, Respondent has violated Section 8(a)(5) and (1) of the Act.

6. By contracting out unit work without notice to or bargaining with the Union and without any demonstrated business justification, while engaging in surface bargaining with the Union, Respondent effectively discouraged union membership in violation of Section 8(a)(3) and (1) of the Act.

7. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the Act, it shall be recommended that Respondent cease and desist therefrom and take certain affirmative action.

Having found that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain in good faith with the Union, I shall recommend that Respondent bargain with the Union upon request and in the event that an understanding is reached, to embody such understanding in a signed agreement.

Having found that Respondent, without notice to the Union and without according the Union an opportunity to bargain, contracted out unit work, I shall order that Respondent cease and desist from unilaterally subcontracting unit work without notifying or bargaining with the Union; restore the status quo ante as it existed prior to the unlawful subcontracting of unit work in June 1990 by terminating the contract for unit work, by making Mallie Robinson a direct employee of Respondent and by making him whole for any loss of earnings or other compensation he may have suffered as a result of Respondent's unlawful action in bypassing his bargaining representative and not applying to him the terms and conditions of employment which existed for unit employees at that time. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵⁰

ORDER

The Respondent, Tennessee Construction Company, Nelse, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively in good faith concerning terms and conditions of employment with the Union, as the exclusive representative of its employees in the following unit appropriate for the purposes of collective bargaining:

All production and maintenance employees of [Respondent] working in or about [Respondent's] Nelse, Kentucky coal preparation plant, but excluding all professional employees, guards and supervisors as defined in the Act.

(b) Refusing or failing to bargain in good faith with the Union by unilaterally contracting out unit work without notice to and bargaining with the Union as the exclusive representative of its employees in the appropriate unit.

(c) Discouraging membership in the Union by unilaterally contracting out unit work while engaging in surface bargaining when such contracting out is without any demonstrated business justification and is done without notice to and bargaining with the Union as the exclusive representative of its employees in the appropriate unit.

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

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

(a) Terminate its contracting out of bargaining unit work.

(b) Offer Mallie Robinson direct employment with Respondent and make him whole for any loss of earnings and other benefits suffered as a result of Respondent's unlawful action in bypassing his bargaining representative and not applying to him the terms and conditions of employment which existed for unit employees at that time, in the manner set forth in the remedy section of this decision.

(c) On request, bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of its employees in the unit set forth above with respect to rates of pay, wages, hours, and other terms and conditions of employment.

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

(e) Post at its Nelse, Kentucky coal preparation plant copies of the attached notice marked "Appendix."⁵¹ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

⁵⁰ 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.

⁵¹ 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."