

International Screw Division of Everlock Fastening Systems, Inc., Employer and Debtor in Possession in Bankruptcy and Mechanics Educational Society of America, AFL-CIO. Case 7-CA-31463

September 25, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT
AND RAUDABAUGH

On March 31, 1992, Administrative Law Judge Karl H. Buschmann issued the attached decision. The Respondent filed 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 record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

The judge found, and we agree, that the Respondent's failure to make retirement fund contributions, failure to pay certain accrued vacation pay, and failure to pay certain health insurance premiums, each required by the collective-bargaining agreement, constituted violations of Section 8(a)(5) and (1) of the Act.

The parties are in agreement as to the relevant facts. The Respondent did not make contractually required payments into the employees' retirement fund from October 1-19, 1990, and did not pay contractually required premiums to the CIGNA health insurance plan from October 15, 1990, through March 25, 1991. On October 19, 1990, the Respondent filed a petition for bankruptcy. From February 12 to March 25, 1991, the Respondent did not pay certain employees for the amount of vacation that they accrued prior to October 19, 1990.

1. It is well established that an employer's failure to make contractual payments to an employees' benefit fund or to employees for accrued vacation, without first bargaining with the union, constitutes a unilateral change in the terms of the collective-bargaining agreement and that such a unilateral modification is a violation of Section 8(a)(5). See *Rapid Fur Dressing*, 278 NLRB 905 (1986). Therefore, the Respondent's failure to make the payments required in this case would normally constitute a unilateral change in the terms of the agreement and a violation of Section 8(a)(5).²

¹We correct the date on p. 4, L. 6 of the judge's decision to read "October 23, 1990" rather than "October 10, 1990."

²As Member Oviatt stated in *Tammy Sportswear Corp.*, 302 NLRB 860 fn. 1 (1991), he is of the view that in certain limited circumstances an employer's financial inability to pay may constitute a defense to an allegation that it unilaterally and unlawfully failed to make contractually required payments to a benefit fund. Member

The Respondent, however, contends that the Bankruptcy Code requires that claims that accrue prior to filing a bankruptcy petition cannot be paid by the debtor, but must instead be submitted to the bankruptcy court as an unsecured claim. Thus, the Respondent argues, the Bankruptcy Code specifically prohibited the Respondent from making payments to both the employees' retirement fund and to certain employees for accrued vacation because these obligations arose "pre-petition." The Respondent maintains that it was not attempting to modify or alter the terms of the collective-bargaining agreement, but rather was merely complying with the provisions of the Bankruptcy Code.

The judge correctly rejected the Respondent's argument. First, it is obvious that the Respondent's argument must be rejected as it is applied to the Respondent's failure to make payments to the employees' retirement fund. These payments were due and owing from October 1 through 19—before the Respondent filed for bankruptcy. Accordingly, the bankruptcy proceeding cannot be a defense to the Respondent's failure to make the retirement fund payments and we find, as did the judge, that the Respondent failed to make the payments in violation of Section 8(a)(5). *Crest Litho*, 308 NLRB No. 24 (July 31, 1992).³

2. Next, we turn to the Respondent's argument that its status as a debtor in possession is a defense to its failure to pay accrued vacation to certain employees. A debtor in possession may assume or reject a collective-bargaining agreement in accordance with the provisions of section 1113 of the Bankruptcy Code. Before a debtor may reject or modify a collective-bargaining agreement, section 1113 requires that the debtor must notify and negotiate with an authorized representative of the employees to attempt to reach an agreement. After taking these steps, the debtor may apply to the bankruptcy court for permission to reject or modify the collective-bargaining agreement.⁴

The Respondent argues that it did not pay employees for vacation accrued prior to October 19, 1990, because it was complying with the provisions of the Bankruptcy Code that prohibit payment of claims that accrued prepetition. Because it was merely complying

Oviatt, however, finds that those circumstances are not present in this case.

³Although we agree with the judge's finding that the Respondent's failure to make the contractually required payments to the employees' retirement fund violated Sec. 8(a)(5), we do not rely on the judge's reasoning that sec. 1113 of the Bankruptcy Code applied to those payments. We instead base our finding on the reasoning set out above. We note, however, that if the October 1 to 19 retirement fund contributions were not due to be paid until after October 19, the date that the bankruptcy petition was filed, then sec. 1113 would apply, and based on the reasoning set out in the judge's decision and clarified in our decision, the Respondent's failure to make the contributions would still constitute a violation of Sec. 8(a)(5).

⁴Sec. 1113 also provides emergency relief necessary to prevent irreparable damage to the debtor's business.

with the Bankruptcy Code and was not attempting to modify the collective-bargaining agreement, the Respondent contends that section 1113 of the Bankruptcy Code is inapplicable. The Respondent's argument, however, is directly contrary to the plain language of section 1113(f), which states that "no other provision of [the Bankruptcy Code] shall be construed to permit a trustee to unilaterally terminate *or alter* any provisions of a collective bargaining agreement prior to compliance with the provisions of this section." (Emphasis added.)

A similar argument was rejected by the Sixth Circuit in *Unimet Corp.*, 842 F.2d 879 (1988), cert. denied 488 U.S. 828 (1988). In *Unimet*, the employer argued that it had no duty to pay health insurance premiums for retirees as required by the collective-bargaining agreement because the insurance premiums were not administrative expenses under the Bankruptcy Code. The Sixth Circuit, however, found that section 1113(f) "unequivocally prohibits the employer from *unilaterally* modifying any *provision* of the collective bargaining agreement." 842 F.2d at 884. The court went on to hold that the employer could not escape its obligations under the collective-bargaining agreement by arguing that the administrative expense provision of the Bankruptcy Code prohibited it from making the payments required by the collective-bargaining agreement.⁵

In the case before us, the bankruptcy court did not issue an order allowing the Respondent to reject or modify the collective-bargaining agreement—in fact, the Respondent never filed a motion pursuant to section 1113 of the Bankruptcy Code requesting such relief. Therefore, on the basis of precedent and the clear language of section 1113(f), we agree with the judge that the Respondent's failure to pay certain employees for vacation that accrued prior to October 19, 1990, constituted a unilateral change in the collective-bargaining agreement and a violation of Section 8(a)(5).

3. We also find no merit in the Respondent's contentions that its actions did not cause cancellation of the CIGNA health insurance policy, but rather that CIGNA, the insurer, disregarded the policy's 31-day grace period for payment of premiums and improperly canceled the policy. The record reveals that the Respondent had difficulty making its premium payments to CIGNA during mid-1990 and that, as a result, the Respondent and CIGNA modified the schedule for

payment of premiums. The modified payment terms did not include a 31-day grace period following each premium's due date. After making two payments pursuant to the modified payment schedule, the Respondent failed to pay the premium due on October 15, 1990, and CIGNA canceled the health insurance policy. In these circumstances, we agree with the judge that the Respondent's failure to pay the health insurance premium to CIGNA on the October due date resulted in cancellation of the CIGNA insurance policy.⁶

4. Finally, we find no merit in the Respondent's argument that the Board should defer this issue to the grievance-arbitration procedure set forth in the parties' collective-bargaining agreement. We agree with the judge that this issue should not be deferred because the Respondent has not unequivocally expressed its willingness to arbitrate. In response to the grievances filed by the Union concerning the Respondent's failure to maintain the CIGNA health insurance policy, the Respondent stated that the grievances "must be held in abeyance" because the bankruptcy proceeding prohibited the Respondent from paying any debts, including payment of insurance benefits due to the employees. In fact, in addition to suggesting that the health insurance issue is not arbitrable because of the bankruptcy proceeding, the Respondent did not, in its response to the complaint or during the hearing, affirmatively state that it would agree to participate in the grievance-arbitration procedure. Instead, the Respondent, in its brief, simply asserts that the collective-bargaining agreement allows the Union to *force* the Respondent to arbitrate. The Board has refused to defer an issue or case when the respondent has failed to affirmatively assert a willingness to participate in the grievance-arbitration procedure and has, in fact, expressed its belief that the issue may not be arbitrable. *Collyer Insulated Wire*, 192 NLRB 837 (1971); *United Technologies Corp.*, 268 NLRB 557 (1984); and *Burroughs Credit Union*, 280 NLRB 292 fn. 3 (1986). On the basis of the record, we affirm the judge's findings that the Respondent has not affirmatively expressed its willingness to arbitrate the Union's health insurance grievances⁷ and that the dispute is not well suited for resolution by the grievance process.⁸

⁶Further, the Respondent's asserted reliance on the presence of a 31-day grace period is belied by its failure to make *any* premium payments between October 15, 1990, and March 25, 1991, including within the purported grace period following the October 15, 1990 payment due date.

⁷We do not rely on the judge's speculative finding that even if the issue were deferred, that the "Respondent's reaction would probably have [sic] the same, that is the bankruptcy proceeding is a bar to its contractual obligation and the dispute should be resolved by the bankruptcy court."

⁸In addition, we note that the Respondent has requested deferral on only one of the three issues presented in this case, i.e., the Respondent's failure to pay contractually required health insurance pre-

Continued

⁵The court stated :

In sum, our reading of 11 U.S.C. § 1113 leads us to the conclusion that Congress intended to give broad protection to collectively bargained for rights which are threatened by a corporate reorganization under Chapter 11 of the Bankruptcy Code. Our conclusion that 11 U.S.C. § 1113 applies to all provisions of a collective bargaining agreement does no violence to the plain language of the statute or the legislative history as we perceive it. [842 F.2d at 885. Accord: *Crest Litho*, supra.]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, International Screw Division of Everlock Fastening Systems, Inc., Employer and Debtor in Possession in Bankruptcy, Mt. Clemens, Michigan, its trustee, officers, agents, successors, and assigns, shall take the action set forth in the Order.

miums. Because the health insurance allegation is legally and factually related to the other two complaint allegations, which we must necessarily resolve, we find that it would not serve the purposes underlying our deferral policy to defer that single aspect of this case to the grievance-arbitration procedure. See *S.Q.I. Roofing*, 271 NLRB 1 fn. 3 (1984); *George Koch Sons, Inc.*, 199 NLRB 166, 168 (1972), enf. 85 LRRM 2548 (1st Cir. 1973).

Dennis Boren, Esq., for the General Counsel.
Michael Alaimo, Esq. (Dickinson, Wright, Moon, Van Dusen & Freeman), of Detroit, Michigan, for the Respondent.
Robert W. Briggs, Esq., of Detroit, Michigan, on behalf of the Charging Party.

DECISION

STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. This case was tried on June 24, 1991, in Detroit, Michigan. The Charge in Case 7-CA-31463 was filed by Mechanics Educational Society of America, AFL-CIO (the Union) on January 30, 1991, and the complaint issued on March 11, 1991, charging International Screw Division of Everlock Fastening Systems, Inc. (the Respondent) with violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by failing and refusing to make contractual payments for the employees' pension funds and health insurance funds and by failing and refusing to meet vacation payment obligations from February 12 until March 25, 1991. The Respondent filed an answer on March 25, 1991, in which it admitted the jurisdictional elements of the complaint and averred that its conduct complied with the U.S. Bankruptcy Code.

FINDINGS OF FACT

I. JURISDICTION

The Company, International Screw Division of Everlock Fastening Systems, Inc., is a Delaware corporation with its principal office at 431 Stephenson Highway, Troy, Michigan, and, until March 25, 1991, with a place of business at 50631 East Russell Schmidt Blvd., Mt. Clemens, Michigan, where it is engaged in the manufacture and distribution of automobile parts.¹ On October 19, 1990, the Respondent filed a bankruptcy petition pursuant to chapter 11 of the U.S. Bankruptcy Code, 11 U.S.C. § 101 et. seq., and has been designated as a debtor in possession by the U.S. Bankruptcy Court for the Eastern District of Michigan, Southern Division of Detroit. With gross revenues exceeding \$1 million during 1990 and with purchases in excess of \$50,000 from suppliers

¹ The Mt. Clemens, Michigan place of business is the only facility involved in this proceeding.

from outside the State of Michigan, the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Charging Party, Mechanics Educational Society of America, AFL-CIO, is a labor organization engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. FACTS

Since 1951, the Company and the Union had a bargaining relationship for the employees in the following unit:

All full-time and regular part-time toolmaker, lathe/grinder operator, header setup and operator, header operator, secondary equipment setup, secondary operator, reheader setup and operator, washer operator, shipping clerk, shipper clerk assistant, shipping clerk, shipper clerk assistant, shipping clerk helper, truck driver, hi-lo driver, inspector-A, maintenance-A, maintenance-B, centerless grinder operator, centerless grinder setup, toolmaker/electrician, janitor, sorter, press operator, tool crib attendant, work cell setup and operator, and toolroom helper employed by Respondent at its Mt. Clemens, Michigan place of business; but excluding all guards and supervisors as defined in the Act.

The latest collective-bargaining agreement, dated March 1, 1990, and effective until March 1, 1993, contains certain provisions relevant to the instant controversy. Article X under the heading "Vacation with Pay" provides for the accrual of vacation days based on an employee's seniority (G.C. Exh. 2). Another proviso, entitled "Insurance" obligates the Company "to continue in effect the current health insurance and drug program without cost to the employee," and gave the Company "the right to select the insurance carrier to provide the benefits specified in this Article" (G.C. Exh. 2, art. XII). The collective-bargaining agreement also provided for the Company's contributions towards the hourly employees' retirement savings plan. (G.C. Exh. 2, art. XII, sec. 5.)

The record shows pursuant to a stipulation between the parties "that since on or about October 1 through 19, 1990, the Respondent did not make the contractual payments into the employees' pension, retirement saving and fringe benefit fund on behalf of the employees and the unit set forth" (Tr. 21-22).² In addition the stipulated facts are that certain employees who had earned vacation pay prior to October 19, 1990, did not receive their vacation pay because "[a]fter February 12, 1991, until March 25, 1991, persons who sought to have their vacation paid, had that vacation prorated to pre and post vacation petition." (Tr. 15-18; G.C. Exh. 3.) In a posted notice, dated February 12, 1991, the Respondent informed the bargaining unit employees that the Company had filed for chapter 11 protection and how the Company would process accrued vacation payments (Tr. 57; G.C. Exh. 3). The employees were informed, inter alia, that payments for vacation time accrued after October 19, 1990, the date of filing for chapter 11 protection, were postpetition obligations which could be paid to the employees because the money was considered "administrative expenses." However, accrued vacation time prior to that date was considered

² The complaint was amended accordingly (Tr. 21-22).

prepetition obligations for which claims could be made to the U.S. Bankruptcy Court and which, according to the Company, it was not permitted to pay.

The Company offered its employees three medical plans, the Health Alliance Plan, the Wellness Plan, and a traditional medical Plan, the CIGNA plan. The parties stipulated that the Respondent failed to pay the insurance premium for the CIGNA insurance plan from October 15, 1990, to March 25, 1991 (Tr. 25). Approximately 11 to 14 unit employees who were insured by CIGNA thereby lost their coverage for a certain time. Although the policy provides for an automatic cancellation if the premium is not paid, it also contains a "Grace Period" provision which extends the policy by 31 days beyond the payment of the premium. (R. Exh. 1.) By letter of August 30, 1990, the Respondent had informed CIGNA that it would reduce its accrued premiums of over \$421,000 by making monthly installments for August, September, October, and November 1990 (R. Exh. 2). The record shows that \$100,000 was paid in August and \$107,176 on September 15, 1990 (R. Exh. 2). But the Respondent failed to pay the October 1990 installment and any subsequent payments through March 25, 1991 (Tr. 37). During this period, 10 to 14 employees were no longer insured under the CIGNA plan. Several employees who lost their coverage joined the Health Alliance Plan, an HMO, as of November 1, 1990, and others joined the Health Alliance Preferred Provider Organization (Tr. 38). Nevertheless, as of the end of the grace period of October 15 to November 1, 1990, several CIGNA insured employees were uninsured and other CIGNA insured employees who opted to join the Health Alliance Preferred Provider Organization remained uninsured until December 1, 1990 (Tr. 37-38). The employees who joined either of the two insurance plans had less choice in the selection of their health providers than they would have had with CIGNA. Accordingly, Donald Larkins, director of industrial relations, contacted an insurance broker in January 1991 to explore an insurance coverage similar to that of CIGNA. However, the Respondent never contracted with an insurance carrier which offered benefits similar to CIGNA. Larkins conceded that the health care plans in existence after October 15, 1990, did not comply with the collective-bargaining agreement (Tr. 39).

The record shows that the Company did not notify the Union and it did not offer to bargain with the Union about its failure to make the contractual contributions. On October 23, 1990, the Company notified the employees during an employee meeting where the employees were informed that the Company had filed for chapter 11 bankruptcy and that the insurance programs were not in effect (Tr. 56-57). On the same date, the Company informed the employees by memorandum that CIGNA stopped the paying of claims for employees' medical and dental bills and that the employees had the option of joining the Health Alliance PPO plan effective November 1, 1990, or the Health Alliance traditional plan effective January 1, 1991, neither of which offered an adequate replacement coverage comparable to the CIGNA insurance, as stated above. (G.C. Exh. 6.)

Employee grievances challenging the Company's failure to maintain the insurance plan were held "in abeyance" by the Union. (G.C. Exhs. 7, 10.) By memorandum dated October 10, 1990, the Company informed the grievant of the bankruptcy proceeding and stated that "such grievance must be

held in abeyance unless the bankruptcy court orders otherwise [and that the] Company is presently investigating the status of insurance coverage prior to October 19, and is undertaking an investigation of alternate methods to provide . . . insurance benefits due . . . as of October 19 that may not have been paid" (G.C. Exh. 8).

In sum, the Company admittedly (a) failed to make contractual payments into the employees' retirement savings plan from October 1 to 19, 1990, in accordance with article XII, paragraph 5 of the collective-bargaining agreement, (b) failed to pay certain unit employees their accrued vacation pay in accordance with article X of the agreement, and (c) failed to pay its premiums for the CIGNA health insurance plan or for a new carrier with comparable benefits as required by article XII of the collective-bargaining agreement (G.C. Exhs. 2, 3; Tr. 22, 39). Respondent's failure in this regard as well as its failure to notify the Union and to bargain collectively, violated Section 8(a)(1) and (5) of the Act, according to the General Counsel. The Respondent argues that its receivership in a bankruptcy proceeding justified its conduct and that the matter should have been deferred to the grievance procedure in the contract.³

Analysis

The question whether a debtor in possession may reject a collective-bargaining agreement is now governed by section 1113 of the Bankruptcy Code (11 U.S.C. § 1113) entitled "Reorganization." This law was enacted by Congress in response to the decision *NLRB v. Bildisco & Bildisco*, 464 U.S. 513 (1984), where the Court held that a debtor in possession does not commit an unfair labor practice when it unilaterally alters the terms of a bargaining agreement. According to section 1113, a debtor in possession or the trustee "may issue or reject a collective-bargaining agreement only in accordance with the provisions of this section." (11 U.S.C. § 1113(a).) The statute outlines in several paragraphs the specific steps required before a collective-bargaining agreement can be changed or modified. The effect of the provisions assures that a debtor in possession may not unilaterally change the terms of a collective-bargaining agreement. For example, the Act requires that a debtor in bankruptcy first make a proposal to the union and furnish the union with relevant information, it must meet with the Union to confer in a good faith attempt to reach mutually satisfactory modifications, and the bankruptcy court must examine and approve any modifications according to specific guidelines. The Company failed to comply with any of these requirements. Indeed, the Act specifically states: "No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective-bargaining agreement prior to compliance with the provisions of this section." (11 U.S.C. § 1113(f).)

The court in *Unimet Corp.*, 842 F.2d 879, 884 (6th Cir. 1988), cert. denied 488 U.S. 828 (1988), interpreted section 1113 and stated that "Section 1113 unequivocally prohibits an employer from *unilaterally* modifying *any provision* of the collective-bargaining agreement." Another circuit court

³The Respondent apparently abandoned its affirmative defense that the issues are barred by Sec. 10(b) of the Act. In any case, the alleged practices occurred within the 6-month period prior to the filing of the charge.

in its analysis of section 1113 stated "that Congress intended § 1113 to be the sole method by which a debtor could terminate or modify a collective-bargaining agreement and that application of other provisions of the Bankruptcy Code that allow to bypass the requirements of § 1113 are prohibited." In *Ionosphere Clubs*, 922 F.2d 984 (2d Cir. 1990).

By stipulation the record shows that the bankruptcy court did not issue an order allowing the Respondent to reject the collective-bargaining agreement, and that the Respondent had not filed a motion pursuant to section 1113 of the Bankruptcy Code (Tr. 14).

The record here shows that the Respondent not only failed to make the contractual contributions to the various funds and to the employees but it also failed to notify the Union of its actions and it certainly did not offer to bargain with the Union. Respondent's failure to pay into the contractually required retirement savings plan and the failure to make certain medical insurance payments required by the contract and that failure to pay certain employees' vacation pay constitutes a violation of Section 8(a)(5) and (1) of the Act. *Zimmerman Painting & Decorating*, 302 NLRB 856 (1991). I accordingly find that the Respondent violated Section 8(a)(1) and (5) as alleged in the complaint.

The Respondent's argument that there "is nothing in the record to support that the lapse in medical insurance was caused by the Respondent" and that in any case, the Union waived its right to bargain over the issue, is plainly contradicted by the record. The payment schedule for four monthly installments already constituted an accommodation by the carrier to continue the coverage, provided the payments were made. The cancellation was a direct consequence of Respondent's failure to make the required installments and was in accord with the insurance contract, providing for automatic cancellation in the event of a failure to pay. Moreover, the Union's decision to keep the issue in abeyance was not tantamount to a waiver, particularly, where as here, the Respondent blamed the CIGNA insurance carrier and its chapter 11 posture.

In its brief, the Respondent has raised the issue of deferral. Initially it is not clear whether the Respondent raised the issue of deferral only with regard to the Company's failure to continue the CIGNA insurance plan and whether the issues of vacation pay and the retirement fund are part of the same defense. The Respondent's answer to the allegations in the complaint does not contain any reference to deferral. And the record shows that grievances filed by the employees were solely concerned with the CIGNA insurance issue (G.C. Exhs. 7, 10). The General Counsel has taken the position that deferral on any issue is warranted at this stage of the proceeding and, in any case, inappropriate. Because the issue of deferral was not raised in the answer and litigated only with regard to the health insurance issue, it will be considered relevant only with regard to that issue.

The collective-bargaining agreement provides for a grievance procedure involving four steps, including arbitration. The grievance procedure presumes the filing of a grievance by an employee and covers any dispute between the Company and any of its employees as to the meaning and application of any provisions of the agreement (G.C. Exh. 2). As already stated the grievances in this case are only concerned with the lapse of the CIGNA insurance. According to the testimony of Robert Briggs, the president of the Union, a deci-

sion was made by the Union and the Company to hold the grievances in abeyance because the Company deemed it fruitless to go on with the grievance as a result of the bankruptcy proceeding (Tr. 81, 174). The Company responded to the grievance by memorandum of October 23, 1990, stating, inter alia (G.C. Exh. 8)

As a result of the bankruptcy filing, any efforts by any person to collect a debt owed by the Company prior to October 19, 1990 are prohibited by law. Thus to the extent that your grievance seeks the immediate payment of insurance benefits due you as of October 19, the Company's position is that by virtue of the Bankruptcy Code, such grievance must be held in abeyance unless the Bankruptcy Court orders otherwise.

The Company recognizes its obligation under the collective bargaining agreement to provide your [sic] with current Insurance coverage. At the present time the Company is working diligently with its carriers to ensure that such Insurance coverage is provided.

The Company took the position that the grievances should be held in abeyance and that they could not "respond because of the Chapter 11, that they could not do anything that their hands are tied." (Tr. 84, 163.) In short, the Union was under the impression that the Company believed "that it would be fruitless to go on with it." (Tr. 175.)

Under these circumstances, it is clear that deferring the issue to arbitration would be inappropriate, *Collyer Insulated Wire*, 192 NLRB 837 (1971); *United Technologies Corp.*, 268 NLRB 557 (1984). The Company had essentially acknowledged its responsibility under the contract, but it took the position that in view of the bankruptcy proceeding, it would be futile to process the grievances. Even if the matter had been taken through the final stage of the grievance process with a finding that the Respondent violated the terms of the collective-bargaining agreement the Respondent's reaction would probably have the same, that is the bankruptcy proceeding is a bar to its contractual court obligation and the dispute should be resolved by the bankruptcy. Accordingly, I find that the Respondent had failed to assert its willingness to use arbitration to resolve the dispute and that the dispute is not well suited to a resolution by the grievance process.

CONCLUSIONS OF LAW

1. The Respondent, International Screw Division of Everlock Fastening Systems, Inc., is a debtor in possession and an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, Mechanics Educational Society of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following is an appropriate unit for purposes of collective bargaining:

All full-time and regular part-time toolmaker, lathe/grinder operator, header setup and operator, header operator, secondary equipment setup, secondary operator, reheader setup and operator, washer operator, shipping clerk, shipper clerk assistant, shipping clerk, shipper clerk assistant, shipping clerk helper, truck driver, hi-lo driver, inspector-A, maintenance-A, mainte-

nance-B, centerless grinder operator, centerless grinder setup, toolmaker/electrician, janitor, sorter, press operator, tool crib attendant, work cell setup and operator, and toolroom helper employed by Respondent at its Mt. Clemens, Michigan place of business; but excluding all guards and supervisors as defined in the Act.

4. The Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally, without notice to the Union and without offering to bargain with it, changing the terms of the collective-bargaining agreement, by (1) failing from October 1 through 19, 1990, to make payments into the employees' retirement savings plan, (2) failing to pay certain unit employees their accrued vacation pay earned prior to October 19, 1990, to March 25, 1991, and (3) failing to pay its health insurance premiums for the CIGNA medical insurance from October 15, 1990, to March 25, 1991, as required by the contractual provisions of the collective-bargaining agreement, dated March 1, 1990.

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

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, I recommend that it be ordered to cease and desist, and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing (1) to make retirement savings plan contributions, (2) to pay certain employees accrued vacation in pay, and (3) to pay insurance premiums, as required in the collective-bargaining agreement, the Respondent must be ordered to make the contributions and the payments on behalf of the unit employees subject to the approval of bankruptcy court with any interest or other sums applicable to the payments to be computed in accordance with the Board's decision in *Merryweather Optical Co.*, 240 NLRB 1213 (1979). The Respondent must make the unit employees whole for any losses they may have suffered as a result of its failure to make the contractually required payments and contributions, *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), and with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent would also be ordered to bargain with the Union as the collective-bargaining representative of the unit employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

⁴If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and rec-

ORDER

The Respondent, International Screw Division of Everlock Fastening Systems, Inc., Employer and Debtor in Possession in Bankruptcy, Mt. Clemens, Michigan, its trustee, officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to bargain collectively with the Union and unilaterally and without notice to the Union changing the terms of the collective-bargaining agreement, by failing to make contributions into contractually required retirement savings plan or failing to pay employees the accrued vacation pay or failing to make insurance premium payments.

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

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

(a) Make all retirement savings plan contributions and payment to employees for their accrued vacation pay and all insurance premium payments which have been unlawfully withheld, with interest pursuant to the collective-bargaining agreement and make whole the employees in the unit for any losses directly attributable to the withholding of those contributions, or payments with interest, as set forth in the remedy section of this decision.

(b) Bargain collectively with the Union as the exclusive bargaining representative of the employees in the aforementioned unit.

(c) 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.

(d) Post at its facility in Troy and Mt. Clemens, Michigan, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

ommended 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.

⁵If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

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

WE WILL NOT refuse to bargain with the Mechanics Educational Society of America, AFL-CIO, and unilaterally and, with notice to the Union, changing the terms of the collective-bargaining agreement by failing to make contractually required contributions to the retirement savings plan or to make insurance premium payments or payments to employees for accrued vacation pay.

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 make the retirement savings plan contributions and payments to certain employees for their accrued vacation pay and all insurance payments which we have unlawfully

withheld, with interest, pursuant to the collective-bargaining agreement between ourselves and the Union.

WE WILL make whole our employees in the unit for any losses directly attributable to our withholding of the payments or contributions, with interest. The appropriate unit is:

All full-time and regular part-time toolmaker, lathe/grinder operator, header setup and operator, header operator, secondary equipment setup, secondary operator, reheader setup and operator, washer operator, shipping clerk, shipper clerk assistant, shipping clerk, shipper clerk assistant, shipping clerk helper, truck driver, hi-lo driver, inspector-A, maintenance-A, maintenance-B, centerless grinder operator, centerless grinder setup, toolmaker/electrician, janitor, sorter, press operator, tool crib attendant, work cell setup and operator, and toolroom helper employed by Respondent at its Mt. Clemens, Michigan place of business; but excluding all guards and supervisors as defined in the Act.

INTERNATIONAL SCREW DIVISION OF
 EVERLOCK FASTENING SYSTEMS, INC., EM-
 PLOYER AND DEBTOR IN POSSESSION IN
 BANKRUPTCY