

Circuit-Wise, Inc. and United Electrical, Radio and Machine Workers of America (UE). Cases 34-CA-4768, 34-CA-4789, 34-CA-4812, and 34-CA-4931

December 16, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

This case involves the issue of whether the Respondent's conduct during a strike violated Section 8(a)(1), (3), and (5) of the Act.¹

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,² and conclusions and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Circuit-Wise, Inc., North

¹On May 19, 1992, Administrative Law Judge Jesse Kleiman issued the attached decision. The Respondent filed exceptions, a supporting brief, and an answering brief to the cross-exceptions taken by the General Counsel. The General Counsel filed cross-exceptions and an answering brief to the Respondent's exceptions.

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

We grant the Respondent's unopposed motion to take official notice of the decision by Administrative Law Judge Wallace H. Nations in a related proceeding against the Respondent in Cases 34-CA-5086 et al., adopted by the Board in *Circuit-Wise, Inc.*, 308 NLRB 1091 (1992).

²The 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.

In adopting the judge's finding that the Respondent, acting through its supervisor, Merle Ames, threatened union representatives at the picket line with physical assault in violation of Sec. 8(a)(1), we note that the issue before Judge Nations in the prior case was whether the Respondent properly investigated the incident involving Ames and acted in a manner consistent with its treatment of discharged strikers. We further note that, in resolving this issue, it was not necessary for Judge Nations to determine whether Ames threatened striking employees or whether he intended to drive his motorcycle at an unsafe speed, dangerously close to the picketers.

We find no merit to the Respondent's argument that its failure to make longevity bonus and vacation payments to strikers was based on a legitimate and substantial business justification because of its purported policy of terminating employees who had been on a leave of absence for more than 6 months, and ceasing any payments to them on termination. As noted by the judge, unfair labor practice strikers retain their status as employees (*NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967)) and the Respondent has failed to meet its burden of demonstrating a clear policy of denying such benefits to employees who were on leave for more than 6 months but were not terminated.

Haven, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.³

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

“(e) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.”

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

³The General Counsel excepts to the judge's failure to include the Board's broad injunctive cease-and-desist language in the recommended Order. We find merit in this exception. In view of the Respondent's repeated violations of the Act in this case and prior cases (306 NLRB 766 and 308 NLRB 1091 (1992)), and the egregious nature of those violations, we find that a broad injunctive order is warranted. *Hickmott Foods*, 242 NLRB 1357 (1979).

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten union representatives or employees on the picket line with physical or vehicular assault.

WE WILL NOT fail to pay accrued longevity bonuses to employees because they were engaged in a strike.

WE WILL NOT fail to pay accrued vacation benefits to employees because they were engaged in a strike.

WE WILL NOT fail and refuse to meet and bargain with United Electrical, Radio and Machine Workers of America (UE) as the exclusive representative of the employees in the appropriate unit described below.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL pay striking employees any accrued longevity bonuses due them with interest.

WE WILL pay striking employees any accrued vacation benefits due them with interest.

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

All full-time and regular part-time production and maintenance employees employed by us at our North Haven, Connecticut facility including employees involved in the production of products for Mint-Pac Technologies, Inc., chemical technicians and waste water treatment technicians; but excluding all other employees, lead persons, office clerical employees and guards, professional employees and other supervisors as defined in the Act.

CIRCUIT-WISE, INC.

Michael A. Marchionese, Esq., for the General Counsel.
Howard I. Wilgoren, Esq., for the Respondent.
Jamie L. Mills, Esq. (Rosenblatt & Mills, Esqs.), for the Union.

DECISION

STATEMENT OF THE CASE

JESSE KLEIMAN, Administrative Law Judge. Charges and an amended charge were filed in Cases 34-CA-4768, 34-CA-4789, 34-CA-4812, and 34-CA-4931 on June 4 and 21, July 9, and August 23 (amended charge filed in Case 34-CA-4812) and October 16, 1990, respectively, by United Electrical, Radio and Machine Workers of America (UE) (the Union). Based upon these charges, complaints, and notices of hearing were issued on July 16, August 16 and 24, and November 29, 1990, respectively, against Circuit-Wise, Inc. (the Respondent). By Orders dated August 24 and November 29, 1990, these cases were consolidated for purposes of hearing. By answers received August 6 and 27, September 6, and December 7, 1990, respectively, the Respondent denied the material allegations in the complaints and amended complaint. The case was tried in Hartford, Connecticut, on February 20, 21, and 22, 1991. By Order dated March 5, 1991, this case was declared closed.

The issues presented in this case are whether the Respondent through its supervisor, Merle Ames, violated Section 8(a)(1) of the Act by threatening union representatives on the picket line in the presence of employees, with physical assault; whether the Respondent violated Section 8(a)(1), (3), and (5) of the Act by unilaterally and without prior notice to the Union and opportunity to bargain thereon, changed its performance and longevity bonus policy, denying longevity bonuses to its striking employees; whether the Respondent violated Section 8(a)(1), (3), and (5) of the Act by denying its striking employees accrued vacation benefits; and whether the Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to meet and bargain with the Union in good faith as the exclusive collective-bargaining representative of its employees.

On the entire record and the briefs filed by the General Counsel and the Respondent and upon my observation of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, Circuit-Wise, Inc., a Connecticut corporation with an office and place of business in North Haven, Connecticut, is engaged in the business of manufacturing printed circuit boards. The Respondent annually, in the course and conduct of its business operations, purchases and receives at its North Haven facility products, goods, and materials valued in excess of \$50,000 directly from points located outside the State of Connecticut. The consolidated complaints allege, the Respondent admits, and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Additionally, the General Counsel alleges, the Respondent admits and I find that the following persons at all times material herein are supervisors within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act: Jack Mettler (president); Rollin Mettler (chariman of the board); Thomas McMahon (personnel manager); Susan Migliazza (benefits coordinator); David Schumacher (vice president of manufacturing); and Merle Ames (supervisor, HASL department).

II. THE LABOR ORGANIZATION INVOLVED

The complaints allege, the Respondent admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act, and that by virtue of Section 9(a) of the Act, the Union is the exclusive bargaining representative for the purposes of collective bargaining of the Respondent's employees in a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act composed of

All full-time and regular part-time production and maintenance employees employed by the Employer at its North Haven, Connecticut facility including employees involved in the production of products for Mint-Pac Technologies, Inc., and chemical technicians; but excluding all other employees, leadpersons, office clerical employees and guards, professional employees and other supervisors as defined in the Act.¹

¹ At the hearing, the General Counsel moved to amend the complaints to include the classification of waste water treatment technicians in the appropriate unit, based on a finding by Administrative Law Judge Raymond Green in *Circuit-Wise, Inc.*, Case 39-CA-3885 et al. JD(NY)-2-91. I granted the motion. As Judge Green stated in his decision:

On the other hand, I see no justification for the company's contention that these new jobs [Waste Water Treatment Technicians] should be outside the bargaining unit. On the contrary, it is my opinion the new job classification was substantially similar to the old job, requiring at most, marginal increase in educational background. Virtually all of the job functions of the new classification were done by the old workers, if perhaps with less attention to detail.

As the bargaining unit in both Judge Green's case and the instant case are the same, established by the Board pursuant to a Decision and Direction of Election, and as the new job classification is sub-

On March 24, 1992, the Board issued its decision in the prior *Circuit-Wise, Inc.*, case above, which adopted the judge's findings of the inclusion of the waste water treatment technicians in the appropriate unit. The Board also found therein that the Respondent had unlawfully withdrawn recognition from waste water technicians thereby violating Section 8(a)(5) and (1) of the Act. *Circuit-Wise, Inc.*, 306 NLRB 766 (1992).

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background and Stipulated Facts

Pursuant to a Decision and Direction of Election dated April 14, 1988, an election was held on May 13, 1988, in the above-described unit of the Respondent's employees found appropriate for the purposes of collective bargaining. Having received a majority of the votes cast in its favor the Union was certified as the exclusive collective-bargaining representative of such employees on May 24, 1988. Commencing on June 9, 1988, and continuing until August 1, 1989, the Respondent and the Union met a total of 38 times for the purpose of negotiating a collective-bargaining agreement. During this period the parties exchanged proposals and counter proposals. On July 18, 1989, the Respondent presented to the Union what it termed its "final offer." As of that date the parties had reached tentative agreement on the following subjects:

Preamble, Recognition (Article I), Purpose of Agreement (Article II), Prior Customs and Practices (Article III), Equal Rights (Article VII), Holidays (Article IX), Vacations (Article X), Discharge and Discipline (Article XIII), Supervisors (Article XIV), Safety and Health (Article XV), Bulletin Boards (Article XVI), Seniority (Article XVII), Cafeteria (Article XVIII), Jury Duty (XIX), Military Leave (Article XXI), Bereavement Leave (Article XXII), Educational Assistance Program (Article XXIII), and Productivity (Article XXIV).

Although there was no agreement on the Leave of Absence provision (art. XX), the parties did tentatively agree to the provisions of section 3 thereof pertaining to leave of absences for union conferences and conventions. All of these tentative agreements were included in the Respondent's "final offer."

Under the Respondent's vacation policy, as set forth in its Employee Manual, the only written description of its bonus and vacation policy, employees are required to use all of their vacation benefits if they have less than 1 week and at least 1 week if they have more, during the annual plant shutdown period which in 1990 was from July 2 to 13, 1990. The Respondent also had a plant shutdown from December 21, 1990, to January 2, 1991, which included three paid holi-

stantially similar to job categories in the existing unit and noting that the Respondent did not except to this finding in Judge Green's decision nor produce evidence which necessitates a contrary finding, and that the same parties are involved, I find and conclude that the unit appropriate for the purposes of collective bargaining shall also include the classification waste water treatment technicians. *Leeds Cablevision*, 277 NLRB 103, 109 (1985); *E. V. Prentice Machine Works*, 120 NLRB 1691 fn. 2 (1958); *Moulton Mfg. Co.*, 152 NLRB 196, 207-209 (1965).

days during this closing. Moreover, according to the Respondent's leave of absence policy, any employee absent 6 months for any reason is terminated, the only exception thereto, based on statute, is for employees absent on military leave.

The Union commenced a strike on September 11, 1989, which ended on February 11, 1991.²

B. Threats to Union Representatives

The complaint in Case 34-CA-4789 alleges that on or about June 14, 1990, the Respondent, acting through its supervisor and agent Merle Ames, threatened union representatives at the picket line at its North Haven facility with physical assault in the presence of employees, in violation of Section 8(a)(1) of the Act. The Respondent denies this allegation.

1. The evidence

The record shows that after the commencement of the strike on September 11, 1989, and the establishment by the Union of a picket line at the entranceway to the Respondent's property on Sackett Point Road, the North Haven Police Department regularly assigned patrol officers to that site to direct and monitor the flow of traffic on this roadway and the vehicles entering and leaving the Respondent's premises through such entranceway, and to ensure the peaceful nature of the picketing activity. In accomplishing this task the police had instituted the following procedure: Vehicles on Sackett Point Road indicating an intention to enter onto the Respondent's property through the entrance driveway were stopped in line by the police officer directing traffic; the officer would then blow his whistle signaling the pickets blocking the entranceway to move aside and behind a painted yellow demarcation line on either side of the driveway leaving an opening through which such vehicles could proceed whereupon the police officer would direct the vehicles waiting in line to turn into the driveway; the picketeers would then close ranks and resume their picket line across the entranceway.

The evidence discloses that this entranceway to the Respondent's property is approximately 30-40 feet wide from curb to curb. Because of the picketing activity, barricades were erected on either side of the driveway narrowing the entranceway to an approximate width of 12-16 feet with painted yellow lines on both sides outlining the parameters of this area in the center of the driveway to be used by vehicles entering or leaving the premises.³ Additionally, the yellow lines served as guidelines behind which the strikers would position themselves for safety regarding any moving vehicles. Moreover, further up the driveway entering vehicles were again detained at a stop sign located near a guard shack by the Respondent's privately hired security guards who

²Judge Green in his decision in *Circuit-Wise, Inc.*, supra, found this to be an unfair labor practice strike from its inception. The Respondent did not take any exception to this finding and I therefore adopt and accept it in the instant case. *Leeds Cablevision*, supra; *Moulton Mfg. Co.*, supra; *E. V. Prentice Machine Works*, supra.

The Board affirmed this finding in *Circuit-Wise, Inc.*, supra.

³See G.C. Exh. 51 (Rough map of the entranceway and surrounding area).

checked the identity and purpose of the vehicle's occupants visiting the property.

On Thursday, June 14, 1990, two North Haven police officers, Patrolman Ted Stockman and Sargeant Frederick Williams, were assigned to patrol duty at the Circuit-Wise facility. Patrolman Stockman arrived at the Sackett Point Road entranceway to the Respondent's premises at 6 a.m. and began directing traffic on the roadway. Sargeant Williams arrived there between 6:20 a.m. and "shortly before seven a.m." to supervise and assist Stockman in the performance of his duties.

According to the testimony of General Counsel's witnesses, Williams and Stockman, at approximately 6:50 a.m. that morning Officer Stockman signaled the strikers to open the picket line to allow traffic stopped in line to turn into the driveway. The picketeers having moved behind the yellow safety lines, Stockman directed the waiting vehicles to proceed onto the Respondent's property. Operating a motorcycle, the Respondent's supervisor Merle Ames, entered the driveway at an "unreasonably fast" speed and in a "direct course "towards the strikers standing behind the yellow lines. Williams testified that instead of entering the driveway at its center, Ames made a "quick and pointed turn directly towards the pickets" and drove so close to the strikers, especially one in particular, William Holden,⁴ an organizer for the Union, that they were compelled to hurriedly move backwards to avoid being struck by the motorcycle.⁵ Stockman testified similarly stating that Ames had turned into the driveway "cutting the corner much closer than he needed to. And he was also traveling a little faster than was normal." Stockman continued that he noticed Ames leaning to the left "more than he needed to, to make the turn" and that the motorcycle's left handlebar almost struck Holden who had to move out of the way so as not to be hit.

Williams related that he motioned to the security guards stationed further up the driveway to detain Ames which they did, and then Williams advised Ames that he was operating his motorcycle in a reckless manner by driving too close to the picket line endangering the strikers and requested that Ames produce his drivers license. While this was happening, Williams noticed that Ames had a 12-15-inch wooden "billy club" fastened to the seat of his motorcycle and confiscated it as a dangerous weapon. Williams added that when Ames opened his "saddle bags" (storage compartments attached to

⁴Williams acknowledged that the strikers were shouting out something while Ames was driving across the picket line but could not remember what it was and that Holden was usually more vocal on the picket line than any of the other strikers. However, Williams also testified that he had never heard any of the pickets shout out threats to anyone entering or leaving the Respondent's facility. Stockman testified that during this incident Holden was just standing there saying nothing.

⁵Williams testified that in his opinion, based on his experience as a police officer having engaged in traffic control duties, Ames drove his motorcycle on to the driveway that morning in an "unreasonable and imprudent" manner "based on the presence of pedestrian strikers on the picket line." Moreover, Williams' official "Case/Incident Report" of this occurrence states that Ames:

[D]rove onto the driveway at a speed greater than was reasonable and the wheels of his motorcycle rode across the clearly visible demarcation line, nearly striking one of the approximately 15 persons who were standing in an assembled area of the strike line.

the rear of the motorcycle) to obtain his drivers' license and/or vehicle ownership Williams observed within, a "huge hunting knife" in a sheath, which he also confiscated. Williams then placed Ames under arrest for reckless driving and carrying dangerous weapons.⁶

Williams also testified that approximately 3 weeks earlier, while directing traffic at this same Sackett Point Road site, he had been obliged to caution Ames for failing to stop when he signaled him to do so, instead driving a van towards the strikers on the picket line across the Circuit-Wise entranceway and before Williams could signal and direct them to safety. Williams stated that Ames' action could have endangered the strikers, that Ames "apparently ignored, disregarded or didn't see my clear signal," and that Ames had told him that he had not heard Williams' signal whistle.

With regard to this incident the General Counsel called two other witnesses, John Hannon and Antonina Busetta who were present on the picket line when it occurred on June 14, 1990,⁷ and their testimony in most part paralleled that as given by Williams and Stockman. However, Busetta also testified that Ames had actually touched Holden when he swerved his motorcycle close to the strikers beyond the yellow safety line causing them to step backwards to avoid being run over. She stated that Holden was just standing behind the yellow line doing nothing when this happened and immediately thereafter the strikers began "screaming and yelling because we thought that Billy got run over." Busetta also related that Sargeant Williams exhibited the confiscated weapons to Holden and asked him if he knew that Ames had possessed these and Holden responded "No."

The testimony of the Respondent's witnesses concerning what happened that morning of June 14, 1990, is in significant part different from that given by the General Counsel's witnesses, although there is no dispute that on that day Merle Ames was arrested by the North Haven police for an incident which occurred on the picket line at the Respondent's facility as Ames was arriving for work that morning.

Ames testified that when the police officer directing traffic at the entranceway to the Respondent's property signaled him to proceed, he turned into the driveway on his motorcycle going 6-8 miles per hour and riding approximately 18-24 inches from the yellow line behind which the strikers were standing. According to Ames, Holden and a few of the strikers were standing on the yellow line, left side, and Holden was, "Waving his arms out in the air and leaning over the line and screaming and hollering. . . . He called me a fucking asshole; a cripple."⁸ Ames denied that he had attempted to assault Holden or any of the other strikers with his motorcycle, or that he had cut the entranceway corner sharply, or that the motorcycle had come in contact with Holden, but he admitted that while Holden was leaning over the yellow line "he was extremely close to me with his arms

⁶Williams testified that Ames had told him that he felt threatened by the pickets and that he carried the hunting knife "for his own protection."

⁷Hannon is neither employed by Respondent or the Union but instead is a community activist who picketed on Thursdays to show his "support for the UE strikers." Busetta however is an employee of Circuit-Wise, Inc.

⁸It appears that Ames wears a leg brace.

and his hands.”⁹ Ames also testified that he normally drove his motorcycle 18–24 inches from the yellow demarcation lines on entering the Respondent’s driveway but that at times he also drove it further away, presumably closer to the center of the entranceway. Moreover, Ames recounted that the police officer directing traffic at this site allowed only one line of traffic to proceed on the driveway at any one time, either in or out of the entranceway, although the driveway is wide enough to handle two lanes of traffic at the same time, one entering and one leaving.

Ames continued that when he was advised by a security guard further up the driveway that a police officer wanted him he pulled over to the side whereupon Sargeant Williams approached and told him that he was being arrested for reckless driving. Ames stated that Williams then observed the nightstick attached to his motorcycle and told Ames that he was also arresting him for carrying a dangerous weapon. Williams asked Ames if he had any other weapons and at first he said no, but then said that “there might be a hunting knife in one of the saddle bags.” On finding a hunting knife in Ames’ saddlebags, Williams also confiscated this weapon. Ames explained that when driving his motorcycle he has at times experienced problems with dogs chasing after him and he uses the nightstick to fend them off and to protect himself, while he carries the knife for use on hunting and camping trips which he and his wife occasionally take on weekends.

Ames further testified that a few weeks prior to this incident while he was operating his motorcycle near the “strike trailer,” Holden “stepped to the curb and [bent] down in a motion as he was going to throw something at me,” which caused Ames to momentarily lose control of the motorcycle.

In support of Ames’ account of what occurred the Respondent offered the testimony of Steve Licitra and the statements of Barry Lazarra and Patrick McQuown,¹⁰ former security guard employees of Boardsen Associates, Inc., who had been present at the Respondent’s premises on June 14, 1990, and observed the incident involving Ames as it occurred. Boardsen Associates, Inc., a private investigative and guard service, had been retained by Circuit-Wise, Inc. to provide security services for the Respondent during the strike activity at its facility.

Licitra testified that on June 14, 1990, while he was talking to his supervisor, sargeant Barry Lazarra and fellow security guard, Patrick McQuown at the Respondent’s facility,¹¹ he observed Merle Ames drive his motorcycle onto the Respondent’s property, “The cop blew his whistle twice, the picket line separated and Merle Ames proceeded into Circuit-Wise.” Lazarra stated that as Ames entered the driveway the

⁹The handlebars of Ames’ motorcycle protrude out from the center of the bike approximately 12 inches on each side.

¹⁰At the time of the hearing Lazarra was in the United States Armed Forces, his reserve unit having been called to active status, while McQuown was attending an “out of the state” college and therefore were allegedly unavailable as witnesses. Moreover, these statements were filed by Lazarra and McQuown as incident reports required as part of their duties and therefore are records kept in the normal course of Boardsen Associates, Inc. business operations.

¹¹Licitra testified that Lazarra had previously instructed the security guards to advise him whenever they observed Billy Holden on the picket line because of problems which had occurred previously on the picket line.

strikers were “yelling names and stuff” and Holden, who was standing on the yellow line, was also “calling names to Merle Ames, waving his hands, gestures, I don’t know what the gestures were.”¹² Licitra recounted that Ames was located about 2 feet away from Holden while this was happening, was driving his motorcycle at a “reasonable speed” on entering the driveway, did not “attempt to cut the corner in any way,” never touched Holden with his motorcycle, and did not drive his vehicle towards the strikers on the picket line. Licitra’s account of what occurred thereafter between Ames and Sargeant Williams which resulted in Ames being arrested is somewhat similar to that as given by the General Counsel’s witnesses.

Moreover, while the statements of Lazarra and McQuown do set forth that Ames “passed the picket line at least 2 feet from the line painted on the right side where Bill Holden was standing,” and that “Merle Ames entered in a normal speed coming in on my right. He was 1 to 2 feet away from the line,” respectively, these statements were quite brief and undetailed as to the actual incident.

2. Analysis and conclusions

In determining the credibility of the witnesses of the respective parties as concerns this particular issue, I have carefully considered the record evidence, and have based my findings on my observation of the demeanor of the witnesses, the weight of the respective evidence, established and admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole, and tend to credit the account of what occurred as given by the General Counsel’s witnesses.¹³ Their testimony was given in a forthright manner, was generally corroborative and consistent with each others, and apparently consistent with the other evidence in the record.¹⁴ This is not to say that I was unimpressed with the testimony of the Respondent’s witnesses in this regard as well.¹⁵ However, in reaching my

¹²Licitra stated that the strikers on the picket line yelled names at all motor vehicles entering onto the Respondent’s property. However both Williams and Stockman denied seeing Holden waving his arms and gesturing at Ames when he was entering the driveway, although Williams acknowledged that the strikers were shouting something at Ames on his entry.

¹³*Parkview Furniture Mfg. Co.*, 284 NLRB 947 (1987); *Gold Standard Enterprises*, 234 NLRB 618 (1978); *V & W Castings*, 231 NLRB 912 (1977); *Northridge Knitting Mills*, 223 NLRB 230 (1976).

¹⁴The Respondent asserts in its brief that the General Counsel’s witnesses were “contradictory and conclusionary.” I do not agree. For example, Williams testified that he arrived at the Sackett Point Road site sometime between 6:20 a.m. and “shortly before seven,” and on cross-examination he testified that he had arrived at 6:30 a.m., “Thereabouts.” However, while I did find some inconsistencies between their testimony, these did not significantly alter the generally corroborative nature of the testimony of these witnesses. For example, Busetta testified that she believed Ames had actually touched Holden with his motorcycle because Holden suddenly stepped backwards to avoid being struck, but all the other witnesses including the Respondent’s stated that they observed no contact at all.

¹⁵The General Counsel in his brief points to the failure of the statements of security guards Lazarra and McQuown to corroborate Ames’ testimony that Holden was standing on the yellow safety line, leaning out and waving his arms as Ames passed by. However,

Continued

above credibility determination, I particularly note that both Williams and Stockman were police officers apparently trained and experienced in traffic control duties,¹⁶ that they, of all the witnesses who testified regarding this incident, seemed the most neutral with the least reason to change, alter, or misstate what actually occurred that morning,¹⁷ and that such facts as are uncontradicted in the record support the General Counsel's witnesses account of this incident such as: Ames drove his motorcycle onto the entranceway turning towards the strikers stationed behind the yellow safety lines and leaning into the turn and passing within 2 feet or less of these people causing them to move backwards to avoid being hit by his vehicle, when he could have safely and prudently proceeded down the middle of the driveway which is 16–18-foot wide; and he operated his vehicle at a speed which, under the circumstances present, experienced police officers deemed faster than would be reasonable and safe with the strikers present.

Based on all the evidence in the record, I find that Merle Ames, a supervisor, deliberately drove his motorcycle unreasonably close to Holden and the other strikers at an excessive rate of speed under the circumstances present at the time,¹⁸ with the intent to frighten them because they were picketing. Implicit in Ames' behavior towards Holden and the other pickets was a threat to assault them, particularly Holden, for the purpose of deterring them and others from continuing to picket. Such conduct violates the Act. As the Board held in *Green Brier Nursing Home*, 201 NLRB 503 (1973), "threatening [pickets] with vehicular assault constitutes conduct violative of Section 8(a)(1) of the Act."¹⁹

Moreover, the fact that Holden was a union representative and not an employee does not render Ames' conduct any less violative of the Act. Threatening a union representative with serious bodily injury in the presence of employees violates Section 8(a)(1) of the Act.²⁰ Nor do I find that the Respondent has established any conduct on the part of Holden or the other pickets which constitutes provocation for Ames' action. While there is evidence that the pickets were shouting at Ames as he entered the driveway and, even assuming arguendo, that Holden was yelling obscenities at him and waving his arms at Ames at the time, this would in no way

Sergeant Williams testified that the strikers were shouting something at Ames as he crossed the picket line into the driveway.

¹⁶It appears that Licitra and McQuown are college students who work as security guards as a side occupation or during summer breaks and the record is devoid of any evidence regarding Lazarra's traffic control experience, if any.

¹⁷While I am not saying that the testimony of Licitra, Lazarra, and McQuown would necessarily be influenced in favor of the Respondent's positions because they were employed by Boardsen Associates, Inc., a company which has a contract with the Respondent to supply security guards, yet this would have to be a consideration in evaluating and determining their credibility against that of police officers Williams and Stockman.

¹⁸Ames could easily have avoided even getting near Holden and the other pickets by driving into the plant in the middle of the driveway or at least several feet from the yellow safety line behind which Holden and the strikers were situated.

¹⁹Also see *Champ Corp.*, 291 NLRB 803 (1988); *Arcadia Foods*, 254 NLRB 1012 (1981); *B. N. Beard Co.*, 248 NLRB 198 (1980).

²⁰*Marchese Metal*, 270 NLRB 293 (1984); *Shenanigans*, 264 NLRB 908 (1982); *Jay Dee Transportation*, 243 NLRB 638 (1979).

justify Ames' threatening to assault Holden or the other pickets with his motorcycle.²¹

Additionally, the General Counsel in his brief asserts:

Ames' conduct was rendered even more coercive by the fact that he was admittedly carrying two dangerous weapons, a nightstick openly displayed on the seat of his motorcycle and a hunting knife concealed in the saddlebags. Employees on the picket line observed these weapons after Ames had nearly run over Holden. Although Ames did not use or threaten to use these weapons, his possession of them at the picket line was also coercive. *Ford Brothers, Inc.* [294 NLRB 107 (1989)].

It is unclear to me whether the General Counsel is asserting an independent violation of Section 8(a)(1) of the Act by Ames' regarding possession of these weapons as occurred in *Ford Bros.*, supra, and *Highland Plastics*, 256 NLRB 146 (1981), cited therein, or as additional evidence of his coercive conduct regarding the operation of his motorcycle as found hereinbefore.

As the Board stated in *Ford Bros.*, supra:

We find that Hamilton's showing of his handgun in the course of an argument with a striking employee would reasonably tend to coerce the pickets from engaging in their lawful economic strike and picketing.⁴⁴ Even though Quillen may not have been frightened by Hamilton's gun, the judge erred in relying on this subjective factor in dismissing the complaint allegation. The test is not whether employees were in fact coerced by the employer, but whether the employee's conduct could reasonably be said to have a tendency to coerce employees in the exercise of their protected rights. Moreover, other employees either saw the gun or were informed about it. In the absence here of any factors concerning the Marietta picket line that might conceivably justify the possession and display of a gun, Hamilton's conduct constituted a threat in violation of Section 8(a)(1).

⁴⁴*Highland Plastics*, [supra].²²

Under the circumstances present in the case at bar, I would not find an independent violation of Section 8(a)(1) of the Act regarding Ames' possession of a nightstick and hunting knife while riding his motorcycle. Unlike the cases cited by the General Counsel, Ames did not show or brandish either

²¹The Board and courts have recognized that in strike situations particularly "strong emotions" are generated by union activity. *Champ Corp.*, supra; *Twilight Haven, Inc.*, 235 NLRB 1337 (1978). Also, in *Corriveau & Routhier Cement Block*, 171 NLRB 787 (1968), enf. denied in circumstances present 401 F.2d 341 (1st Cir. 1969), the Board stated, "Meaningful protection in this situation must require that relatively minor incidents, such as name calling or somewhat ambiguous or veiled threats do not remove the Act's protection from the perpetrator, or suffice to legitimize his discharge." One can analogize this to the instant case situation.

²²In *Highland Plastics*, supra, after pickets had lawfully requested that a truck driver honor their picket line, the employer's principal shareholder appeared brandishing a gun, and, in full view of the pickets, jumped on the running board to speak to the driver.

weapon while interacting with the pickets which, if this had happened, could reasonably be said to give rise to “a tendency to coerce employees in the exercise of their protected rights.”

From all of the above, I find and conclude that the Respondent, acting through its supervisor and agent, Merle Ames, threatened union representatives at the picket line with physical assault in the presence of employees, in violation of Section 8(a)(1) of the Act.

C. *The Longevity Bonus*

The complaint in Case 34–CA–4768 alleges that since on or about May 21, 1990, the Respondent changed its performance and longevity bonus policy and denied its striking employees accrued longevity bonuses without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain as the exclusive representative of its employees in an appropriate unit with respect to such acts and conduct, in violation of Section 8(a)(1), (3), and (5) of the Act. The Respondent denies these allegations.

1. The evidence

The Respondent’s bonus award plan provides that an employee who has completed 6 months of credited service by the end of the quarter from which profits are being distributed, will receive a bonus based on his/her overall performance rating. The plan also provides for a longevity bonus when the employee has 1 or more years of credited service by the end of the quarter from which profits are being distributed. Although the plan envisions bonus awards payable four times a year, this is subject to business performance and earned profits and at times has resulted in no bonus being paid to employees. The parties stipulated that the only written policies regarding the bonuses was the provision contained in the employee manual as set forth above.

The strike commenced on September 11, 1989. Thereafter, by notice dated February 16, 1990, the Respondent advised its employees that a bonus had been authorized payable on February 19, 1990, stating:

As you know, our bonus plan is divided into two parts, a performance portion and a longevity portion and the allocation will be the same as in the past.

As in the past, the performance portion will be paid only to employees with more than six months of service who worked all or part of the quarter. Since striking employees did not work during the October/December quarter, they are not eligible to participate in this portion of the bonus.

Also as in the past, the longevity portion will be paid to all employees with more than one year of service who were listed as active employees. This includes employees who were, during this time, on medical or military leaves of six months or less.²³ Our legal advisors

²³The reference to a “six-months or less” duration for medical or military leaves derives from another section of the Employee Manual which limits medical leaves to 6 months’ duration and provides that any employee who does not return within 6 months will be terminated. The Respondent’s witness, Mary Ann Hudson, its human resources technician, testified that the 6-months rule applies

inform us that we must also include in this category employees who were on strike during this quarter and pay them the longevity portion only.

We do not like this or agree with it, but we legally have no choice. Fortunately, the longevity portion to be paid to the strikers is a very small amount, about 2% of the total bonus pool. Possibly those on strike will choose to thank us for this contribution to their welfare as we enter the plant rather than to yell obscenities and idiotic claims.

By notice dated February 19, 1990, the Respondent explained to its striking employees why they were only receiving the longevity portion of the bonus:

Our bonus policy provides that all employees are entitled to the longevity portion of the bonus, whether they worked or not. Only employees who actually worked during all or part of the quarter involved are entitled to the performance portion of the bonus. Accordingly, you are entitled to receive the longevity portion of the bonus only.

Neither the Employee Manual nor the February 16, 1990 notice to employees or the February 19, 1990 notice to the strikers indicates that an employee’s right to receive longevity bonuses is subject to termination at any point.

Carol Lambiase, employed by the Union as an International representative, testified that in May 1990 the Union learned from one of the strikers that the nonstriking employees had received a quarterly bonus to the exclusion of the strikers. Lambiase stated that the Union received no notice from the Respondent that it had decided not to pay a longevity bonus to the strikers. By letter dated May 31, 1990, Lambiase protested the failure of the Respondent to pay the strikers a longevity bonus as a “unilateral change” in the employees’ benefits and requested information regarding the amount of the bonus paid to nonstriking employees. By letter dated June 27, 1990, the Respondent’s attorney, Howard I. Wilgoren, provided the requested information which revealed that nonstriking employees had received both longevity and performance bonuses. It is admitted that the Respondent ceased the payment of any longevity bonuses to strikers since May 1990.

The Respondent offered evidence that only one employee, Derrell Hilton, had ever been carried on the Respondent’s payroll on leave status for more than 6 months, since any other employee who had been absent for any longer period had been terminated. Hilton had received a leave of absence to join the Army and was carried on the Respondent’s payroll in leave status (pay status 20) from January 1986 until February 13, 1990, when the Respondent learned that Hilton had left the Army and was employed elsewhere. Other evidence in the record shows that Hilton received no “wages, tips and other compensation” from the Respondent for 1987 and 1988.²⁴ In 1989, Hilton received a bonus of \$53 from the Respondent for the first quarter of that year and a bonus check for \$23.34 was prepared for Hilton with the date of

to all leaves of absence other than military leave which by statute prohibits the termination of employees on military duty.

²⁴The Respondent offered no evidence to show whether Hilton received any bonuses in 1986, the first year of his military leave.

May 15, 1989, but voided on May 13, 1989, before it was issued. Hudson testified that the failure to void the prior bonus check was an error and its issuance to Hilton was a mistake. Hudson related that employees in pay status 20, i.e., leave status, receive bonuses until they are terminated at the end of 6 months as ceasing their employment. Hudson stated that employees who went out on strike in September 1989 were assigned a different number-pay status 25. Hudson added that while the Respondent's policy is that benefits cease after 6 months' absence, she conceded that no such policy is contained in writing and that her basis for attributing such a policy to the Respondent was based on the medical leave provision that after 6 months' duration the employee is required to return or is terminated.

2. Analysis and conclusions

In *Texaco, Inc.*, 285 NLRB 241 (1987), the Board set forth the governing principles for determining when an employer's suspension of benefits to strikers violates Section 8(a)(1) and (3) of the Act, adopting the *Great Dane* test for alleged unlawful conduct.²⁵

Under this test, the General Counsel bears the prima facie burden of proving at least some adverse effect of the benefit denial on employee rights. The General Counsel can meet this burden by showing that (1) the benefit was accrued and (2) the benefit was withheld on the apparent basis to a strike.

Once the General Counsel makes a prima facie showing of at least some adverse effect on employee rights, the burden under *Great Dane* then shifts to the employer to come forward with proof of a legitimate and substantial business justification for its cessation of benefits. The employer may meet this burden by proving that a collective-bargaining representative has clearly and unmistakably waived its employees' statutory right to be free of such discrimination or coercion. . . . If the employer does not seek to prove waiver, it may still contest the disabled employee's continued entitlement to benefits by demonstrating reliance on a *non-discriminatory* contract interpretation that is "reasonable and . . . arguably correct" [emphasis in original, footnote omitted], and thus sufficient to constitute a le-

gitimate and substantial business justification, for its conduct. Moreover, as under *Great Dane*, even if the employer proves business justification, the Board may nevertheless find that the employer has committed an unfair labor practice if the conduct is demonstrated to be "inherently destructive" of important employee rights or motivated by antiunion intent.²⁶

While *Texaco* and *Amoco* dealt with the payment of benefits to disabled employees absent during a strike, the Board has applied the same analytical framework to the withholding of other benefits.²⁷

Moreover, in determining whether a benefit is "accrued" under the *Texaco* test, the Board stated in *Texaco, Inc.*, supra at 245, "We emphasize the need for proof that the disability benefit is accrued, that is, 'due and payable on the date on which the employer denied [it].'"²⁸ In *Texaco, Inc.*, the Board further held that the "due and payable" standard is met when no further duties must be performed by the employee in order to qualify for the benefit or as the Board stated therein, supra at 246, "Benefits are due and payable based on past performance with no further work required for continuing receipt."

Applying the *Great Dane* principles articulated in *Texaco* to the situation here, I find that the General Counsel has proven a prima facie 8(a)(3) and (1) case concerning the Respondent's withholding of the longevity bonus from its striking employees. According to the Respondent's "Bonus Awards" plan, an employee with "one or more years of credited service by the end of the quarter from which profits are distributed" shares in the longevity portion of the bonus pool. Under the Respondent's own description of the bonus policy, "all employees are entitled to the longevity portion of the bonus, whether they worked or not."²⁹ Thus, it appears that entitlement to the longevity bonus is based solely on an individual's status as an employee without any requirement of further work for continuing receipt.³⁰ Since the law is well settled that unfair labor practice strikers retain their status as employees even when they have been permanently replaced³¹ it is clear that the longevity bonus was "due and payable" and had accrued to the striking employees who met the "one or more years of credited service" on the date on which the Respondent denied the longevity bonus to them.³² In addition, it is undisputed that the Respondent eventually withheld the longevity bonus from strikers while paying such benefits to nonstriking employees. Moreover, according to the evidence in the record, the Respondent was hostile to the payment of any bonus to strikers. Thus the apparent basis for the Respondent's decision not to pay the longevity bonus to

²⁵ *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967). The Court in *Great Dane* articulated the following test for violations turning on unlawful motivation:

First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is on the employer to establish that it was motivated by legitimate objectives since proof of motivation is most accessible to him. [388 U.S. at 34.]

²⁶ Accord: *Amoco Oil Co.*, 285 NLRB 918 (1987).

²⁷ *Glover Bottled Gas Corp.*, 292 NLRB 873 (1989) (bereavement and vacation benefits); *Forest Products Co.*, 286 NLRB 1336 (1987) (matching funds contributed by the employer to a Christmas savings program); *Bil-Mar Foods*, 286 NLRB 786 (1987) (vacation benefits).

²⁸ *Emerson Electric Co. v. NLRB*, 650 F.2d 463 (3d Cir. 1981), cert. denied 455 U.S. 939 (1982). Also see *Hecla Mining Co.*, 286 NLRB 1391 fn. 1 (1987).

²⁹ This is in contrast to the performance portion of the bonus which provides that only employees who actually worked during all or part of the quarter involved are entitled to the performance bonus.

³⁰ *Texaco, Inc.*, supra.

³¹ *NLRB v. Great Dane Trailers*, supra.

³² *Texaco, Inc.*, supra.

strikers in May 1990 was their status as strikers. Such denial of accrued benefits on the basis of protected strike activity warrants the inference of unlawful discriminatory conduct.³³ Consequently, the burden shifts to the Respondent to prove a legitimate and substantial business justification for its action.

The Respondent makes no argument here that the Union explicitly waived the right of employees to receive longevity bonuses in the event they engaged in protected strike activity. The Respondent does argue however that it had a non-discriminatory policy of terminating employees who are out of work for more than 6 months which is applicable to longevity bonuses and other benefits and since the strikers who were denied the longevity bonuses had been absent for more than 6 months, this was a ‘reasonable and . . . arguably correct’³⁴ interpretation of its policy sufficient to constitute a legitimate and substantial business justification for its conduct. I reject this argument.

First, it should be noted that the Respondent’s alleged non-discriminatory policy that payment of bonuses to employees on leave ceased after 6 months does not appear in its Employee Manual, nor anywhere else in writing. In fact, the only written policy is that employees who have been on leave of absence for 6 months are automatically terminated. Since bonuses are only paid to ‘employees,’ an individual who has been out for more than 6 months is no longer an employee and thus not entitled to a bonus. It seems clear to me that the incident of termination for being out of work or on leave for more than 6 months triggers the loss of benefits including the longevity bonus. It is well established that striking employees nevertheless remain employees, and for the Respondent to argue that striking employees are not on its payroll is to equate them with discharged or otherwise terminated employees.

Moreover, the Respondent, in support of its contention, was able to cite only one individual who was absent more than 6 months and was carried on Respondent’s payroll as an employee. The Respondent’s practice with respect to this individual, Derrell Hilton, who was on military leave, was not consistent. The Respondent’s records show that Hilton received a bonus of \$43 in 1989 which the Respondent asserts was made due to an oversight. Even assuming that this payment was a mistake, Hilton’s status was distinguishable from the strikers. In fact, the Respondent assigned different payroll codes to differentiate striking employees from employees on leave status.

From all the above, I find and conclude that the Respondent has failed to prove that its suggested interpretation of the provisions in its Employee Manual and policy to terminate employees on leave or absent for more than 6 months, as applied to the withholding of longevity bonuses to strikers is nondiscriminatory and reasonable and arguably correct. Further, the Respondent has not met its burden of showing that it denied the longevity benefits to strikers based on a legitimate and substantial business justification. Accordingly, I find that the Respondent violated Section 8(a)(3) and (1) of the Act when it withheld such accrued benefits from the striking employees. Similarly, because the Respondent had no established practice authorizing it to withhold a longevity

bonus from employees who were on strike, its decision to do so, without notifying the Union and affording it an opportunity to bargain about this change in employee’s established benefits, violated Section 8(a)(5) of the Act.³⁵

D. Vacation Benefits

The complaint in Case 34-CA-4812 alleges that since on or about June 29, 1990, the Respondent has denied its striking employees accrued vacation benefits and without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain as the exclusive representative of its employees in an appropriate unit with respect to such acts and conduct, in violation of Section 8(a)(1), (3), and (5) of the Act. The Respondent denies these allegations.

1. The evidence

The Respondent’s vacation benefits are set forth in its employee manual as follows:³⁶

Less than 10 months—1/2 day for each full month before June 1 of vacation year not to exceed 5 days.

10 months to less than 2 years—1 week
 2 years to less than 8 years—2 weeks
 8 years to less than 15 years—3 weeks
 15 years to less than 25 years—4 weeks
 25 years and over—5 weeks

The manual does not specifically require that employees be physically working during all or part of the year to earn vacation. Various of the General Counsel’s witnesses,³⁷ testified that they received full vacation benefits, based on their length of service, even during years when they were absent for medical reasons for periods of time ranging from several weeks to as long as 6 months. For example, McCutchen testified that after being out on medical leave for 6 months in 1988, on her return to work she found that the Respondent had initially deducted this absence calculating her vacation entitlement for the coming vacation year to 2 vacation days (16 hours). When she questioned her supervisor and her personnel director, Thomas McMahon, about this, her vacation was restored to 5 days (40 hours).

In the aforementioned prior proceeding, *Circuit-Wise, Inc.*,³⁸ Judge Green found that the Respondent has a practice of distributing to its employees each year a form advising them of the amount of vacation time they are entitled to during the upcoming vacation year, from June 1 through May 31. The amount of time accrued is based on length of service as of June 1. All employees are required to use the first 40 hours of earned vacation during the annual plant shutdown period in July, but can take any remaining vacation benefits, on request, at any time during the vacation year. Judge Green

³⁵ *Houston County Electric Cooperative*, 285 NLRB 1213 (1987).

³⁶ Employees earn paid vacation time based on ‘‘credited length of service’’ as of June 1 of each year.

³⁷ Janet McCutchen, Peggy Ann Rauccio, and Hattie McClary.

³⁸ Case 39-CA-3885 et al., JD(NY)-2-91. In the instant case I granted the General Counsel’s motion to take official notice and incorporate into the record the record in this prior proceeding involving the same parties (Case 39-CA-3885 et al.). Judge Green’s findings are based on the record in the prior proceeding.

³³ *Bil-Mar Foods*, supra.

³⁴ *Vesuvius Crucible Co. v. NLRB*, 668 F.2d 162 (3d Cir. 1988).

also found that there is no restriction on the use of vacation time, with employees having been permitted to use earned vacation time for sick leave or personal leave.

In the case at bar, by individual letters mailed to the Respondent in June 1990, the striking employees requested "all vacation pay due me which was accrued during the 1989–1990 vacation year. This is to be taken as per company policy during the scheduled shutdown."³⁹ By letters dated July 25, 1990, to each striker who had made such a request, the Respondent informed these employees that, "according to existing Company policy, you are not entitled to vacation pay at this time." The Union, by letter dated August 15, 1990, also requested, on behalf of the strikers, "their 1990–1991 vacation pay." The Respondent admittedly has not paid any vacation benefits to the striking employees for the current vacation year.

The Respondent apparently relies on the same evidence regarding Derrell Hilton, as previously set forth above, to support its position that striking employees were not entitled to any vacation benefits as of June 1, 1990, for the 1990–1991 vacation year, because they had been out of work for more than 6 months, applying its policy that employees who are out of work for 6 months or more are terminated. The Respondent offered no other evidence regarding its reason for denying striking employees' requested vacation benefits they had earned as of June 1, 1990.⁴⁰

2. Analysis and conclusions

As noted hereinbefore, the Board has applied the test enunciated in *Texaco, Inc.*, supra, to cases alleging a denial of vacation benefits to strikers as violative of Section 8(a)(3) and (1) of the Act.⁴¹ Pursuant to the Respondent's vacation policy contained in the Employee Manual, vacation benefits accrue as of June 1 of each year, based on the employee's length of service as of that date. Employees are entitled to use these vacation benefits during the 12-month vacation year, from June 1 through the following May 31 based on their past service with no further work required during the vacation year.⁴²

³⁹ The parties stipulated that the Respondent's scheduled shutdown for 1990 was July 2–13.

⁴⁰ In the prior proceeding, *Circuit-Wise, Inc.*, supra, the Respondent's contentions that employees had to take vacation time in order to receive vacation pay and that vacation time not used during a given vacation year is forfeited, was rejected by Judge Green, with the Respondent having failed to take any exception to this ruling in his decision. Moreover, as noted by Judge Green, the Respondent eventually paid the strikers the unused vacation benefits they had earned prior to June 1, 1989, in June 1990, while the prior proceeding was in progress. Importantly, the Board affirmed Judge Green's findings on this issue in its decision, *Circuit-Wise, Inc.*, 306 NLRB 766.

⁴¹ *Glover Bottled Gas Corp.*, supra; *Bil-Mar Foods*, supra.

⁴² Judge Green so found in the previous case, *Circuit-Wise, Inc.*, supra, holding that the Respondent's refusal to pay unused 1989–1990 vacation benefits to striking employees was unlawful. Judge Green specifically found that the striking employees were entitled to any vacation they had earned as of June 1, 1989, which they had not used by September 11, 1989, the time they went out on strike. The Respondent failed to except to these findings making them binding upon the same parties in this proceeding. See *Circuit-Wise, Inc.*, supra.

In applying the principles articulated in *Texaco, Inc.*, for the application of the test as set forth in *NLRB v. Great Dane Trailers*, supra, to the facts in this case, I find that the General Counsel has made a prima facie showing of some adverse effect of the denial of vacation benefits on employee rights by showing that the benefit in question was accrued and that it was withheld on the apparent basis of a strike.

In the instant case, the striking employees, and the Union on their behalf, sought any vacation benefits these employees had earned as of June 1, 1990, for use during the year ending May 31, 1991. As of June 1, 1990, the strikers remained employees, even though they had been on strike since September 11, 1989. Additionally, the strikers had worked at least part of the prior year, from June 1–September 11, 1989. The record evidence shows that employees need not work a full year, nor even be present on June 1, to earn the full vacation entitlement based on their length of service. Moreover, nothing in the Employee Manual regarding the Respondent's vacation policy requires any minimum amount of work to be performed before June 1 for vacation benefits to accrue. Based on the above, it is clear that the employee's right to vacation benefits for 1990–1991, based on their past service, had accrued as of June 1, 1990. It also appears that the Respondent's decision not to pay vacation benefits to employees who requested it in June, prior to the scheduled shutdown, was based on the strike action.⁴³

Under *Texaco, Inc.*, supra, the burden now shifts to the Respondent to prove a legitimate and substantial business justification for denying such vacation benefits to strikers. The Respondent's defense, similar to that proffered with respect to the denial of longevity bonuses to strikers as discussed hereinbefore, is that the strikers are not entitled to vacation benefits this year because they were absent for more than 6 months as of June 1, 1990. The analysis applied above with regard to the issue of longevity bonuses is substantially applicable to this issue of vacation benefits, as hereinbefore discussed. As noted, such a policy does not appear anywhere in the employee manual. In fact, employees who are on leave or out for more than 6 months, with an exception for military leave, are terminated and such employees receive their unused vacation benefits on termination. With respect to Hilton, on military leave for more than 6 months, there is no evidence in the record regarding whether or not he received any vacation benefits at all. Thus, the Respondent has not established a consistent practice of terminating vacation benefits for employees who have been out for 6 months as of June 1. Neither has the Respondent established that its interpretation of the provisions of its employee manual and its policy to terminate employees on leave of absence for more than 6 months as applied to the denial of vacation benefits to strikers is nondiscriminatory and reasonably and arguably correct.⁴⁴ Moreover, the Respondent has not met its burden of showing that it denied vacation benefits to strikers based on a legitimate and substantial business justification.⁴⁵

⁴³ Had the employees not been on strike, the Respondent's policy would have required them to use their vacation entitlement during the shutdown based upon the vacation amount accrued.

⁴⁴ *Texaco, Inc.*, supra. Also see *Glover Bottled Gas Corp.*, supra. Contrast, *Bil-Mar Foods*, supra.

⁴⁵ *Texaco, Inc.*, supra.

From all the above, I find and conclude that the Respondent violated Section 8(a)(3) and (1) of the Act when it denied its striking employees accrued vacation benefits. Furthermore, the Respondent violated Section 8(a)(5) of the Act when it unilaterally changed an established employee benefit and implemented such change without notice or bargaining with the Union thus denying vacation benefits which was not based on any existing policy with regard thereto.⁴⁶

E. *The Refusal to Meet and Bargain with the Union*

The complaint in Case 34-CA-4931 alleges that since on or about October 12, 1990, the Respondent has failed and refused to meet and bargain with the Union in violation of Section 8(a)(1) and (5) of the Act. The Respondent denies this allegation.

1. The evidence

In the aforementioned prior proceeding, Judge Green found that the Respondent had committed various unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the Act during the period when the parties were engaged in negotiations. Specifically, he found that the Respondent discriminatorily disciplined union activists, including two members of the Union's negotiating committee Lonnie Hailey and Frank Blazi; generally applied its rules more harshly to union activists; unilaterally modified the scope of the bargaining unit, over the Union's objections, by removing a classification of employees, i.e., waste water treatment technicians who were employed in the pollution control department; unilaterally changed the work schedules of certain of its employees, without any notice to the Union; refused to furnish information requested by the Union regarding replacement employees after the strike commenced, found to be relevant and necessary to the Union's performance of its duties as the bargaining representative of its employees and withheld vacation benefits from striking employees accrued before they went on strike. The Respondent did not take exception to these findings and conclusions in Judge Green's decision.

Moreover, in *Circuit-Wise, Inc.*, supra, the Board affirmed the myriad and substantial findings of Judge Green of unfair labor practices engaged in by the Respondent in failing to timely furnish or provide at all, information requested by the Union and relevant and necessary for the Union's performance of its duties as the collective-bargaining representative of its employees in an appropriate unit such as: the Respondent's refusal to furnish financial information in connection with the Respondent's proposal for a profit-based retirement plan, a significant issue separating the parties, and its refusal to provide the Union with information relevant to the Respondent's proposal to pay employees a quality bonus; in making unilateral changes in wages and working conditions such as unilaterally increasing employee contributions for medical insurance thereby in effect, reducing employee wages;⁴⁷ and in issuing warnings and suspensions and in dis-

charging employees because of their union activities,⁴⁸ the above violative of Section 8(a)(1), (3), and (5) of the Act as applicable, all of which is more particularly set forth in the above-mentioned Board decision in *Circuit-Wise*.

Furthermore, the Board in *Circuit-Wise* found that the Respondent had committed additional violations of the Act, specifically by denying access to a union health and safety expert for evaluation of workplace health and safety hazards in violation of Section 8(a)(5) in addition to Section 8(a)(1);⁴⁹ the Respondent's supervisor's statement to employee Blazi that he would have received an outstanding performance rating except for his union activities violates Section 8(a)(1) of the Act;⁵⁰ the Respondent's discriminatory enforcement of its no-solicitation rules against union supporters violated both Section 8(a)(3) and (1) of the Act;⁵¹ the Respondent's exclusion of the Union from its problem solving procedure, and its dealing directly with employees regarding their grievances violated Section 8(a)(5) and (1) of the Act;⁵² and the Respondent's conditioning the use of its problem solving procedure on an employee's willingness to forego union representation violated Section 8(a)(3) and (1) of the Act.⁵³

As stipulated by the parties, the Respondent and the Union have not met for the purposes of collective bargaining since August 1, 1989. At that last meeting the Respondent unilaterally declared impasse when the Union rejected the Respondent's July 18, 1989 contract proposal, its "Final Offer." The Respondent's personnel manager and member of its negotiating team, Thomas McMahon, testified that while there were a number of issues still unresolved as of August 1 such as, wages, group health insurance, management rights, pension, grievance procedure, no-strike clause, etc., the major issues creating an impasse were union security and drug testing. McMahon stated that the Union had maintained an inflexible position on these issues throughout the negotiations including the last negotiation session on August 1, 1989, insisting on the exclusion of any drug testing provision in any contract and the inclusion of a union-shop clause therein.

However, the evidence shows that the Respondent, with a new proposal on June 15, 1989, and modification thereof on June 23, 1989, reduced the scope of its drug testing proposal. While the evidence also shows that the Union maintained at the time its desire not to have a drug testing provision in the bargaining agreement,⁵⁴ by letter dated July 10, 1989, the

⁴⁸ For example, the Respondent discriminatorily denied an outstanding performance rating to employee Blazi because of his union activities.

⁴⁹ *Hercules, Inc.*, 281 NLRB 961 (1986), enf. 833 F.2d 426 (2d Cir. 1987).

⁵⁰ The Board, has consistently found that such a statement linking an employee's success on the job to involvement in union activities violates Sec. 8(a)(1) of the Act. *Armor Con-Agra*, 291 NLRB 962 (1988).

⁵¹ *Premier Maintenance*, 282 NLRB 10 (1986).

⁵² See *Harowe Servo Control*, 250 NLRB 958, 1049 (1980), and cases cited at fn. 250.

⁵³ *Circuit-Wise, Inc.*, supra.

⁵⁴ McMahon testified that at the negotiation sessions in both April and May 1989 union negotiators Lambiase and Hart remained adamant that the Union would "never sign a contract with Respondent containing a drug testing provision."

⁴⁶ *Circuit-Wise, Inc.*, supra; *Gulf & Western Mfg. Co.*, 286 NLRB 1122 (1987).

⁴⁷ Lambiase testified that this had a significant impact on the bargaining process since there had already been some give and take on the proposal of medical insurance and reevaluation by the Union would now have to be given to this issue.

Union, in effect, proposed a "just cause" standard.⁵⁵ Moreover, the Union therein also requested information from the Respondent regarding the procedures and criteria to be used to test employees so that the Union could "examine your proposed program." The Respondent did not supply the Union with this information until after the August 1, 1989 last negotiation session and the Respondent's declaration of impasse.

With respect to union security, McMahon testified that the Union's position through August 1, 1989, was that it would not sign a contract without full union security. The evidence does not show that the Union modified its position therein through August 1, 1989. While the evidence indicates it did so thereafter when Hovis informed the mediators in July 1990 that the Union would be willing to accept an "agency shop" provision, still up until August 1, 1989, it cannot be said that the Union would have done so earlier except perhaps to trade this off for a different issue concession, since there remained other important areas of disagreement between the parties as of that last bargaining session.

The Union in correspondence addressed to the Respondent during the month of August 1989, contested the Respondent's declaration of impasse, indicated its willingness to meet in an attempt to reach a collective-bargaining agreement, and advised the Respondent that the Union had "flexibility in our position on the remaining issues, both economic and non-economic." By letter dated August 23, 1989, the Respondent refused to meet with the Union unless the Union made "substantial modification to its positions," citing "wages, pension, union security, management rights and others" as "crucial" issues unresolved by the parties. On September 11, 1989, the Union struck the Respondent's facility which Judge Green found to be an unfair labor practice strike.

According to the evidence the Union then engaged in a campaign to enlist the support of the community, including religious leaders and local political leaders, in an effort to bring about the resumption of bargaining between the parties but to no avail. The Union's efforts in this respect were unsuccessful. Beginning in February 1990 the Union sought the appointment of a special mediator by the U.S. Secretary of Labor and in or about late June such a special mediator, Donald Doherty, was designated to attempt to settle the strike. Through Doherty's efforts, a meeting was arranged for July 6, 1990, in Boston to consider possibilities for reaching an agreement. Union President John Hovis testified uncontradictedly that Doherty had stated that the Respondent's terms for such a meeting were that the parties would not meet together in the same room, that there would be no formal exchange of proposals, and that this meeting was not to be considered a negotiation session. Doherty also advised Hovis that the Respondent's attorney, Howard Wilgoren, was

also concerned about any action which might be considered to impact adversely on his "impasse strategy."⁵⁶

Hovis met with Doherty and Federal mediator, Larry Gloeckler⁵⁷ on July 6, 1990, in Boston. Hovis testified that Doherty told him that the Respondent believed, based upon the Union's statements during negotiations, that the Union would never agree to a bargaining contract which did not contain a union security clause or one which had a drug testing provision or a 1-year contract, and that the Union had the Respondent's final offer and it was now up to the Union to make counterproposals. Hovis stated that he advised Doherty that the Union was prepared to move on the unresolved issues remaining to be negotiated such as: contract duration, managements-rights clause, grievance procedure, bargaining unit, wage structure, union-security, pension and drug testing. Specifically, Hovis testified that he told Doherty that while the Union desired a 3-year contract it would accept one for a 2-year term, but if necessary would accept a "one year" contract if other issues were agreed to; that the Union could probably "live with" the Respondent's modified management-rights clause proposal; that the Union was flexible on the grievance procedure proposal but there was a need to negotiate the number of stewards handling grievances; that the Union wanted the inclusion of the waste water treatment technicians in the bargaining unit as found by Judge Green; that the issue of health insurance could be resolved since the parties had already reached interim agreement that the Respondent and the employees would each pay half of the premium increases; that the Respondent had already given employees two unilateral wage increases in October 1989 and April 1990 since the commencement of the strike and that their wages were now close to the Union's proposals on this issue; that the Union might accept an agency shop provision in an agreement if the Respondent would accept a 2- or 3-year contract; that in order to intelligently consider the Respondent's pension plan proposal the Union required requested information which the Respondent had failed to supply and after which receipt the Union could then negotiate on this issue; that the Union would accept a drug testing provision if it were for cause and not random and in this connection wanted an employees assistance committee for appraisal and treatment of employee drug problems, and if other terms of such a provision were worked out; and indicated in other areas of dispute that the Union was "flexible" in negotiations. Hovis related that Doherty said that "the union was very flexible in its position and had some room to move," and that the mediators would now meet with Wilgoren, asking Hovis to leave the building. Doherty also asked Hovis if the Union were agreeable to a marathon bargaining session and Hovis said yes.

Hovis recounted that after his return to the mediator's office he was told by Doherty that the situation seemed hopeful, that the parties were "a lot closer than what we and they have realized" and that one additional meeting, with his speaking to the parties individually, would be necessary. Doherty also told him that Wilgoren had accepted, "in prin-

⁵⁵ Lambiase testified that in July 1989 and continuing thereafter, the Union was in the process of drafting a drug-testing counterproposal, using model language received from the International union headquarters when the Respondent declared an impasse on August 1, 1989. It should be noted that if credibility is at issue with regard to this, I would credit Lambiase's testimony over that of McMahon whose testimony, especially on cross-examination was at times evasive and/or forgetful, and Lambiase's statements are more supported by other evidence in the record.

⁵⁶ Wilgoren did not testify nor otherwise dispute Hovis' testimony regarding Doherty's statements. Because of 29 CFR § 401.2(a) Doherty was unavailable to either party as a witness.

⁵⁷ Gloeckler had participated in the parties negotiations prior to August 1, 1989.

ciple,” the idea of a marathon bargaining session, but would have to clear this with the Respondent, with the suggested dates of August 20, 21, and 22, 1990, for such a session to begin. According to Hovis, on July 11, 1990, Doherty called and advised him that the Respondent had decided not to resume negotiations.

By letter dated August 3, 1990, from Bernard E. DeLury, director of the Federal Mediation and Conciliation Service (FMCS) to Senator Joseph Lieberman of Connecticut, DeLury advised Senator Lieberman that while the FMCS commissioners who contacted the parties “found that while the apparent gap between the parties seemed very difficult to bridge, the real positions of the parties were probably much closer . . . that progress toward a settlement might result from further meetings with the parties,” which the Respondent declined to do. Senator Lieberman’s letter to the Respondent’s president, dated December 17, 1990, also noted that the FMCS’s commissioners had felt that “progress towards a settlement could be made by meetings because the positions of the parties were closer than they appeared,” and that the Respondent’s refusal to meet with the mediators either with or without the Union being present “to explore these possibilities,” was “unfortunate.”

The Union, by letter dated October 9, 1990, to the Respondent, requested that the “Company meet and bargain in good faith at the negotiating table in a sincere effort to reach an agreement.” Also in that letter the Union indicated our flexibility on many of the outstanding contractual issues and noted that it was over a year since the parties had met to negotiate a bargaining agreement, that the Respondent’s “three unilateral rate increases” to employees in the bargaining unit and the effect of the continuing strike on both parties “have changed the conditions and circumstances that existed in July 1989 and indicate that an agreement may now be possible.” The Respondent’s reply letter dated October 12, 1990, rejected the Union’s request for the resumption of bargaining, asserting that the “mere passage of time and increases to the wage scales” did not warrant such a move. The Respondent therein took the position that, “the impasse in bargaining which commenced with the Union’s rejection of the Company’s final contract offer on August 1, 1989, continues in effect at the present time.” This letter further stated:

The parties remain hopelessly deadlocked despite good faith negotiations of 38 sessions over a 14 month period. Among the impasse issues are several overriding and important mandatory subjects of bargaining contained in the Company’s final contract offer rejected by the Union on August 1, 1989, (including but not limited to, Drug Testing, about which you stated that the Union would “never sign a contract containing a drug testing provision; Management Rights; No Strike; Grievance Procedure and Arbitration; Pensions and Union Security). Stalemate on these issues makes resumption of bargaining fruitless.⁵⁸

⁵⁸The General Counsel in his brief states, “The issues cited by Wilgoren as creating this deadlock were somewhat different from those cited in his August 23, 1989 letter . . . [omitting] wages from his list of disputed items creating an impasse.” I find this of little significance since the Union in its subsequent letter of October 29, 1990, referring to the Respondent’s “three unilateral rate increases,”

On January 17, 1991, Judge Green issued his decision in *Circuit-Wise, Inc.*, supra. In his decision Judge Green stated:

Although I conclude that the parties were at impasse upon the Union’s rejection of the Company’s final offer, this does not mean that bargaining cannot or will not resume in the future. *Hi-Way Billards, Inc.*, 206 NLRB 22, 23 (1973). The Company’s final offer, including its proposal concerning quality bonuses, was never withdrawn and therefore is still a proper subject of bargaining if and when negotiations resume.⁵⁹

However, on March 24, 1992, the Board issued its decision in the above case, *Circuit-Wise, Inc.*, 306 NLRB 766 (1992), in which the Board stated:

We also find it unnecessary to pass on the judge’s finding that the parties were at impasse on August 1, 1989, or that the Respondent’s July 18 final offer was never withdrawn.

By telegram dated January 29, 1991, the Respondent advised the Union that “despite the Decision of the Judge” the Respondent’s final offer had been withdrawn on August 1, 1989, when the Union rejected it on that date and that, “There is currently no Company offer on the table.” The Union, by letter dated February 1, 1991, disputed that the Respondent’s offer had been withdrawn on August 1, 1989, and stated that the Respondent’s withdrawal of its final proposal as noted in its January 29, 1991 telegram, “is a significant departure from the bargaining position the Company has taken with the Union for the last 18 months.” The Union therein then requested a statement of the Respondent’s present position as to issues on which the parties had reached tentative agreement and on “all outstanding mandatory subjects of bargaining.” By letter dated February 4, 1991, the Respondent reiterated its contention that “the Company’s final offer was, by its terms withdrawn when it was rejected by the Union on August 1, 1989.” The Respondent, through Wilgoren, also stated therein:

In this regard, I enclose a copy of the negotiation notes of Al Hart for July 18, 1989. I call your attention to page 2 wherein it is stated; “Co. is going to present final offer. On table til Aug 1.” This statement clearly reflects Mr. Hart’s understanding that the offer would be withdrawn if not accepted by August 1, 1989.⁶⁰

Moreover, without making reference specifically to those issues on which the parties had reached tentative agreement during the negotiation sessions or any of the “outstanding mandatory subjects of bargaining,” the Respondent stated

might conceivably be assumed to have possibly removed wages as a disputed and stalemated issue in the Respondent’s mind.

⁵⁹The General Counsel took exception to Judge Green’s conclusion that the parties were at impasse upon the Union’s rejection of the Respondent’s final offer. The Respondent on the other hand, excepted to the judge’s finding that the Respondent’s final offer was never withdrawn.

⁶⁰Al Hart was the Union’s chief spokesperson at the negotiation sessions between the parties. However, nothing in Hart’s notes of the last bargaining meeting on August 1, 1989, indicates that the Respondent told the Union that its “final offer” was being actually withdrawn then and there.

“the Company adheres to the agreement reached with the Union at the first negotiating session. That is, all tentative agreements reached during negotiations are done so with the understanding that such tentative agreements are subject to agreement on the entire contract.”⁶¹

By letter dated February 4, 1991, the Union notified the Respondent that the strikers were unconditionally returning to work on February 11, 1991, thus ending the strike. In this letter, the Union again requested that the Respondent meet and negotiate with the Union regarding wages, hours, and other terms and conditions of employment, citing, inter alia, Judge Green’s findings of preimpasse unfair labor practices by the Respondent, the ending of the strike, and the passage of over 18 months since the last negotiation session, among others as factors indicating an opportunity for fruitful negotiations. In its response letter to the Union dated February 6, 1991, the Respondent adhered to its position that the parties were still at impasse and that further negotiations were futile unless the Union “states with specificity” what substantial changes from its prior “intransigent” positions in negotiations it was prepared to make.

By letter dated February 8, 1991, the Union requested a “face to face meeting between the parties to discuss each parties current proposals” in view of the Respondent’s express withdrawal of its prior proposals on January 29, 1991, and the ending of the strike. The Union also stated therein that:

The Union is prepared to make significant changes in open areas, specifically on wages, grievance procedure, union security, pension, health insurance, uniforms, management rights, no strike and drug testing.

The Respondent, by letter dated February 11, 1991, denied the Union’s request to resume negotiations and “reiterated [its] prior position”:

Should the Union have substantial and material changes in its positions on the issues which caused the impasse, those positions should be submitted to the mediators. The Company will consider any proposal so submitted.

2. Analysis and conclusions

As alleged in the complaint the Respondent has refused to meet and bargain with the Union since October 12, 1990. The Respondent cites impasse as its reason for refusing to meet with the Union.

In *Taft Broadcasting Co.*, 163 NLRB 475 (1967),⁶² the Board stated:

Whether a bargaining impasse exists is a matter of judgement. The bargaining history, the good faith of the

⁶¹ Carol Lambiase, another of the Union’s spokespersons during the negotiations testified that when the Respondent presented its “final offer” to the Union on July 18, 1989, Wilgoren told the Union it was on the table until August 1, 1989, for their consideration. When the Union inquired as to what would happen on August 1, Wilgoren replied: “I don’t know.” Additionally, Hovis testified uncontradictedly that when he met with the Federal mediators in July 1990, they advised him that Wilgoren had stated that “the Union has our final offer.”

⁶² Enfd. sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is agreement, the contemporaneous understanding of the parties as to the state of the negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

A genuine impasse in negotiations exists only where the parties have exhausted all avenues for reaching agreement and there is “no realistic possibility that continuation of discussion at that time would have been fruitful.”⁶³ Furthermore, a parties declaration that an impasse has occurred will not be dispositive in determining whether one does indeed exist—all of the circumstances of the case must be analyzed.⁶⁴

A finding of impasse presupposes that the parties prior to the impasse have acted in good faith. Generally, a lawful impasse cannot be reached in the presence of unremedied unfair labor practices.⁶⁵ The Board has long held that an employer may not “parlay an impasse” resulting from its own misconduct.⁶⁶

As found by Judge Green and either established by the failure of the Respondent to take exception to these findings or affirmed by the Board in *Circuit-Wise, Inc.*, supra, the Respondent committed various violations of the Act. While no unfair labor practice is insignificant, in the context of determining whether an impasse is present some have more significance than others in their ability to impact upon the negotiating process and its progress. For example unilateral changes in employee’s terms and conditions of employment may constitute significant violations of the Act in the context of which misconduct, no lawful impasse can be reached.⁶⁷ The record evidence establishes that during the course of negotiations prior to August 1, 1989, the Respondent, on March 1, 1989, unilaterally increased employee contributions for health insurance benefits,⁶⁸ and unilaterally changed the work schedules of employees in the midst of contract negotiations.

Moreover, as the Board stated in *Bozzuto’s, Inc.*, 277 NLRB 977 (1985), “Unit scope is not a mandatory bargaining subject, and consequently a party may not insist to impasse on alteration of the unit.”⁶⁹ Thus, the Respondent’s continued insistence, up to August 1, 1989, on exclusion of the waste water treatment employees from the appropriate

⁶³ *Television Artists AFTRA v. NLRB*, 395 F.2d at 628. And as the Board held in *Patrick & Co.*, 248 NLRB 390 (1981), enfd. mem. 644 F.2d 889 (9th Cir. 1981), for an impasse to be found, the parties must have reached “that point of time in negotiations when the parties are warranted in assuming that further bargaining would be futile.”

⁶⁴ *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176 (5th Cir. 1982). Also see *Teamsters Local 175 v. NLRB*, 788 F.2d 27 (D.C. Cir. 1986).

⁶⁵ *White Oak Coal Co.*, 295 NLRB 567 (1989); *La Porte Transit*, 286 NLRB 132 (1987), enfd. 888 F.2d 1182 (5th Cir. 1989).

⁶⁶ *Wayne’s Dairy*, 223 NLRB 260, 265 (1976).

⁶⁷ *White Oak Coal Co.*, supra. Contrast *Litton Microwave Cooking Products*, 300 NLRB 324 (1990), enfd. 949 F.2d 249 (8th Cir. 1991), which will be more fully discussed hereinafter.

⁶⁸ According to the testimony of Lambiase, this unilateral change had a profound impact on subsequent bargaining regarding this issue.

⁶⁹ *Douds v. Longshoremen Assn., Ind.*, 241 F.2d 278 (2d Cir. 1957).

unit, would preclude the parties from reaching a lawful impasse.

Additionally, in *Circuit-Wise, Inc.*, supra, the Board found that the Respondent had violated Section 8(a)(5) and (1) of the Act by refusing to furnish the Union with financial information it requested in connection with the Respondent's proposal for a profit-based retirement plan. As the Board stated therein:

We find no logical or legal basis for requiring a party to accept a proposal before being given a chance to review information that is relevant and necessary to its evaluation.

By refusing the Union's request, the Respondent violated its obligation to bargain in good faith. Because prior good-faith bargaining is a prerequisite to a lawful impasse, the Respondent's withholding of information relevant and necessary for the Union to be able to bargain about this proposal would preclude a finding of such impasse.⁷⁰ The Board also found in *Circuit-Wise* that the Respondent had failed to bargain in good faith regarding a grievance procedure since it refused to create an interim grievance procedure with the Union to serve during the negotiations for a bargaining agreement, instead continuing to use in a discriminatory manner its own problem-solving procedure.

The Respondent in its brief asserts that while the parties were far apart on several issues when the Union rejected the Company's final proposal on August 1, 1989, "the overriding impasse issues were union security and drug testing." On the issue of drug testing the General Counsel states in his brief:

The sham nature of Respondent's claim of impasse is revealed by its reliance on an alleged deadlock on the issue of drug testing as proof that further bargaining would have been futile. As the facts above demonstrate, as of August 1, 1989, the Union had substantially altered its earlier position opposing inclusion of a drug testing provision in the contract. Respondent's final proposal on this issue, limiting testing to just cause situations, was remarkably similar to the position the Union had taken. Moreover, the Union had sought information regarding, inter alia, the type and standards of testing which would be utilized by Respondent, and the effects of a positive result, and was awaiting that information when Respondent declared impasse. Thus, as to this issue, it cannot be said that the Union's position had become fixed and rigid and that further discussion of this subject would not have been fruitful.

The record evidence shows that both the Union and the Respondent had modified their positions on drug testing prior to the last meeting on August 1, 1989, with the Union requesting information which appears relevant and necessary to its evaluation of the Respondent's proposal in its last contract offer. By failing to supply such information to the Union prior to August 1, 1989, the Respondent inhibited the Union's ability to bargain about this proposal which consid-

ered with the above, would preclude a finding of impasse as of that date.

With regard to union security it is not unusual for parties to maintain positions on key issues late into the negotiations so as to trade off modifications of their proposals for counter proposals. While it appears that the Union's position regarding union security was not to accept a bargaining agreement without such a provision, in the nature of collective bargaining, a parties adamant position on an issue may change or be modified as the process proceeds and changes in position on one major issue may bring hope of such change on others. I cannot find on the record evidence that the parties had reached the point on August 1, 1989, wherein "no realistic possibility that continuation of discussion at that time would have been fruitful."⁷¹

Furthermore, there was no "contemporaneous understanding of the parties as to the state of the negotiations."⁷² The Union disputed the Respondent's unilateral declaration of impasse on August 1, 1989, and sought through correspondence during the following months to continue negotiations. At the August 1, 1989 meeting and in its correspondence, thereafter the Union consistently advised the Respondent that it had further movement to make. The Board has held that there is no valid impasse where either party is willing to make movement or concessions.⁷³ Additionally, while factors to be considered, neither the length of the negotiations nor the number of meetings held, by themselves establish the existence of an impasse.⁷⁴ Similarly, an impasse should not be mechanically inferred simply because the parties have failed to reach complete agreement after some specified number of negotiating sessions or whenever one party announces that his position is henceforth fixed and no further concessions can be expected (final offer).⁷⁵

The Respondent asserts in its brief:

On August 1, 1989, the Union rejected the company's final offer. There is no real dispute that the parties were at impasse over the issues of union security and drug testing. The only real issue is whether or not a party that his purportedly committed unfair labor practices is precluded from reaching a bona fide impasse where it has continued to bargain in good faith and the logjam in negotiations is unrelated to the unfair labor practices.

The Respondent then points to Judge Green's finding in his decision, supra, that the parties had reached a valid impasse on August 1, 1989, as declared by the Respondent. However, the Board in its decision in that case, did not affirm this finding asserting that it was "unnecessary to pass on the judge's finding that the parties were at impasse on August

⁷¹ *Television Artists AFTRA v. NLRB*, supra.

⁷² *Taft Broadcasting Co.*, supra.

⁷³ As the Board stated in *Liquor Wholesalers*, 292 NLRB 1234 (1989), "The fact that the Union insisted and continued to insist for days and weeks afterward that it had further movement to make is consistent with our finding that there had been no exhaustion of the possibility of compromise." Also see *Old Man's Home of Philadelphia*, 265 NLRB 1632 (1982); *Cal-Pacific Furniture Mfg. Co.*, 228 NLRB 1337 (1977).

⁷⁴ *SGS Control Services*, 275 NLRB 984 (1985).

⁷⁵ *Westchester County Executive Committee*, 142 NLRB 126 (1963).

⁷⁰ *A.M.F. Bowling Co.*, 303 NLRB 167 (1991); *Reece Corp.*, 294 NLRB 448 (1989).

1, 1989.” Judge Green did not set forth the basis for his conclusion that “the parties were at impasse on the Union’s rejection of the company’s final offer,” nor discuss the facts and the law upon which such conclusion is predicated. As it appears to me from his decision, Judge Green was not faced with the same issue present as in the instant case—that the Respondent unlawfully failed and refused to bargain with the Union in good faith in violation of the Act. Therefore, Judge Green’s mere assertion of impasse cannot be said to add substantial weight or support to the Respondent’s contention that the parties had reached a bona fide impasse.

Nor do I find, as contended by the Respondent in its brief, that the Union agreed that the negotiations between the parties were at impasse as of August 1, 1989, because of a union newspaper article dated October 5, 1990, in which the following statement appeared, “Negotiations between the Company and Local 299 reached an impasse in August, 1989.” The Union objected to the Respondent’s characterization that the negotiations were at impasse consistently since the August 1, 1989 last negotiating session and thereafter, and its continuing requests for the resumption of bargaining subsequent thereto belie the accuracy of any such statement in the union newspaper. The newspaper’s observation of impasse could just as well have been a misquote or a mistaken belief by the person writing the article as to the state of the negotiations. Even if it were not, under the circumstances of this case as set forth above, I cannot find that such newspaper statement constituted an unequivocal admission by the Union that a bona fide impasse existed on August 1, 1989, nor an acceptance or acquiescence by it of the Respondent’s contention thereon.

The Respondent cites *Litton Microwave Cooking Products*, 300 NLRB 324, enf. 949 F.2d 249 (8th Cir. 1991), in support of its position stating in its brief:

The Board has recently rejected Counsel for the General Counsel’s theory. In *Litton Microwave Cooking Products*, 300 NLRB No. 37, 136 LRRM 1163 (September 28, 1990), the Board held that “violations of Section 8(a)(5) and (1), . . . do not preclude the finding that the parties reached a genuine impasse in negotiations.”

In the *Litton* case the Board first considered whether the company, during a 53 session, 17-month-long course of negotiations in which no independent evidence of bad-faith bargaining existed engaged in surface bargaining in violation of Section 8(a)(5) and (1) of the Act. The administrative law judge had found that the employer had engaged in an overall pattern of conduct designed to frustrate the bargaining process because of its bad-faith bargaining concerning the topics of checkoff, the zipper clause, the absence control program, and the recognition clause.

The Board then held in *Litton*, 300 NLRB at 326–327:

In considering these topics, we stress that our examination of the Respondent’s bargaining positions and proposals relates to whether they indicate an intention by the Respondent’s to avoid reaching an agreement; it is not a subjective evaluation of their content.⁹ We stress further that, in dismissing the allegations that the Respondent violated Section 8(a)(5) and (1) by its bargaining conduct, we are relying on the totality of the

Respondent’s bargaining conduct.¹⁰ Thus, as discussed below, the Respondent’s bargaining on these topics must be examined in the context of the Respondent’s frequent (53) meetings with the Union, its extensive explanations for its positions and extensive examination of the Union’s proposals, its numerous significant concessions, and the absence of evidence that it procedurally tried to frustrate the bargaining process. Further, although we have adopted some of the judge’s findings that the Respondent engaged in acts of misconduct away from the bargaining table, these are not sufficient, as discussed below, either to warrant a finding of overall-bad-faith bargaining or to taint the Respondent’s bargaining positions on the four topics discussed below with an unlawful intent of frustrating agreement.

⁹ See *Reichhold Chemical*, 288 NLRB 69 (1988).

¹⁰ See, e.g., *Tritac Corp.*, 286 NLRB 522, 523 (1987); *Atlanta Hilton & Tower*, 271 NLRB 1600, 1601 (1984).⁷⁶

However, there is no allegation in the instant case of overall-bad-faith bargaining on the part of the Respondent.

More importantly in regard to the case at bar, the Board next considered whether the Employer’s violations of Section 8(a)(5) and (1) during the negotiations period precluded a finding that the parties had reached a genuine impasse in negotiations. The Board then stated in *Litton*, 300 NLRB at 333:

One, a crucial factor in determining whether a party has forfeited its privilege of announcing impasse and lawfully engaging in unilateral action is whether the party had by its own action precluded an agreement being reached.⁴⁶ We find that, on a practical level, the Respondent’s unlawful conduct away from the bargaining table did not contribute to the deadlock in negotiations so as to prevent a lawful impasse. As we explained in our discussion of surface bargaining, . . . the Respondent’s unilateral actions . . . did not have a significant impact on whether an agreement was achieved.

⁴⁶ See, e.g., *J. D. Lunsford Plumbing*, 254 NLRB 1360, 1366 (1981), enf. mem. sub nom. *Sheet Metal Workers Local 9 v. NLRB*, 684 F.2d 1033 (D.C. Cir. 1982).

And therein lies the distinguishing factor between the *Litton* case and the instant case. Unlike in *Litton*, in the case at bar, as found hereinbefore, the Respondent engaged in unlawful conduct which precluded an agreement being reached and/or the Union from preparing its counterproposals to the Respondent’s contract offers.⁷⁷

⁷⁶ The Board also held in *Litton* that although it found that the company had violated Sec. 8(a)(5) and (1) by failing to grant a regularly provided wage increase it could not conclude on the basis of the evidence therein that this action prevented the parties from reaching an agreement. The Board also held therein that its findings of unlawful unilateral changes were such as not to alter its finding that the Employer had not engaged in bad-faith bargaining since they did not preclude the parties from reaching an agreement as “stumbling blocks” to negotiations.

⁷⁷ For example, the Respondent’s unilateral increase in employee contributions for health insurance benefits and its failure to provide financial information necessary for the Union’s acceptance of the

A consideration of whether events occurring subsequent to August 1, 1989, would have any impact on impasse, assuming arguendo that the parties had actually reached a bona fide impasse on that date, I believe would serve a useful and valid purpose. As the Board stated in *Hi-Way Billboards*, 206 NLRB 22, 23 (1973):

A genuine impasse in negotiations is synonymous with a deadlock: the parties have discussed a subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position. When such a deadlock is reached between the parties, the duty to bargain about the subject matter of the impasse merely becomes dormant until changed circumstances indicate that an agreement may be possible. Once a genuine impasse is reached, the parties can concurrently exert economic pressure on each other: the union can call for a strike; the employer can engage in a lockout, make unilateral changes in working conditions if they are consistent with the offers the union has rejected, or hire replacements to counter the loss of striking employees. Such economic pressure usually breaks the stalemate between the parties, changes the circumstances of the bargaining atmosphere, and revives the parties' duty to bargain.

Thus, a genuine impasse is akin to a hiatus in negotiations. In the overall ongoing process of collective bargaining, it is merely a point at which the parties cease to negotiate and often resort to forms of economic persuasion to establish the primacy of their negotiating position. . . . Therefore, it is clear that an impasse is but one thread in the complex tapestry of collective bargaining, rather than a bolt of a different hue. In short a genuine impasse is not the end of collective bargaining.

The United States Supreme Court in *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404, 412 (1982), agreed with the Board stating, "As a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations 'which in almost all cases is eventually broken, through either a change of mind or the application of economic force.' 243 NLRB at 1093-1094."

Anything that creates a new possibility of fruitful discussion (even if it does not create a likelihood of agreement) breaks an impasse.⁷⁸ A strike may,⁷⁹ so may bargaining concessions, implied or explicit,⁸⁰ the mere passage of time may also be relevant.⁸¹ As the Board stated in *D.C. Liquor Wholesalers*, supra:

Respondent's proposal on a profit-based retirement plan and/or the Union's preparation of its counterproposal. See *Circuit-Wise, Inc.*, 306 NLRB 766 (1992). It also should be noted that the above is in addition to other factors found by me to preclude a valid impasse being reached in the instant case.

⁷⁸ *Gulf States Mfg. v. NLRB*, 704 F.2d 1390 (5th Cir. 1983).

⁷⁹ *Jeffery-De Witt Inslator Co. v. NLRB*, 91 F.2d 134, 139-140 (4th Cir. 1936), cert. denied 302 U.S. 731 (1937); *Diester Concentrator Co.*, 253 NLRB 358 (1980); *Hi-Way Billboards*, supra.

⁸⁰ *NLRB v. Webb Furniture Corp.*, 366 F.2d 314, 315-316 (4th Cir. 1966); *Pillowtex Corp.*, 241 NLRB 40 (1979).

⁸¹ *Jeffery-De Witt*, supra; *Transport Co. of Texas*, 175 NLRB 763 (1969).

Circumstances change, sometimes dramatically, as a result of which bargaining positions are altered especially if the parties are in good faith committed to trying to reach an agreement.

In the instant case, the Union by letter dated October 9, 1990, requested bargaining which was rejected by the Respondent. At that time, the parties had not met face-to-face in over 14 months, employees in the appropriate unit had been engaged in an unfair labor practice strike for about 13 months, and the Respondent had implemented a series of wage increases bringing its current wage scales to a level higher than the last wage proposals offered by both parties. The issue of wages was one of the significant issues separating the parties as of August 1, 1989. These circumstances, in and of themselves, might constitute a change in conditions affecting an existing bargaining impasse.⁸² However, in addition to the above, the uncontroverted evidence herein shows that the Respondent was apprised on July 6, 1990, through the Federal mediators that the Union was prepared to substantially modify its prior bargaining positions on unresolved issues, including drug testing and union security which the Respondent itself characterized not only as "hopelessly deadlocked," but as significant and important issues. Based upon the positions on these issues taken by the parties during separate meetings with the mediators, the mediators themselves concluded that further discussion and negotiations would be fruitful.

Both the Board and the courts have held that substantial concessions by a union relieves impasse in bargaining and revives an employer's obligation to meet and bargain with the Union's representatives.⁸³ The Union's significantly altered bargaining positions, as expressed by Hovis to the Federal mediators for conveyance to the Respondent, as apparently occurred, relieves the impasse and revived the Respondent's duty to bargain with the Union.⁸⁴ Additionally, the issuance of Judge Green's decision, the Respondent's withdrawal of its last offer, and the termination of the strike

⁸² *Transport Co. of Texas*, 175 NLRB 763 (1969). The Board found therein, "that under all the circumstances, including a strike which was lost by the Union, the replacement of strikers, the wage changes instituted by the Respondent, and the hiatus of 7 months since the last bargaining meeting, conditions had changed materially from those existent at the time of the impasse. . . . On these facts, and mindful of the public policy of promoting and encouraging collective bargaining at reasonable times and in good faith, the refusal of the Respondent to meet with the Union after the strike was violative of Section 8(a)(5) of the Act." Also see *U.S. Cold Storage Corp.*, 96 NLRB 1108 (1951), enf. 203 F.2d 924 (5th Cir. 1953).

⁸³ *Webb Furniture Corp.*, 152 NLRB 1526 (1965), enf. 366 F.2d 314 (4th Cir. 1966). As the United States Court of Appeals, Fourth Circuit stated in *NLRB v. Webb Furniture Corp.*, 366 F.2d at 316, "When the union tendered some concessions, the employer might reasonably be required to recognize that negotiating sessions might produce other or more extended concessions."

⁸⁴ *Id.* Moreover, the Respondent's duty to bargain collectively under Sec. 8(d) of the Act includes the requirement to "meet at reasonable times and confer in good faith" and such requirement is not satisfied by the Respondent requiring the Union to first submit in writing, any "substantial and material changes in its positions on issues which caused the impasse," to the Federal mediators, as a condition to the resumption of face-to-face bargaining meetings. *Chemung Contracting Corp.*, 291 NLRB 773 (1988); *Fountain Lodge*, 269 NLRB 674 (1984); *U.S. Cold Storage Corp.*, supra.

and the strikers return to work, further changed the circumstances from those that existed on August 1, 1989, when the Respondent declared impasse.

The Respondent asserts in its brief:

The Board has stated that “the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank discussion and support of position. Indeed, to avoid this consequence, the Board has held that the duty to bargain is suspended during periods of impasse . . . and thereafter until broken by some intervening event removing the element of futility from further discussion. *Bloomsburg Craftsmen*, 276 NLRB 400, 404 (1985).⁸⁵

The Respondent then cites *Holiday Inn Downtown-New Haven*, 300 NLRB 774 (1990), as being “most analogous to the instant case,” in support thereof.

In the *Holiday Inn* case, the complaint alleged that the employer had violated Section 8(a)(5) and (1) of the Act by refusing to engage in face-to-face negotiations with the union since the employer unlawfully preconditioned further bargaining, requiring the union to furnish the employer in advance with those proposals that it intended to make at a future negotiation meeting or to accept the employer’s unit work subcontracting proposal, the “major stumbling block” when contract negotiations ended in “a good-faith bargaining impasse.” The Board in *Holiday Inn* found, (1) that while it is a well-settled principle that an employer may not insist that collective bargaining pursuant to Section 8(d) of the Act take place by an exchange of proposals in advance of any face-to-face negotiations,⁸⁶ this was true where the parties had not already begun the bargaining process through which proposals would have been subjected to the give-and-take of negotiations, as was not the case in *Holiday Inn*, where bargaining had progressed to impasse, (2) that there was absent in *Holiday Inn*, any changed circumstances suggesting the possibility that the purported bargaining impasse no longer existed and that future bargaining could be promising,⁸⁷ and (3) that after bargaining impasse had been reached in *Holiday Inn*, the union’s subsequent “bare assertions of ‘flexibility’ on open issues and its generalized promises of new proposals” were insufficient to provide a basis for the Board to determine if the union’s offer represented “any change, much less a substantial change,” in the union’s position since the impasse, and could not therefore “relieve the existing impasse.”⁸⁸ The Board then concluded that “the record as a whole indicates that the Union continued to oppose the concept of unlimited subcontracting and that it failed to give a sufficient indication of changed circumstances to suggest that future bargaining might be fruitful” and therefore the employer had not violated the Act by its refusal to resume face-to-face negotiations.

Based on my above findings in the instant case, it is clearly distinguishable from *Holiday Inn*. Unlike *Holiday Inn*,

⁸⁵ Also see *Teamsters Local 45 v. NLRB*, 355 F.2d 842 (D.C. Cir. 1966).

⁸⁶ *Fountain Lodge*, supra. Also see *Chemung Contracting Corp.*, supra.

⁸⁷ For example, *U.S. Cold Storage Corp.*, supra, where an employee strike preceded the union’s request for resumed bargaining.

⁸⁸ *Pepsi-Cola-Dr. Pepper Bottling Co.*, 219 NLRB 1200 (1975).

present herein are several significant changed circumstances occurring subsequent to the purported impasse, i.e., the strike and its conclusion, unilateral wage increases which brought employee’s wage levels to approximately where they no longer constituted a possible “stumbling block” in any resumed negotiations, the Board’s decision in the prior case affirming many of Judge Green’s findings, a few of which would impact on the Union’s ability to make its own proposals or consider those of the Respondent’s, and other considerations as set forth previously in this portion of my decision. Moreover, it cannot be said that the Respondent received “bare assertions of ‘flexibility’ on open issues.” The Union conveyed to the Respondent’s chief negotiator, Wilgoren, through the auspices of the Federal mediators in July 1990, with some detail and on important, significant, and unresolved issues (union security, drug testing, terms of contract, etc.), substantial proposed changes in its positions thereon since August 1, 1989.⁸⁹

From all of the above, I find and conclude that by failing and refusing to meet and bargain with the Union as requested, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.⁹⁰

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth in section III, above, found to constitute unfair labor practices occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. THE REMEDY

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

Having found that the Respondent unlawfully withheld accrued longevity bonuses from its striking employees since on or about May 21, 1990, I recommend that the Respondent be ordered to make the strikers whole for any loss of such bonuses by payment to each of them of a sum of money equal to the amount they normally would have received under the Respondent’s bonus plan including any and all bonuses denied them because of their status as striking employees, and if applicable, even after the conclusion of the strike, with interest to be paid thereon in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

⁸⁹ Nor does the Respondent’s citing of *Transport Co. of Texas*, supra, and *NLRB v. Webb Furniture Corp.*, supra, support its position that the purported “existing impasse in negotiations justifies its refusal to return to negotiations.”

⁹⁰ The General Counsel in his brief asserts that the Respondent’s refusal to bargain dates, “at the latest, from its refusal to meet in response to the Union’s February 1991 request, after the strikers had returned,” but he also submits that it actually occurred in October 1990 when Respondent denied the Union’s first direct request to bargain since Respondent’s August 1989 declaration of impasse. While I tend to agree with the General Counsel, it actually makes no difference based upon the remedy to be recommended.

Having found that the Respondent unlawfully failed to pay its striking employees accrued vacation benefits since on or about June 29, 1990, I recommend that the Respondent be ordered to make the strikers whole for any loss of such accrued vacation benefits either in pay or otherwise (use of accrued vacation benefits as time off or leave) and if in money, by payment to each striker so choosing, the sum of money equal to the amount they normally would have received under the Respondent's vacation plan including in either case all such vacation benefits denied them because of their status as striking employees, and if applicable, even after the conclusion of the strike, and in the case of the monetary option, with interest to be paid thereon in the manner prescribed in *New Horizons for the Retarded*, supra.

Having found that the Respondent has unlawfully refused to bargain with the Union, I recommend that the Respondent be ordered to bargain collectively with the Union, on request, as the exclusive bargaining representative of the employees in the appropriate unit.

I also recommend that the Respondent be ordered to refrain from 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.⁹¹ The Respondent should also be required to post a customary notice.

CONCLUSIONS OF LAW

1. The Respondent, Circuit-Wise, Inc., is now and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, United Electrical, Radio and Machine Workers of America (UE), is a labor organization within the meaning of Section 2(5) of the Act.

3. The following constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time production and maintenance employees employed by the Employer at its North Haven, Connecticut facility including employees involved in the production of products for Mint-Pac Technologies, Inc., chemical technicians, and waste water treatment technicians; but excluding all other employees, leadpersons, office clerical employees and guards, professional employees and other supervisors as defined in the Act.

4. At all the times material, the Union has been and is the exclusive bargaining representative of all the employees within the above-described appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By threatening union representatives with physical and/or vehicular assault at the picket line, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

6. By failing to pay accrued longevity bonuses to its striking employees since on or about May 21, 1990, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the Act.

7. By failing to pay accrued vacation benefits to its striking employees since on or about June 29, 1990, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the Act.

8. By failing and refusing to meet and bargain with the Union since on or about October 2, 1990, or February 11, 1991, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁹²

ORDER

The Respondent, Circuit-Wise, Inc., North Haven, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening union representatives or employees on the picket line with physical or vehicular assault.

(b) Failing to pay accrued longevity bonuses to employees because they were engaged in a strike.

(c) Failing to pay accrued vacation benefits to employees because they were engaged in a strike.

(d) Failing and refusing to meet and bargain with the Union as the exclusive representative of the employees in the aforesaid appropriate unit concerning terms and conditions of employment.

(e) 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 whole with interest striking employees who suffered any loss of accrued longevity bonuses and accrued vacation benefits as a result of the Respondent's unlawful actions, in the manner set forth in the remedy section of this decision.

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

(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 New Haven, Connecticut, copies of the attached notice marked "Appendix."⁹³ Copies of the

⁹² 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.

⁹³ 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

Continued

⁹¹ *Circuit-Wise, Inc.*, 306 NLRB 766.

notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days

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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.