

**Goldsmith Motors Corp. and Local Union No. 868,  
an affiliate of the International Brotherhood of  
Teamsters.** Case 29-CA-14934

May 7, 1993

DECISION AND ORDER

CHAIRMAN STEPHENS AND MEMBERS OVIATT  
AND RAUDABAUGH

On June 22, 1992, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed an answering brief.

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

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

<sup>1</sup> The judge inadvertently erred as to the following dates. The complaint issued on August 23, 1990, rather than on August 23, 1992, and the decertification petition was filed November 21, 1989, rather than on November 21, 1990. The judge also erred in finding that on January 29, 1990, the Respondent proposed that employees pay half the cost of the medical benefit plan. The record shows that the Respondent sought the elimination of the medical benefit plan on January 29, 1990. According to the testimony of the Respondent's negotiator, Perry Heidecker, the Respondent's proposal that employees pay half the cost of medical plan premiums was a modification, announced on February 9, 1990, of its initial proposal.

The judge found that on February 10, 1990, the Respondent sent a mailgram to the Union stating that the Respondent was willing to bargain. The record contains a confirmation copy sent by Western Union to the Respondent on February 12, 1990, stating that the mailgram sent to the Union was not delivered because no one was present for delivery and there was no response to the notice of delivery.

The General Counsel contends that the judge erroneously failed to draw an adverse inference against the Respondent for failing to produce former co-owner Ann Louison as a witness. As the judge found, however, at the time of the hearing Louison was no longer associated with the Respondent because Louison and co-owner Goldsmith terminated their business relationship in 1990. In these circumstances, the General Counsel has not demonstrated that Louison may reasonably be assumed to be favorably disposed toward the Respondent so as to trigger an adverse inference. *Property Resources Corp.*, 285 NLRB 1105 fn. 2 (1987), *enfd.* 863 F.2d 964 (D.C. Cir. 1988).

<sup>2</sup> The General Counsel contends that After-Sales Vehicle Coordinator Lucille Winters is a statutory supervisor and that in November 1989, outside the 10(b) period and prior to the start of contract negotiations, Winters originated the filing of a decertification petition. The General Counsel contends that Winters' alleged role in the petition evinces the Respondent's intention to avoid reaching agreement with the Union. As the General Counsel concedes, however, Winters was not involved in the negotiation process. Further, there is no evidence that those involved in the negotiation process had any role in the petition. Accordingly, there is no meaningful correlation between Winters' alleged activities and the Respondent's bargaining posture and activities. In any event, we agree with the judge's conclusion that Winters was not a statutory supervisor when the decertification

On February 9, 1990, the Respondent locked out its employees and, thereafter, unilaterally implemented terms and conditions of employment for its lawfully hired temporary replacements at variance with the former employment terms of its locked-out employees. We agree with the judge that, even assuming the absence of a bargaining impasse, the Respondent's conduct did not violate the Act.<sup>3</sup>

It is now well settled that an employer permissibly may pay lesser benefits during a strike to lawfully hired strike replacements after the termination of a contract, even in the absence of a bargaining impasse. *Capitol-Husting Co.*, 252 NLRB 43, 45 (1980), *enfd.* 671 F.2d 237 (7th Cir. 1982); *GHR Energy Corp.*, 294 NLRB 1011, 1012 (1989). As the Board found in *Capitol-Husting*, *supra*, this is so for two reasons. First, as a practical matter, a union is not expected simultaneously to represent the interests of the replacements as it would the interests of the strikers. Second, the ability to set employment terms for replacements is a necessary incident of the right to hire them in the first instance.<sup>4</sup>

We discern no meaningful reason why a union's relationship to newly hired temporary replacements in a lockout situation, as here, should be considered stronger than a union's relationship to newly hired replacements in a strike situation. In either instance, the union's representational role during the job action is directed toward the interests of the displaced employees, not toward their replacements. As a result, an employer's unilateral implementation of employment conditions for such replacements does not truly undermine a union's representational interests or authority.<sup>5</sup>

Further, as noted, the unilateral implementation of employment terms for replacements is a necessary incident of an employer's right to hire temporary replacements during a lawful lockout. If the lockout itself is lawful and the hiring of temporary replacements

petition was filed. The record shows that Winters was an employee with many years of service with the Respondent who, in this capacity, occasionally assisted other employees in resolving disputes and on routine work duties, and assisted them in handling customer matters. After the lockout, Winters assisted the sales manager in screening and interviewing job applicants, but the sales manager made the decision whether to hire the applicant.

<sup>3</sup> For the reasons set forth by the judge, we find that the reason for the breakdown in negotiations on February 9, 1990, was the Union's insistence that the previous bargaining agreement had automatically renewed. We agree with the judge that the Respondent did not bargain in bad faith and did not violate the Act when it locked out unit employees and hired temporary replacements.

<sup>4</sup> We are not concerned here with terms and conditions that an employer proposes as permanent changes that, even in the absence of impasse, would apply also to the striking or locked out employees once they returned to work following the termination of the strike or lockout. Cf. *Schmidt-Tiago Construction Co.*, 286 NLRB 342, 343 (1987).

<sup>5</sup> See *Harter Equipment*, 293 NLRB 647 (1989) (replacements for locked-out employees are not in the bargaining unit).

is lawful, there is no logical or practical reason to require that a bargaining impasse must exist before the employer may implement terms that are incidental to these more critical underlying, and lawful, acts. Accordingly, we shall dismiss the complaint.

### ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

*Rhonda Schechtman, Esq.*, for the General Counsel.  
*Perry Heidecker Esq. (Marshall Miller Associates)*, for the Respondent.  
*Irving T. Bush, Esq.*, for the Union.

### DECISION

#### STATEMENT OF THE CASE

RAYMOND P. GREEN Administrative Law Judge. This case was tried in Brooklyn, New York, on various dates in January, February, and March 1992. The charge was filed on June 18, 1990, and the complaint was issued on August 23, 1992. The complaint as amended at hearing alleged that the Employer engaged in surface bargaining with the Union, that it unlawfully locked out its employees on February 9, 1990, and that it unilaterally changed terms and conditions of employment vis-a-vis employees it hired as replacements.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

##### II. ALLEGED UNFAIR LABOR PRACTICES

##### A. Background

The Company and the Union have had a collective-bargaining relationship for many years wherein the Union has represented the salesmen. The most recent contract was one of 3 years' duration having an expiration date of January 31, 1990. That contract had a clause providing for an automatic renewal of the contract unless either party gave written notice, 60 days prior to the expiration date, that it wished to terminate the agreement.

There was a prior case involving a situation back in 1989 and which is reported at 299 NLRB 867. In that case the company had acquired another facility, the union obtained authorization cards from a majority of the salesmen and had demanded recognition. The company's refusal to recognize and bargain with the union was found to be a violation of Section 8(a)(5) based on the theory that because of an "after acquired" clause in the collective-bargaining agreement, the employer had waived its right to have an election. The Board's decision issued on August 22, 1990, and on February 12, 1991, a memorandum of agreement was signed be-

tween the union and Anne S. Louison Cadillac Corp. (The two companies having split in the interim period.)

##### B. The Operative Facts

On November 1, 1989 (60 days prior to the contract's expiration date), the Union, in accordance with standard procedures, sent the Employer a notice that it desired to terminate the contract and negotiate for a new agreement. Copies of this notice were sent to the New York State Mediation Board and to the Federal Mediation and Conciliation Service as required by Section 8(d) of the Act.<sup>1</sup> The notice to the Employer, although having the correct name and address, had the wrong zip code.

It is conceded by the Union that the automobile industry was in serious decline from 1989 to 1991 and that this reduction in sales hit particularly hard at Cadillac dealers. (The Respondent, at that time dealt exclusively in Cadillacs.)

In November 1989 a couple of the salesmen, Jorge Perez and Ronald Daniels, talked with Lucille Winters about getting rid of the Union. Although there is some dispute as to whether the idea of filing a decertification petition originated with Winters or with the two salesmen, the evidence shows that at the time of this transaction, Winters was a longtime employee of the Company and not a supervisor within the meaning of the Act.<sup>2</sup> In any event, Perez and Daniels signed a petition dated November 20, 1989, which stated:

The following employees are salesmen employed by Goldsmith Motors Corp., . . . and are interested in having the N.L.R.B. conduct an election for the purpose of decertifying Local 868 IBT as the collective bargaining representative.

<sup>1</sup> Sec. 8(d) provides in pertinent part:

*Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

. . . .

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State of Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

<sup>2</sup> At that time Winters' main function was in after sales. This means that after an automobile sale was consummated, the customer would be brought over to her office where she would then attempt to sell them, such items as burglar alarms, sunroofs, etc. As she worked on commissions only, her sales obviously depended on the activity of the salesmen in the showroom.

After the lockout, on February 9, 1990, Winters took on extra duties and among them was the initial interviewing and screening of job applicants.

This was followed by a decertification petition that was filed on November 21, 1990, by Daniels. Subsequently, the petition was withdrawn on January 17, 1990.<sup>3</sup>

Mitch Haddad became the sales manager of the instant facility after he was transferred in early January from the Hempstead location. He testified on behalf of the General Counsel that in late January 1990, about 10 days after he began to work at Jamaica, he complained to Joel Goldsmith that the salesmen at the facility were not being cooperative with him in relation to a private sale. He testified that Goldsmith said, "Don't worry about it, I'm going to get rid of the Union." (In my opinion, Haddad, who has no interest in the outcome of this case, was a credible witness.)<sup>4</sup>

On January 18, 1990, the Union's representative, Harold Wolchok, sent the Company a list of the Union's demands calling for modest improvements in wages and conditions. On January 22, the Company's attorney, Perry Heidecker, wrote to Wolchok asking for a meeting date.

January 29, 1990, was the first bargaining session. At this meeting the Company tendered its demands which included the following items:

1. Deletion of the after acquired clause.
2. Effective deletion of the union security clause by eliminating the company's requirement to discharge anyone who failed to pay dues and initiation fees.
3. Deletion of dues checkoff.
4. A provision allowing the company to discharge salesmen for lack of productivity, the determination of which would be solely in the discretion of management. (In other respects, discharge for other reasons would still be subject to a just cause standard).
5. Elimination of superseniority for the shop steward.
6. A provision that employees laid off for more than 3 months would not be entitled to recall.
7. Elimination of the provision limiting the number of salesman the employer can assign to the floor.
8. An increase in hours.
9. A provision allowing management to make sales.
10. Vacations to be paid on the basis of the minimum wage and not the average yearly earning.
11. A provision limiting access to salesmen by union representatives by requiring 24 hour notice to management before a visit.
12. Deletion of the Pension Plan.
13. A Requirement that employees pay half the cost of the medical benefit plan.
14. Reduction in commissions.
15. A 2 year agreement.

A second meeting was held on February 2, 1990, at which Wolchok suggested that the prior contract be extended for 3 years without change or modification. Wolchok also sug-

gested the use of a mediator. On both counts the Company said no.

A third meeting was held on February 5, but not much progress seems to have been made in the negotiations. However, Heidecker states that at this meeting, Wolchok said that he thought that the Union had not sent the 60-day notice to the Company and that the contract might have automatically renewed itself.

Heidecker testified that on February 6, he called the Federal and state mediation services and was told that the Union had sent copies of the 60-day notices to them. The Federal service faxed their copy to Heidecker and he in turn faxed it to the Company. According to Heidecker, on receipt, Anne Louison<sup>5</sup> said that she had located the letter and that she was in possession of the original. Heidecker states that he then called Wolchok, told him that the Company had copies of the notice, and that Wolchok should quit fooling around.

On Friday, February 9, 1990, there was some initial give and take between the parties. Among other things, the Union offered a two-tier pay system with new hires receiving less pay than the existing work force. Heidecker asserts, but the Union's witnesses deny that he offered to remove its demand to eliminate the pension fund and made some concessions on its vacation proposal. The Union showed a number of help wanted ads that had been in local newspapers and after inquiry, the Company asserted that these ads were a mistake; that the Company was not interviewing or hiring anyone. The Union asserted that the Company was behind the decertification petition and also accused it of interfering with certain car deliveries. These accusations were denied by the Company.

At about 4 p.m., Heidecker suggested a break in the negotiations so that he could pick up his daughter. Wolchok then stated that he had to leave by 6 p.m. and that as far as the Union was concerned there was no need for further negotiations as the contract had renewed itself pursuant to the automatic renewal clause because the Company had not received the 60-day notice. (It should be noted that Wolchok was well aware that the Union had, in fact, mailed the 60-day notice to the Company.) At that point, the Company demanded that the employees turn in the keys to their demonstrator cars and the salesmen were locked out.

On February 10, 1990, Heidecker sent a mailgram to the Union stating that the Company was willing to bargain. And on February 12, the Company filed a charge with the NLRB alleging that the Union was refusing to bargain with it. (That charge was subsequently dismissed.)

For about 10 days after February 9, the Company did not hire any replacements and attempted to cover the sales floor with the managers and with Winters.

Beginning around February 21, 1990, the Company began hiring replacements who were interviewed by Winters and

<sup>3</sup> The incidents involving the decertification petition occurred more than 6 months before the unfair labor practice charge was filed. They therefore cannot be alleged as unlawful because of the statute of limitations in Sec. 10(b) of the Act.

<sup>4</sup> It is true that Haddad was discharged by the Company while he was in the hospital with an illness. It is also true that such a circumstance might anger any reasonable man. However, I was impressed with the forthrightness of his testimony and I do not think that Haddad was influenced to give false testimony against the company because of any ill feelings he might have had.

<sup>5</sup> Louison was the company officer designated to handle the negotiations in 1990. She no longer is associated with the Respondent after it split in two and she was not called to testify in this proceeding. Joel Goldsmith testified that it was decided that he would not participate or play a role in the negotiations because this function had been taken by Louison in the past and because he did not have the temperament for collective bargaining. In an affidavit submitted during the investigation, Heidecker stated that he met with both Louison and Goldsmith to formulate the Company's bargaining position.

the Sales Manager Mitch Haddad. (Winters and Haddad testified that she was used to screen out unsuitable applicants and that the decision to hire or not hire was made by Haddad.) In this respect, there is some confusion as to whether new employees were told that they were temporary or permanent hires. For example, Felix Dourousseau testified that he was told by Winters, at his interview, that the job was permanent. Mario Dimisa testified that it was his impression that he was offered a permanent job because he was told that he could make \$50,000 in the first year and more thereafter. He states that nothing was said about a labor dispute and he also states that neither the words permanent or temporary were used in connection with the job offer. On the other hand, Mitch Haddad, who was called as a witness by the General Counsel and who impressed me as an honest witness, testified that he followed explicit instructions to tell all job applicants that there was a labor dispute and that the positions were temporary.

I suspect that what really happened here was that most job applicants were told about the labor dispute and that the positions were temporary whereas in other cases, these qualifications were inadvertently forgotten. In any case, as the labor dispute and the lockout had not ended as of the dates of this hearing, there has been no test as to whether the replacements were permanent or temporary as no locked-out employee has ever been told that he would not be rehired if and when the contract dispute is resolved.

Sometime between February 10 and 20 the Union demanded arbitration regarding the lockout and the Company refused. On February 20 the Union filed a suit in Federal court requesting an order compelling arbitration of the alleged discharge of the employees. As a predicate for its contention that the matter was arbitral, in light of the contract's expiration, the Union asserted that the contract had automatically renewed itself.

On March 19, 1990, the judge dismissed the case because he perceived that the parties had settled the matter. However, as it became apparent that this was not the case, the Union's attorney requested that the original case be put back on the calendar and each side pressed their respective points until sometime in April 1990 when a stipulation was entered. Pursuant to that stipulation, the parties agreed to arbitrate the question of whether the employees had been discharged on February 9 but also agreed not to arbitrate the issue as to whether the contract had automatically renewed itself.

On May 24, 1990, the parties met before an arbitrator but a dispute arose concerning the scope of arbitration. Heidecker proposed that the arbitrator should decide not only whether the locked-out employees constituted a discharge without just cause pursuant to contract law, but also that any decision by the arbitrator should be final and should constitute a waiver by the Union of any rights to file charges or other legal proceedings if they lost. In this respect, Heidecker stated that the Company was willing to have the arbitrator decide whether the lockout violated the National Labor Relations Act. The Union refused to agree to this and the meeting ended.

On May 25, 1990, Wolchok wrote to the Company and asserted, inter alia, that the lockout was illegal, that no legal impasse existed and that the Company had not bargained in good faith. The letter stated that the Union was prepared to

continue negotiations if the Company was prepared to make changes in its offer of February 9, 1990. It also states:

Months ago the Union abandoned its position that the collective bargaining agreement renewed itself when the Company furnished the Union with a copy of a letter dated November 1, 1989 it had received terminating the agreement and requesting bargaining.

On May 29, 1990, Heidecker responded by stating:

During an arbitration hearing held before the Hon. Jerome Katz on May 24, 1990 the union, by . . . its attorney . . . made a formal request to resume negotiations. Please be advised that Goldsmith Motors is willing to meet . . . at reasonable times and places upon the request of the union.

The Union's attorney, Irving T. Bush, testified that in June 1990 he spoke to Heidecker and suggested that the parties get together so that the employees could return to work. He states that Heidecker responded that the "real problem here is Hempstead." According to Bush, he told Heidecker, that if Heidecker thought that the Union was going to pull out of Hempstead, he could forget it because the Union was not going to do so. Heidecker denied this stating that he is not so stupid as to jeopardize his client's position with such a statement.

Following an exchange of letters by each side sent for the purpose of setting up a meeting (and each containing self serving statements to buttress their respective legal positions), a meeting was finally arranged for July 20, 1991. At this meeting, Bush asked if the Company was going to make any changes in its proposals and asked for the Company's position on each of its proposals. Heidecker suggested mediation, but Bush stated that mediation was not necessary for noneconomic items; that they might use mediation once they got to economic items. During the meeting, Bush asked if the Company would put the locked out employees back to work while negotiations were being conducted and the Company said no. With respect to specific items, the Company modified and in some cases dropped certain of the proposals that it had made as of the February 9 meeting. Thus although continuing to be regressive, the Company's position as of July 20 was less so. Further, there is no indication that the Company's position was final.

Another meeting was scheduled to take place on August 15, 1990, but this was canceled due to Bush's illness. Thereafter, no further meetings were sought by the Union.

The General Counsel also contends that the Company violated the Act by unilaterally changing terms and conditions of employment insofar as the replacement. In this respect, the General Counsel asserts that the changes, which only affected the replacement employees, were as follows:

1. Replacements received a minimum salary of \$135 per week as opposed to the locked-out employees who had received a salary of \$75 per week. (In both cases, salesmen's earnings were, for the most part, based on commissions.)

2. Replacements were paid lower commissions than the locked-out employees had been paid.

3. Pension contributions were not made on behalf of the replacements whereas the locked-out employees, pursuant to

the old contract, had been covered by a pension plan to which the Employer made contributions.

4. Most of the replacements were not given demonstrator cars (although they could rent a car for \$75 per week), whereas the locked out employees had been allowed to use company cars for their own use.

5. Replacement employees were required to pay half of the premium for health and life insurance, whereas under the expired contract, the locked out employees did not.

6. Replacements were required to work longer hours than the locked out employees.

### III. ANALYSIS

While I have found above, that Goldsmith told Haddad that he desired to get rid of the Union, that statement although relevant, does not prove, of itself, that the Company at the negotiations actually bargained in bad faith and without any intention of reaching an agreement. Also, while relevant, the fact that the Company demanded substantial contractual give backs is not by itself inconsistent with a finding that the Company manifested by its objective conduct, its intention to reach a contract, albeit one on its own terms.

The duty to bargain in good faith is defined in Section 8(d) of the Act which does not compel either party in a collective-bargaining relationship to agree to a proposal or to make a concession. Insofar as mandatory subjects of bargaining (relating to wages, hours, and other terms and conditions of employment), the National Labor Relations Act does not require either party to yield or compromise its position. As stated by the Supreme Court in *NLRB v. American National Insurance Co.*, 343 U.S. 395, 404 (1952):

[T]he Board may not either directly or indirectly, compel concessions or otherwise sit in judgement upon the substantive terms of collective bargaining agreements.

The Court further stated in *H. K. Porter v. NLRB*, 397 U.S. 99, 107–108 (1970):

It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contents to the bargaining strengths of the parties. . . . While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premises on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.

In *NLRB v. Insurance Agents*, 361 U.S. 477, 489 (1960), the Court stated:

The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. . . . [T]he truth of the matter is that at the present statutory stage of national labor relations policy, the two factors—necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the party incline to agree on one's terms—exist side by side.

As I stated previously in *Peele Co.*, 289 NLRB 113, 120 (1988);

It therefore is not necessarily unlawful for the stronger side to make demands or take positions consistent with its strength. Quite obviously, the respective strength of a union versus a company in bargaining is largely dependent on the support of the employees it represents, their willingness to strike, and the vulnerability of the company to a strike. . . . Furthermore, collective bargaining is basically a two-way street. Thus although a union may lawfully make demands designed to improve existing employee wages and benefits, there is nothing in the Act that denies an employer the right, . . . to demand give-backs.<sup>6</sup>

Although a company may use its relative strength to press for favorable contract terms, it may not engage in futile or sham negotiations with the intention of never reaching an agreement. *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 232 (5th Cir. 1960). In *Abingdon Nursing Center*, 197 NLRB 781, 787 (1972), the Board stated:

Good faith, or want of it, is concerned essentially with a state of mind. . . . That determination must be based upon reasonable inference drawn from the totality of conduct evidencing the state of mind with which the employer entered into and participated in the bargaining process. . . . All aspects of the Respondent's bargaining and related conduct must be considered in unity, not as separate fragments each to assessed in isolation.

Moreover, it must be kept in mind that at the beginning of negotiations, it is not unusual for both sides to make extreme contract demands from which they will then compromise. Such demands often are nothing more than bargaining tactics designed to give space for concessions to be made later during the negotiations. The crucial question in these kinds of cases is not what position a party opens with, but how it conducts negotiations thereafter and throughout the entire bargaining process. *Peele Co.*, supra at 120.

Although the Board may look at specific contract proposals made by a side charged with bad faith bargaining, it will generally refrain from deciding that particular proposals (if involving mandatory subjects of bargaining), are either "acceptable" or "unacceptable" and will strive to avoid making purely subjective judgments concerning the substance of proposals. *Reichold Chemicals* 288 NLRB 69 (1988). On the other hand, where a company's proposals called for a union to waive its right to strike and to negotiate grievances, while coupled with an almost unlimited management-rights clause, the Board concluded that the company essentially was offering a contract which would be illusory because unenforceable. *Prentice-Hall, Inc.*, 290 NLRB 646 (1988).

The General Counsel makes the following propositions.

1. The Respondent, as of February 9, 1990, was bargaining without any intention of reaching an agreement. This is evidenced by;

(a) The single statement by Joel Goldsmith to his manager, Mitch Haddad, in January 1990, that he was going to get rid of the Union.

<sup>6</sup>See also *I. Bahcall Industries*, 287 NLRB 1257, 1261 (1988).

(b) The fact that the Company's contract proposals called for substantial give backs.

(c) The fact that the Company, in its initial contract proposals, sought to eliminate the union security and dues-checkoff clauses.

(d) The fact that the Company, during the initial phase of negotiations refused the services of a mediator.

(e) The alleged company involvement in the filing of the decertification petition.

2. Because the Company bargained in bad faith, the lockout that commenced on February 9, was unlawful and violated Section 8(a)(3) of the Act.

3. Alternatively, that no impasse existed as of February 9, and therefore the Company's lockout was violative of the Act because it hired permanent replacement.

4. As no impasse had yet been reached, or alternatively, because the Company bargained in bad faith, the Company violated Section 8(a)(5) by unilaterally changing wages and conditions of employment vis-a-vis the replacement employees.

5. That the Company linked further bargaining on resolution of the matters previously litigated in Case 29-CA-13885.

It is true that the Company's initially proposed contract offer contemplated substantial give backs from its previous collective-bargaining agreements with the Union. Nevertheless, the Union concedes that conditions in the retail automobile business were extremely bad and were even worse for those dealers that sold Cadillacs. Indeed, it seems clear to me that the Union felt it would be lucky if it could maintain the existing terms and conditions embodied in the expired contract. Both sides to the negotiations realized that these were hard times, and that concessions would likely have to be made by the Union and the employees it represents.

I am not impressed by the argument that the Company's initial contract demands were so regressive. As noted above, parties to collective bargaining often start out at positions from which they intend to compromise. The fact here, is that the initial contract demands were made by the Company on January 29, 1989, and bargaining continued for only another 12 days (before being broken off by the Union), without indication by Heidecker that the Company's position was fixed or unalterable.

I am not persuaded that bad faith has been shown by the fact that the Company's initial proposals asked for, but did not insist as a condition of reaching agreement, on the elimination of union security and dues-checkoff provisions. *Gaywood Mfg. Co.*, 299 NLRB 697 (1990).<sup>7</sup> Nor do I think it particularly relevant that the Company refused during the first round of negotiations to utilize the services of a mediator. (During the negotiations that were held in the summer of 1990, the Union refused to use a mediator as requested by the Company.)

Goldsmith's statement to Haddad is troublesome. However, I do not think that this isolated statement offsets the fact that the Company's negotiators did put forth a proposed contract and did, over the entire course of bargaining, make concessions to the Union. Also, as the evidence shows that the the decertification petition was filed outside the 10(b) pe-

<sup>7</sup>Cf. *American Thread Co.*, 274 NLRB 1112 (1985), overruling *Markle Mfg. Co. of San Antonio*, 239 NLRB 1353 (1979).

riod and was not solicited by agents of the Company, I do not believe that this transaction shows the Company's bad faith.

The facts here show that on February 9, 1990, it was the Union that broke off negotiations contending that the expired contract had automatically renewed itself. Moreover this contention was based on the false assertion that the notice required by Section 8(d) of the Act was not sent to the Company.

Whether or not there existed an impasse, the proximate cause of the breakdown in negotiations and the concurrent lock-out, on February 9, 1990, was the Union's insistence that further bargaining was unnecessary because the old contract had renewed itself. On February 10, Heidecker sent a telegram to the Union stating that the company was willing to bargain. Instead of responding, the Union sought to compel arbitration wherein it contended, inter alia, that the contract had renewed itself.

In light of the above, it is my conclusion that the Company did not bargain with no intention of reaching an agreement. I further find that the lockout was an offensive lockout in furtherance of the Company's bargaining position. As such, absent proof of antiunion motivation, the Respondent did not violate the Act by using temporary replacements during such a lockout. *Harter Equipment*, 280 NLRB 597 (1986). See also *Boilermakers Local 88 v. NLRB*, 858 F.2d 756 (D.C. Cir. 1988).<sup>8</sup>

The General Counsel contends that the replacements hired by the Company were permanent and not temporary replacements, a contention that the Company's witnesses deny. The evidence on this point is somewhat ambiguous.

The Company did not hire any replacements immediately after February 9, 1990, and attempted to get by with Winters and its managerial staff. This became impossible to maintain and commencing around February 21, 1990, the Company began interviewing and hiring replacement salesmen. Although, the General Counsel asserts that replacements were told that they were being hired on a permanent basis, she produced only one, Felix Dourousseau, who unequivocally testified that he was told by Winters that his job was permanent. The other two General Counsel witnesses who testified on this subject were Haddad, who in response to my questions, stated that he told all employees hired after February 9 that there was a labor dispute and that they were hired on a temporary basis. Mario Demisa's testimony on this subject was that he got the impression that he was being offered a permanent job, although he was not told at the time of his hire of the labor dispute and he was not told that the job was either temporary or permanent in nature.

As stated above, it seems probable, in accordance with the credited testimony of Haddad, that most replacements were told about the labor dispute and informed that their jobs were temporary. It also seems possible that in a few cases, the Employer neglected to say anything about the labor dispute and thereby gave the impression that the job was permanent. On balance, however, I do not think that the General Counsel

<sup>8</sup>This case is distinguishable from cases such as *D.C. Liquor Wholesalers*, 292 NLRB 1234 (1989), where the company, having been found to have bargained in bad faith, terminated negotiations in the absence of a lawful impasse, locked out its employees, hired replacements, and unilaterally implemented its last offer.

has proved with sufficient clarity that the respondent hired permanent rather than temporary replacements.

I also conclude that the Respondent did not violate the Act by giving to the replacement employees different wages and conditions than those enjoyed by the locked out employees under the expired contract.

The general rule is that a company may implement some or all of its contract proposals but only after the parties have reached an impasse in their negotiations, *Colorado-Ute Electric Assn.*, 295 NLRB 607 (1989); *Sacramento Union.*, 291 NLRB 552 (1988). However, that rule is not applied to strike replacements whose wages and terms of employment may be unilaterally established by the employer. Thus, in *Marbro Co.*, 284 NLRB 1303 (1987), the Board stated:

The Judge found that the Respondent violated Section 8(a)(5) by unilaterally discontinuing contributions to the fringe-benefit trust funds after the parties' collective-bargaining agreement expired . . . and the employees went on strike. . . . We agree with the Judge's finding, but only to the extent that the Respondent discontinued the contributions on behalf of those of its employees who were returning strikers. In this regard it is well settled that even in the absence of impasse, an employer may lawfully change the terms and conditions of employment for strike replacements after a collective-bargaining agreement terminates. . . . Accordingly, we shall modify the Judge's recommended remedy for the unlawful unilateral changes by requiring the Respondent to make the requisite contributions solely on behalf of those of its employees who were members of the bargaining unit at the commencement of the strike and who thereafter worked for the Respondent as returning strikers. We shall further modify the Judge's recommended remedy to conform it to the violation found by requiring the Respondent to make whole its employees who were returning strikers for any losses suffered as a result of the unlawful unilateral changes. (Case citations omitted.)

In my opinion, there is no functional difference between an economic strike and an offensive lockout. In a strike, the

purpose is to put pressure on the employer to agree to the union's demands. In a lockout, the purpose is to put pressure on the union to accept the company's bargaining position. As such, it seems to me that temporary replacements in a lockout situation stand in much the same relationship as permanent replacements would be in the context of an economic strike. And this position is consistent with the position taken by the General Counsel in an advice memorandum reported at 125 LRRM 1374 (1987), in *Lincoln, a Subsidiary of Pentair*, Case 14-CA-18744.

The Union's attorney testified that in June 1990, while speaking with Heidecker about setting up a bargaining session, Heidecker said that the "real problem here is Hempstead." Apparently Bush interpreted this one line response as meaning that the Company would not bargain in the present context, unless the Union withdrew from its right to bargain at the other location that was the subject of the previous unfair labor practice case. Whatever Bush's interpretation, the fact is that according to his own testimony, Heidecker did not insist that the Union waive any rights it had at Hempstead nor did he condition bargaining in Jamaica on any action at Hempstead. (In fact, at a later date, a contract was executed for the Hempstead location.) I therefore see nothing in this testimony that would constitute a violation of the Act.

#### CONCLUSION OF LAW

The Respondent has not violated the Act in any manner encompassed by the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>9</sup>

#### ORDER

The complaint is dismissed.

<sup>9</sup>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.