

The Detroit Edison Company and Local 23, Utility Workers Union of America, AFL-CIO. Cases 7-CA-32263, 7-CA-32460, 7-CA-32271, 7-CA-32491, 7-CA-32710, and 7-CA-32778

March 4, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT
AND RAUDABAUGH

On July 31, 1992, Administrative Law Judge Thomas R. Wilks issued the attached decision. The Respondent filed exceptions and a brief in support, and the General Counsel filed a cross-exception and supporting brief and a brief in response. The Respondent thereafter filed a reply.

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

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

1. The Respondent challenges the judge's finding that it violated Section 8(a)(5) and (1) by bypassing the Union and dealing directly with employees at the Marysville facility. Specifically, the judge found that the Respondent unlawfully communicated to Marysville employees a "sweetened proposal" for phasing out the senior power plant operator (SPPO) classification without first adequately presenting the proposal to the employees' bargaining representatives. The Respondent asserts that the General Counsel failed

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

The second paragraph of the judge's decision incorrectly states that Case 7-CA-30042, among others, was severed from the above-captioned cases. The case number referred to should be Case 7-CA-30842. In his decision, the judge inadvertently states that the Regional Director dismissed Case 7-CA-32491, when in fact the petition in Case 7-RD-2759 was dismissed. Additionally, we note that James Mulrenin, the Respondent's general director of union relations, is not described in the record as Macomb Division Manager James Roosen's "superior," as the judge states. None of these errors affects the resolution of the case.

No exceptions were taken to the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by dealing directly with employees at the Harbor Beach facility when it sought their input and approval during mandatory employee meetings concerning a proposal to alter their job responsibilities and descriptions in exchange for an increase in wages, without first presenting or discussing the matter with the Union. Further, no exceptions were taken to the judge's finding that the Respondent did not unlawfully engage in direct dealing with employees at the Trenton Channel facility.

to prove a violation because he failed to adduce evidence concerning bargaining at the Marysville facility on the "SO/SPPO issue" as the parties refer to it. We disagree. We find that the Union was not afforded any meaningful opportunity to consider the "sweetened proposal" before it was communicated directly to employees, because the evidence fails to show that the sweetened proposal was previously offered by the Respondent in negotiations with the Union.²

Through evidence adduced concerning the Marysville facility, as well as the Trenton Channel facility, where the Respondent also wanted to phase out SPPOs, the General Counsel established that the Respondent had long desired to phase out the SPPO classification at its facilities by promoting employees in that classification to senior operators (SO), and by moving employees who declined promotions into the power plant operator position, with grandfathered pay and benefits.³ The SO/SPPO issue was ultimately excluded from "main table" negotiations for a new contract between the Respondent and Local 23 (the Union) in 1989, and the parties agreed that bargaining on the subject would take place at the unit/facility level.

Thereafter, in January 1991,⁴ Marysville Unit Chairman David Maynard asked for details about the power plant operator classification's duties and responsibilities. The Respondent answered his questions in a memorandum dated January 17 that included a description of some of the effects of the desired SPPO phase-out. There is no evidence that the issue was broached again at Marysville until August, when Maynard asked Plant Supervisor William Harrison to verify the rumor that the Respondent was engaged in discussions concerning phasing out the SPPO classification at its Trenton Channel facility. As verification, Harrison gave Maynard a copy of an August 21 memorandum that the Respondent had distributed to Trenton Channel employees. The memorandum outlined the Respondent's proposal for phasing out SPPOs at Trenton Channel and included certain job security guarantees.

In late August, while Maynard was at home on vacation, painting his house, Harrison brought him a copy of a memorandum that the Respondent intended to distribute to Marysville employees. The memorandum, which was very similar in text and format to the memorandum distributed to Trenton Channel employees, states in relevant part that "[j]ob security provisions would be added" to the Respondent's earlier proposal on the issue and describes "Productivity Im-

² Accordingly, the Respondent is not warranted in claiming that the General Counsel's case with respect to the Marysville unit shows no more than that the Respondent distributed an innocuous memorandum to Marysville employees that outlined its SPPO phaseout proposal.

³ The Respondent's unilateral attempt to phase out SPPOs was successfully challenged by the Union through arbitration in 1988.

⁴ Hereafter all dates refer to 1991.

provement Protection” and “Significant Plant Capacity Reduction or Closure” guarantees related to job security. Maynard asked Harrison about the memorandum’s reference to an attachment of questions and answers, as there was nothing attached to the copy Harrison presented to him, and Harrison replied that it was “a list of questions that you already asked as far as [SO/SPPO].” Although Maynard did not consent to the distribution of the memorandum, the Respondent distributed it to Marysville employees on September 3. Significantly, Union President Manoogian testified that the job security provisions had not previously been proposed in connection with the SO/SPPO issue.

The Respondent attempted but failed to establish that the attachment referred to above, a list of questions and answers concerning the SPPO phaseout, was distributed along with the September 3 memorandum. Implicit in the Respondent’s undertaking at the hearing and in its arguments is the contention that the Respondent and the Marysville unit representatives had previously bargained about the SO/SPPO issue, and that the September 3 memorandum presented no proposals not previously bargained.

Viewing the issue in its entirety, we are faced with uncontroverted evidence that the job security proposals described in the memorandum to Marysville (and Trenton Channel) employees were not made or discussed at main table negotiations. The September 3 memorandum, by its own terms, *adds* the job security proposals. The chief unit representative for Marysville was given a copy of the memorandum while at home on vacation and painting his house, and it was distributed to unit employees a few days later without the unit representative’s further involvement or consent. The foregoing is sufficient to establish a prima facie case of unlawful direct dealing. Even if the question and answer attachment was distributed to employees along with the memorandum, without more evidence, that document fails to rebut the showing that job security provisions were new and had not been presented previously to Marysville unit representatives. Thus, the Respondent failed to prove its defense. Inasmuch as we agree with the judge that under the circumstances the “sweetened proposal” was not adequately presented to Maynard or any other Marysville unit representative, we affirm the judge’s finding that the Respondent violated the Act as alleged.⁵

2. In affirming the judge’s finding that the Respondent violated Section 8(a)(5) and (1) by withdrawing

⁵ The judge found that the sweetened proposal was presented to unit representatives at Trenton Channel in a manner that gave them an opportunity to bargain about it before it was presented to Trenton Channel unit employees, and that the Respondent, therefore, did not engage in unlawful direct dealing with employees at that facility. As noted, no exceptions have been taken to that finding. In any event, no evidence establishes that Marysville unit representatives were given such an opportunity.

recognition from the Union with respect to the represented A-grade employees at the Macomb facility, we rely solely on the fact that the withdrawal occurred in the context of an unremedied unfair labor practice adversely affecting employee support for their bargaining representative.⁶ The record establishes that the Respondent unlawfully bypassed the Union and dealt directly with Macomb employees when it distributed a memorandum to them on October 22, seeking to ascertain their personal preferences about the work station each of them wished to be assigned to in connection with a reorganization it planned to implement. The memorandum instructed employees to submit their first, second, and third relocation preferences to the Respondent by October 31. Although the parties were engaged in negotiations for an initial contract in the A-grade unit, the Respondent did not notify the Union about the work station preference memorandum prior to its distribution to employees. On October 24, the Union filed an unfair labor practice charge regarding the solicitation of the employees’ work station preference.

For the reasons stated by the judge, we agree that the foregoing conduct constitutes direct dealing with employees in violation of Section 8(a)(5) and (1), and that the conduct was not remedied by a conciliatory letter given to Union President Manoogian on November 18—a letter not disseminated to the unit employees. Accordingly, we find that the Respondent was not privileged to rely on an employee decertification-type petition, signed by 16 of 30 A-grade unit employees and presented to it on December 17, as a basis for withdrawing recognition from the Union. It is well settled that a withdrawal of recognition must occur in a context free of unfair labor practices.⁷ *Cannon Boiler*

⁶ On January 25, 1993, the Respondent filed a motion for continuance and to reopen the record in the instant proceeding to receive evidence it plans to adduce in an upcoming unfair labor practice hearing in Case 7-CA-33818(1). The General Counsel filed an opposition to the motion on February 3, 1993, and the Respondent filed a reply on February 18, 1993. The evidence that the Respondent refers to relates to the authenticity of the signatures on the employee petition on which the Respondent relied in withdrawing recognition from the Union as the representative of a unit of A-grade employees. Because, as stated below, we do not rely on the judge’s findings regarding the authenticity of those signatures in affirming his finding that the Respondent unlawfully withdrew recognition, the Respondent’s motion is denied.

⁷ Member Raudabaugh notes that there is a parallel between cases involving a withdrawal of recognition and cases involving union objections to a lost election. In both cases, there is a showing of employee disaffection from the union. And, in both cases, a question can be raised as to whether the employer’s conduct tainted the disaffection. In his view, the same test should be applied to both. The test for both should be whether the character and quantity of the employer’s conduct provide a reasonable basis for declining to accord validity to the employee disaffection from the union. Accordingly, he does not agree that the commission of an employer unfair labor practice will almost always result in the overturning of an election.

Continued

Works, 304 NLRB 457 (1991); *Mental Health Services, Northwest*, 300 NLRB 926 (1990); *Guerdon Industries*, 218 NLRB 658 (1975). The Respondent's 8(a)(5) and (1) misconduct conveys to employees the notion that they would benefit more, or receive greater consideration, without union representation. Such conduct improperly affects that bargaining relationship and precludes the Respondent from withdrawing recognition on the basis of a claimed good-faith doubt.⁸

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Detroit Edison Company, Detroit, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

(The Board will set aside an election based on unfair labor practices unless such practices are de minimis so that it is "virtually impossible to conclude that they would have affected the results of the election." See *Caron International, Inc.*, 246 NLRB 1120 (1979); *Super Thrift Markets*, 233 NLRB 409 (1977).) Similarly, in Member Raudabaugh's views, an employer's unfair labor practice would not necessarily taint an employer's doubt of union majority status in a case involving a withdrawal of recognition. However, Member Raudabaugh believes that the character and quantity of the unlawful conduct in this case were sufficient to taint the Employer's doubt. Accordingly, he agrees with his colleagues that the withdrawal of recognition was unlawful.

⁸We note that a decertification petition in Case 7-RD-2759 was filed by Macomb A-grade unit employee Ken Miller on October 31. That petition eventually was dismissed by the Regional Director. It was supported by only 10 signatures obtained either on October 22, the same day that the Respondent solicited the employees' work relocation preferences, or on October 23. Further, although there is evidence that in August Miller presented Macomb Division Manager Roosen with a copy of a letter to the chairman of the board requesting withdrawal of recognition, the record does not establish that the sentiments expressed there were shared by a majority of unit employees. Therefore, we can only conclude that whatever disaffection employees may have felt toward the Union "came to a head" or came to be widely shared only after the Respondent dealt directly with them and thereby undermined the role of their collective-bargaining representative in protecting their interests with regard to effects of a major relocation.

Mark D. Rubin, Esq. and *Gary Saltzgeber, Esq.*, for the General Counsel.

Stanley H. Slazinski, Esq. and *Jane K. Souris, Esq.*, of Detroit, Michigan, for the Respondent.

George G. Manoogian, President, Local 223, for the Charging Party.

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge. The very first unfair labor practice charge, in a series of such charges ultimately consolidated herein, was filed on August 3, 1990, in Case 7-CA-30842 by the Charging Party Union, Local 223, Utility Workers Union of America, AFL-CIO, against the Respondent, The Detroit Edison Company. Thereafter,

other charges were filed by the Union and complaints were issued by the Regional Director who, on February 11, 1992, issued the final consolidated complaint which included not only the above-captioned cases but also Cases 7-CA-30842, 7-CA-31160, and 7-CA-32463. That trilogy of cases involved alleged violations of Section 8(a)(5) of the Act encompassing in major part bargaining information demand issues involving several of a multitude of well over 30 collective-bargaining units, all of which the Union is the designated agent. These cases are referred to as the information request cases. The balance of issues involve 8(a)(5) allegations of direct dealing, unilateral actions affecting pay or working conditions in several units and the withdrawal of recognition in one unit.

On March 27, 1991, the Acting Regional Director issued an order severing certain cases, approving withdrawal of charges and dismissing complaints in Cases 7-CA-30842, 7-CA-31160, and 7-CA-32463, on the grounds of a non-Board adjustment of those cases.

Timely answers denying the alleged violations of law were filed on all cases. Pursuant to the February 11, 1992, consolidated complaint, the issues raised therein were litigated at trial before me on March 30 and 31 and April 1, 1992, at Detroit, Michigan.

At the trial, the outstanding consolidated complaint was amended to remove the issues raised by the information request cases paragraphs 17-27 and all references were thereby deleted. However, the General Counsel moved to amend the consolidated complaint to join a new complaint based upon a charge filed in Case 7-CA-32934(1) involving an information request in still another bargaining unit represented by the Union. Respondent objected to consolidation which would have necessitated an adjournment of the hearing. Having ascertained that there was no or insufficient commonality of bargaining unit, Respondent agents, union agents, and that the issues were not related to those litigated herein, I concluded that consolidation would have impeded the expeditious resolution of the issues herein and were contrary to the interests of judicial economy. Accordingly, I denied the motion for consolidation.

After the parties presented evidence relevant to the remaining issues, they were provided with opportunity to argue orally, but they elected to file written briefs. Because of extensions of time granted, briefs were not received by me until June 30, 1992.

On the entire record and from my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a corporation duly organized under and existing by virtue of the laws of the State of Michigan, has maintained its principal office and place of business at 2000 Second Avenue, Detroit, Michigan (the Detroit place of business). Respondent is, and has been at all times material herein, a public utility engaged in the production, sale, and distribution of electrical power. Respondent maintains several facilities in the State of Michigan. Its facilities located at 4695 West Jefferson Avenue, Trenton, Michigan (the Trenton Channel Power Plant); at 755 North Huron Avenue, Harbor Beach, Michigan (the Harbor Beach Power Plant); at

15600 19 Mile Road, Mount Clemens, Michigan (the Macomb Division); and at Gratiot Boulevard, Marysville, Michigan (the Marysville Plant) are the only facilities involved in this proceeding. During the calendar year ending December 31, 1990, which period is representative of its operations during all times material hereto, Respondent, in the course and conduct of its business operations, derived gross revenues in excess of \$500,000 and purchased and caused to be transported and delivered to its various Michigan facilities goods and materials valued in excess of \$100,000, of which goods and materials valued in excess of \$50,000 were transported and delivered to its Michigan facilities directly from points located outside the State of Michigan.

It is admitted, and I find, that Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

It is admitted, and I find, that the Charging Party Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

Harbor Beach Unit

The Harbor Beach Power Plant unit consists of operating and maintenance employees within Respondent's production department at its power plant in Mount Clemens, Michigan, for which Respondent has been the designated employee bargaining agent since 1968. At the time material herein, there were 18 unit employees.

According to the uncontradicted testimony of John Luther, the employee bargaining unit chairman at Harbor Beach, the following sequence of events led to the meeting of seven unit employees on August 20 and September 4, 1991, at which it is alleged Respondent's agent James Repp, superintendent of the North Area plants, dealt directly with them concerning conditions of employment. His account of what transpired was not contradicted.

On August 20 at 9:30 a.m., Luther and six other unit employees were summoned to a meeting in the plant at which they were addressed by Repp and by Plant Manager Robert Socia. The employees were told that the North Area power plants, which included Harbor Beach, were losing \$50,000 annually with respect to the maintenance operations. Printed leaflets entitled "Elements of an Expanded Maintenance Journeyman Classification" were distributed which contained the outlined highlights of a voluntary plan whereby the employees' job functions and responsibilities would change and be augmented in return for an increase in pay. Repp explained the plan directly to the assembled unit employees. There had been no prior disclosure to the Union of the plan or the intent to present such a plan to the unit employees. At the end of his explanation of these proposed changes, Repp addressed the group as one and asked how they "felt" about it, and stated "I'd like you to get behind us; are you for it or against it?" Hearing no response, he told the group to discuss the proposal and to direct their opinions to Socia. Luther participated as one of the group and was not addressed individually or as a union representative.

On September 4, Luther heard rumors from other employees that another such meeting was impending. He directly questioned Socia who admitted such intent and rebuffed Luther's protestation that the Local Union should be notified by asserting that he did not want a "confrontation." Luther said that he did not want to attend unless the Local Union had been notified and authorized his attendance. Socia told him that he was free to attend or not attend as he wished. On the morning of September 5, Socia told Luther that it had been decided by the Company that he must attend. Accordingly, Luther attended a meeting later that day in Repp's office with about the same number of unit employees.

At the September 5 meeting, Repp distributed a multipage printed document entitled "Multi-Craft Agreement." Like the earlier handout, this document had not previously been provided to Luther or to the Union. Repp proceeded to explain to the unit employees how the content of the document would change their job description and solicited their opinions of it. Luther and several other employees raised objections to the content, but Repp told the group to read it carefully, to discuss it amongst themselves and to give their individual reactions directly to Socia thereafter. There is no dispute that the proposed plan would significantly affect the unit employees' job duties, responsibilities, and pay. Before the end of the meeting, Repp told the employees that Respondent would evaluate their suggested changes to the plan and incorporate them into a proposal that would thereafter be submitted to the Union.

Section 9 of article VIII of the collective-bargaining agreement between Respondent and the Union provides with respect to "Job Description, Job Analyses and Job Evaluation" that "management reserves the exclusive right to determine the duties of any classification." Relevant portions of article VIII of the Labor Agreement also provides that management must give notice only as defined by the Labor Agreement to the Union after the decision has been made by the Company to establish a new job. Section 9(b) states in part:

Should the Company contemplate changes in an existing job description or group of job descriptions, the Company will advise the unit of such changes at least thirty (30) days prior to the proposed effective date of such changes and, during such period, enter into negotiation in an attempt to reach agreement respecting such changes.

Arbitration decisions have supported Respondent's position that it reserves "broad contractual freedom to modify, subtract from, or add to the classification structure." The "Expanded Maintenance Journeyman Classification" plan was aborted and no effective date was ever reached.

Trenton Channel Unit

Since 1943, the Union has been the designated bargaining agent for a unit of production and maintenance employees at its power plant in Trenton, Michigan, for whom it has negotiated collective-bargaining agreement coverage.

For some years, Respondent has been attempting, through negotiations with the Union, to phase out the job classification of Senior Power Plant Operator, i.e., SPPO, by promoting some to the senior operator classification, i.e., S.O. and for those declining promotions to the power plant operator

position, i.e., PPO, but grandfathered at their current SPPO benefit and pay level. The Trenton Channel Power Plant superintendent, Tullio H. Bilenchi, testified that prior to 1989, Respondent had determined that it had the right to do so unilaterally but that an adverse arbitration decision had compelled it to negotiate the issue with the Union. Respondent had unsuccessfully sought agreement with the local bargaining chairman in 1988 before its attempt at unilateral action. Pursuant to the arbitration decision, Respondent again futilely sought agreement on the SPPO issue during the June 1989 "main table" collective-bargaining negotiations and in late 1989 negotiations with the Trenton Channel Power Plant unit representatives headed by bargaining agent chairman Henry Hicks and other North Area units. It is not disputed that negotiations with the Trenton Channel unit committee came to a halt, i.e., "a dead issue," when the unit members instructed their representatives not even to discuss the issue with Respondent. Bilenchi admitted his awareness of the adamant position of the unit members and their clear instructions to their representatives.

Bilenchi testified that on some unspecified date and in some unspecified context, he and employee bargaining unit Vice Chairman Patrick Champion, on Champion's initiative, discussed the possibility of a renewal of negotiations but with a modified proposal that would include a job-security provision. Bilenchi testified in a similar general fashion to a subsequent conversation with Hicks wherein Hicks confirmed Champion's indication of a willingness to renew negotiations of the SPPO issue. According to Bilenchi, he and Hicks reviewed the history of that issue and agreed to place it on an agenda for a regularly scheduled management-union meeting set for August 15, 1991.

Bilenchi testified that he appeared at or near the end of the August 15 meeting between senior representatives of Respondent and a bargaining unit committee, inclusive of Hicks and Champion. According to Bilenchi, he addressed the union committee with respect to the SPPO issue and stated that it was his understanding that there was "considerable sentiment among bargaining unit members to explore the possibility of resurrecting Respondent's SPPO proposal but with a job-security modification. In generalized terms, Bilenchi testified that when they discussed how to move along on such a negotiation, he was reminded of the past instruction of the unit members, as embodied in a written petition to their representatives, which prohibited such negotiation. Bilenchi testified that he suggested that the unit bargaining committee should put the question of negotiation renewal to a vote by the unit member.

Continuing with his generalized narration, Bilenchi claimed that in response to his proposal at the August 15 meeting, the unit bargaining committee inquired as to what kind of job-security provision the Respondent might have in mind. He testified further that inasmuch as he had not as yet formulated a proposal, at a break in the meeting he "scratched out" a draft of a proposed management letter to employees which outlined his ideas as to a possible job-security provision and thereafter read this draft outline to the unit bargaining committee. He testified that he explained to them that Respondent was willing to make a commitment to a job-security provision in return for some kind of guarantee of improved productivity, but without layoffs or the loss of any jobs except through attrition. Bilenchi testified that the bar-

gaining committee members "were encouraging" in their response. Yes, he answered Respondent's counsel's leading question, Hicks did raise some questions and did offer a timetable for the issuance of a letter from management to unit members of the nature outlined in his draft. According to him, the Union already had a unit membership meeting scheduled at a future date and "they" suggested that he issue a letter to employees a few days in advance thereof in order to give the members time to think it over.

On cross-examination, Bilenchi admitted that the idea of a direct management letter to unit members was raised by him at the August 15 meeting but that Hicks neither objected to it nor suggested a special unit membership meeting as an alternative to a direct management appeal to members.

Bilenchi did issue the aforesaid letter to employees on August 21, 1991. He asserted that he and Hicks met several times for Hicks to review the draft of the letter and to add or subtract from it and that Hicks told him that what the Company proposed was up to the Company and never objected to it even up to the time he told Hicks he was about to issue it. Bilenchi testified that several days after the issuance of the August 21 letter at an unspecified union-management meeting, Hicks informed him that the bargaining unit members decided not to renew negotiations of the previously rejected SPPO proposal.

After some contorted evasion, in cross-examination Bilenchi finally admitted the palpably obvious, i.e., that he did indeed think that his August 21 letter to employees would mitigate their opposition to the SPPO proposal for which Respondent avidly sought agreement for so long.

Bilenchi's letter to employees of August 21 briefly alluded to Respondent's past effort to restructure the organization of the Trenton Channel High Pressure Plant and the past negotiations with the Union. Bilenchi then states:

To this end I have offered your bargaining unit officers the opportunity to discuss the following proposal with the hope of moving this issue forward.

Thereafter, the letter reiterated the proposals referred to above, inclusive of job-security provisions. The letter ended:

I am aware that you have instructed your bargaining unit representatives not to discuss with management any terms concerning these issues. Therefore, I am presenting you with Management's ideas and, respectfully request that you review your own position on this matter. I would like you and your Union representatives to understand that I am willing to meet with them and discuss further any matters which affect this issue. I hope that we can resolve it and continue to improve Trenton's competitive position among power plants in the Midwest.

There is a factual dispute as to whether Bilenchi had discussed with the union representatives the details of the proposal set forth in the letter and whether those union representatives, Hicks and Champion, approved of the direct communication to employees.

Although Bilenchi's presentation occurred at a regularly scheduled meeting at which were present three other management representatives, they were not called to corroborate his testimony. The General Counsel adduced the testimony of

only two of five of the union representatives present and a copy of the minutes recorded by one of the union representatives.

Champion testified that it was Bilenchi who raised the subject of renewed negotiations at a social function 3 weeks before August 15. Champion claimed that in a generalized discussion, Bilenchi suggested that the SPPO issue was not dead because Respondent could move forward with an improved offer. He did not "recall" that Bilenchi alluded to any specific language of the modified proposal. He admitted that he observed that the written agenda prepared by Bilenchi for the August 15 meeting included the issue.

Hicks' direct examination failed to allude to individual pre-April 15 conversations between himself and Bilenchi. On cross-examination, he admitted to having had various encounters with Bilenchi before the August 15 meeting but denied that Champion had ever discussed with him the possibility that SPPO negotiations ought to resume. He did not "recall" that Bilenchi approached him with a claim that Champion suggested renewed negotiations. However, also on cross-examination, Hicks denied even a "glimmer of an idea" that there was a possibility of renewed SPPO negotiations. Champion testified in cross-examination that it was Hicks who had informed him at the time of his observation of the agenda for the forthcoming August 15 meeting that Bilenchi wanted to discuss the SPPO issue.

On further cross-examination, Hicks admitted that prior to August 15, Bilenchi did approach him and say that he would raise the SPPO issue and that he responded to Bilenchi that "he could come and talk to us and he did." He asserted in cross-examination that the Union team did not discuss the issue at the meeting but merely listened to Bilenchi's proposal. He explicitly testified that Champion only listened as Bilenchi spoke for 10 minutes.

On direct examination, Hicks' account of the August 15 meeting was extremely succinct and conclusionary. He testified that "we" responded to an SPPO proposal by Bilenchi with the assertion that it was a dead issue that had been rejected by the membership and that it was Bilenchi who suggested a management letter to employees. As to the idea of a management letter to the members, Hicks testified that the union committee responded that it was "not a good idea" and at no time agreed to it. His direct examination was unspecific as to what Bilenchi proposed either as to the SPPO issue itself or the contents or nature of the proposed letter. He merely denied that the substance of the August 21 letter was discussed at any time with the Union or himself before August 21. On cross-examination, Hicks admitted that the union team did take a caucus to discuss Bilenchi's presentation. Clearly, Bilenchi must have proposed sufficient language to warrant an internal discussion by the union team. Whatever it was that Bilenchi proposed, the union team discussed it and, according to Hicks' sketchy testimony, they decided against it. On further cross-examination, Hicks admitted that after the meeting, Bilenchi very frequently spoke with him in the plant about the appropriateness of specific language for the forthcoming letter, i.e., "every time I was down there he mentioned it." He then testified that he did not "recall" Bilenchi's reference to specific language at the meeting itself. He did not recall whether Bilenchi left the room at any point nor whether he wrote anything down on yellow paper. Nor did he recall whether Champion explicitly

reiterated Hicks' own response at the meeting, nor could he recall anything that was said by Champion. He then testified that he did not "remember" whether Bilenchi actually came to him and offered to him to read the final draft of the August 21 letter before it was sent. He testified, "I don't think it happened. I don't remember. I don't recall [seeing the proposed letter]." He did not "recall" any discussion with respect to a deadline date for the letter. His demeanor was neither certain nor convincing.

Champion testified that at the August 15 meeting Bilenchi offered to improve the offer on the SPPO issue if negotiations were renewed "or words to that effect." He testified that he "believed" that the union committee responded that it was a dead issue and contrary to the membership's instruction not to negotiate further on the issue.

According to Champion, but not mentioned by Hicks, Bilenchi asserted that he had the right to go out into the plant and personally discuss it directly with the unit employees. According to Champion, both he and Hicks responded to all of Bilenchi's statement and that, to this startling claim, they merely expressed that "it was not a good idea." It was thereafter, he claimed, that Bilenchi suggested a management letter to employees to which both he and Hicks told him not to do that. Champion testified that despite their opposition, there was "some discussion" as to what language Bilenchi wanted to include in the letter. Champion did not specify the nature or contents of that discussion, but apparently it was of some substance and significance because it directly precipitated the union committee caucus "to see if our members wanted us to discuss the matter with management." When Champion was about to testify in direct examination as to what was discussed in that caucus, he was interrupted by counsel and directed to what occurred thereafter. Thus there is no clear indication of just what they discussed if it was not the substance of an improved offer as contained in the August 21 letter, and as Bilenchi testified that he proposed at the meeting. Bilenchi certainly must have expressed something of substance to at least have caused consideration by the committee. Champion testified that after the caucus, Bilenchi was told not to send a letter to employees but that the bargaining committee would call a special meeting "to see if [the] members wanted [it] to discuss the matter with management."

Champion denied vehemently that in any manner the committee approved for direct communication by Bilenchi with the employees. He denied that the proposal set forth in the August 21 letter had ever previously been conveyed to the Union. In cross-examination, he admitted that there indeed was some discussion by Bilenchi of job security. He did not testify as to how much of the job-security offer outlined on the August 21 letter was or was not proposed at the meeting. He admitted as "partially true" Bilenchi's assertion on the August 21 letter that he had offered the union bargaining committee an opportunity to discuss the modified proposal. Champion did not explain further.

The union-prepared minutes of the August 21 meeting are very cryptic. With respect to the items discussed, they appear to be less than complete, and selective at best. With respect to the SPPO discussion wherein Bilenchi's presentation alone consumed 10 minutes, there is only the following memorialization:

Bilenchi: My objective regarding the SPPO's is not beyond hope. I want to make headway on this. Hicks: Our Bargaining unit has instructed us not to negotiate on this.

Bilenchi: That is not negotiation. It will be a letter from me to the bargaining unit. Hicks: We wish you would not do this. We could call a special meeting of our division to ask them if they want us to talk to you about this.

Bilenchi: Again, this is not a negotiation. Our goals are less cost, more accountability, and I think we could put together a better package than main table negotiations. Some of the items in this package could be productivity protection, geographic protection, pay grade protection, automatic progression for the SPPO's et cetera.

At this point there was a caucus. Hicks: We can call a special divisional meeting on August 29, 1991. We will ask our membership if they want us to talk about this with you.

Meeting adjourned.

The General Counsel stresses, of course, the language "we wish you would not do this" as corroboration of his witnesses. However, when that language and reference to a special meeting was read to Hicks in cross-examination, he testified as follows:

A. I might have said that. I said something on that order, yes.

Q. Okay. Do you recall how Mr. Bilenchi responded to your statement?

A. If I recall rightly, he said he was going to put the letter out.

Q. Did he ask you to call a special meeting to discuss the proposal?

A. I don't [recall] if he did that or not. I think that was our Union's decision—that's when we went out and caucused. We talked about maybe—maybe, going to bring it back to the membership, but we never did.

Q. Didn't you suggest to him that [you] could call a meeting for the purpose of discussing your letter?

A. I—yes.

Q. Isn't that what you said?

A. Yes.

Thereafter, on further cross-examination, Hicks insisted that the union committee objected to the issuance of a letter, that he had made no offer to have a special meeting to discuss the letter and that what he said to Bilenchi was that he "could" have a special membership meeting. He had no recollection of Bilenchi's response.

Thereafter, Union President George Manoogian objected to the August 21 letter and, on September 30, Respondent withdrew it and disclaimed any intent to bypass the Union. There was insufficient evidence of propagation of this disclaimer to unit employees.

Although counsel for Respondent at times lapsed into somewhat leading examination of Bilenchi, I am convinced from observation of his overall testimony and demeanor that he was the far more certain, responsive, detailed, internally

consistent, spontaneous, and convincing witness than either Hicks or Champion. Hicks was particularly hesitant, unresponsive and uncertain in demeanor. His and Champion's testimony were internally and mutually inconsistent, generalized and selective. They were both unconvincing. I credit the testimony of Bilenchi that ultimately the Union committee caucused because Bilenchi proposed something significant enough for them to consider, i.e., the substance of a modified offer, and that Hicks and Champion, at that meeting or shortly thereafter, acquiesced to Respondent's proposed letter to be issued in advance of a special union meeting at which the question of whether it was worthwhile to renew negotiations or the SPPO offer as modified could be discussed.

Marysville Unit

Since 1943, the Union has represented a unit of production employees at Respondent's power plant located in Marysville, Michigan, which is included among the North Area plants involved in the SPPO issue. As noted, that issue had not been resolved at the main bargaining table but had been referred to local unit bargaining in late 1989 which proved futile and stalemated.

In January 1991, the superintendent of the North Area power plants, James Repp, responded to questions put to him by the Union's Marysville Power Plant Division chairman, David Maynard, regarding the details of the PPO classification. The response took the form of a January 17 memo from Repp to Maynard which set forth in four pages the proposed duties and responsibilities of the PPO position and the effects upon SPPO's upon the elimination of their classification.

Maynard testified that in August 1991 he had heard "through the rumor mill that there was to be renewed discussion of the SPPO issue at the Trenton Channel Power Plant. Accordingly, he approached Marysville plant supervisor William Harrison and sought verification. As it happened, Harrison had just received a fax of Bilenchi's August 21 letter to the Trenton Channel unit employees and gave Maynard opportunity to read it. Thereafter, in late August, when Maynard was at home on vacation he received a telephone call from Harrison who told him that he was about to distribute to the Marysville unit employees a letter similar to the Bilenchi letter of August 21 to Trenton Channel unit employees. Maynard said he would have to see the letter before he was able "to agree to anything." Harrison then personally delivered a copy of a letter to the unit employees from Repp which was thereafter issued on September 3 and which was virtually identical to Bilenchi's letter. That letter indicated copies sent to Manoogian and Maynard, and in its first paragraph referred to meetings with Marysville Unit and Local union representatives on the SPPO issue since January 7, and referred to an attachment of written answers to their questions concerning the impact of the SPPO proposal. Distribution and receipt of the letter was stipulated by the parties. The General Counsel did not concede distribution and receipt by unit employees of the January 17 letter from Repp to Maynard as an attachment to the September 3 letter, or in any other form. Respondent adduced evidence that it was the intent to attach the January document to the September letter, and that its file copies reflect actual attachment, and that subordinate persons were instructed to attach the document for distribution. There is no probative evidence of the last link in the sequence of distribution, i.e., that both documents

were attached and deposited in the mail and that the unit employees actually received the attachment, except for hearsay testimony that a former unit member, now a supervisor, displayed a copy of both attached documents to a manager who passed it to witness Repp at the trial.

The Macomb Unit

A. *Unilateral Withholding of Pay Raise*

On July 6, 1990, the Union was certified as designated bargaining agent for certain of the "A" Grade classification of employees employed within Respondent's Macomb Division of Energy, Marketing and Distribution organization (E M & D). That division services Respondent's nonindustrial customers in such areas as service, planning and engineering in the design of a service installation. The division is so-named because it geographically encompasses Macomb County, Michigan. I shall refer hereafter to the Macomb County "A" Grade employees as MAG. The MAG unit is the only unit of "A" Grades represented by the Union in Respondent's entire system.

The tally of ballots for the election conducted by the Board prior to the certification reveals 36 ballots cast designated union representation. One nondeterminative challenged ballot was uncounted and unopened. According to the testimony of Respondent's Macomb Division manager, James Roosen, there were 30 employees employed within the bargaining unit from October 1, 1991, until December 17, 1991, whose complement remained constant without addition or deletion.

Because the parties failed to agree upon a bargaining schedule of dates, times and places, the negotiations for an initial collective-bargaining agreement did not take place until February 1991, except for one or two preliminary meetings at some undisclosed dates in 1990. Early in negotiations, the Union proposed that the noncertified MAG unit be "folded" into a preexisting 1987 collective-bargaining unit or Master Agreement with Respondent covering other employee units except that the issue of their wages would be left open for negotiation. Respondent refused and insisted upon a separate contract for a separate unit. The Union's actual proposal was submitted in writing in late 1990.

Union President Manoogian testified that negotiations for MAG unit wages did not commence until late November 1991 or early December 1991, at which time the Union proposed a 5-percent raise for 1990 and 6-percent raise for 1991. Manoogian testified that at the second of only two meetings dealing with MAG unit wages in early December, Respondent offered an 8-percent raise retroactive to 1991, but the Union rejected it and countered for an 8-percent raise retroactive to 1990. Martin claimed that there was some discussion of wages that preceded November 18. He was, like Manoogian, unspecific.

It is stipulated that preceding September 1990, Respondent maintained a policy and practice of annually granting all "A" Grade employees a September general pay raise, the amount of which, of course, was determined unilaterally as there historically had been no union representation of any "A" Grade employees. The "A" Grade classification traditionally had included entry level professionals, administrative, first line supervisors, as well as technical employees, paid by weekly salary. Union-represented employees tradi-

tionally were paid an hourly rate schedule, i.e., "T-Grade" wage schedule as set forth in the Master Agreement.

The past practice and policy of Respondent had also provided for a second possible pay raise for "A" grade employees by means of individual merit increase granted on the anniversary of each employee's tenure but not to exceed the maximum level set by the Respondent in the range of pay it determined for "A" grades. That range was adjusted annually by virtue of the September general raises which flowed from the across-the-board adjustments to "A" grade pay schedule determined and announced annually in August.

In August 1990, Respondent prepared to announce the rate of the September raise for "A" grades it had unilaterally determined, to be received by all "A" grades exclusive of the MAG unit employees. In advance of that announcement, Respondent communicated with the Union by letter dated August 17, 1990, from Richard Martin, director of labor relations, addressed to Manoogian which stated:

This letter is to advise you that effective September 3, 1990, the wage rate ranges for all non-represented A-Grade employees will be increased by 4%.

Approximately six weeks ago, we suggested Management and the Union commence the collective bargaining process for the Macomb A-Grades your Union now represents. You are once again invited to bargain on behalf of those Macomb A-Grade employees.

Martin testified that he intended that letter as notice of the Union which would either elicit a bargaining request or possibly an unfair labor practice change, inasmuch as unfair labor practice charges were pending at that time with respect to certain annual merit raises allegedly withheld from certain MAG unit employees. Martin characterized the letter as a bargaining invitation. (The other pending charges ultimately settled.)

By letter dated August 23, 1990, addressed to Martin from Manoogian, certain information regarding MAG employees was requested. Then in the second and final paragraph, it is stated:

I am happy to learn of the four percent (4%) general increase for the non-represented "A" grade employees effective September 3, 1990. The employees in the "A" grade classifications, non-represented and represented alike, are deserving of this increase. Moreover, the Company obviously agrees and understands a minimum of a 4% increase is due to these classifications. This increase will be the "springboard" for our upcoming negotiations on behalf of the represented "A" grades in the Macomb Division.

The MAG unit employees did not receive a raise in 1990, either in September or thereafter. Manoogian testified in direct examination that he was at the time under the impression that the MAG unit employees also received a 4-percent general pay raise in September 1990, but that he first became aware they did not during the "latter part of 1991." He filed no charge nor grievance over the withheld pay raise. As noted above, the Union, as Manoogian admitted, proposed a 5-percent raise for 1990 in late November or early December 1991, presumably retroactive for 1990. There was no ref-

erence by the Union to an incorporation of or implementation of the non-MAG unit employee pay raise for 1991.

In further direct examination, Manoogian testified when asked why he had filed no charge nor raised any complaint about the withheld 4-percent 1990 raise: "Well, I wasn't aware under the law that they were entitled to it."

On cross-examination, Manoogian testified that he had understood Martin's letter to constitute an announcement of a wage increase to all "A" grades, inclusive of MAG unit employees, despite its explicit characterization as a raise for all "non-represented A-Grade employees." He testified that no MAG unit member told him of the nonreceipt of a September 1990 raise until "maybe" April 1991. He was not sure of the date. When asked why he did not immediately complain when he did hear about it, he testified that he thought Respondent could lawfully withhold the raise and was not aware that they had to *continue* on with them. Thus, at least by early 1991 if not late 1990, Manoogian perceived that Respondent had discontinued its past practice of annual pay raises with respect to represented "A" grade employees. He appears to have accepted the amount of MAG unit general pay raise to be a subject for negotiations by virtue of his 5-percent to 6-percent 1990-1991 wage increase proposal.

In September 1991, the MAG unit employees did not receive a second general wage increase of 4 percent as received by other nonunit "A" grades. Manoogian testified that in an undated conversation with Respondent Director of Union Relations Richard Martin prior to the last negotiation where Respondent offered an 8-percent retroactive raise to 1991, he complained to Martin that the withheld raise of 1991 was an unfair labor practice. He was not contradicted. On December 20, 1991, in Case 7-CA-32710, 3 days after Respondent withdrew recognition pursuant to an employee petition submitted to it, only then did the Union file the charge upon which the complaint alleges the September 1991 withholding of a pay raise to the MAG unit employees as an unlawful unilateral discontinuation of a past practice. Presumably, according to the General Counsel's theory, each succeeding year that Respondent again unilaterally "discontinued" its past practice would constitute separate and discrete violations of the law.

It is difficult to accept Manoogian's assertion that he had not learned of the withheld 1990 pay raise until 1991. He conceded that he met with and consulted with MAG unit bargaining committee-persons. It is improbable that they did not raise the issue with them as this was the first time in 8 years they did not get a pay raise in September. Martin's letter is not subject to misunderstanding. It is precisely what he intended it to be, i.e., notice of a 4-percent raise to nonunit "A" grades and an invitation to negotiate the wages of the MAG unit. I find Manoogian's explanation as disingenuous and unconvincing as was his demeanor.

I conclude that the reason Manoogian took no action is not because he misunderstood Martin but because he assumed that Respondent could lawfully suspend its past wage increase policy as to MAG unit employees whose wages were to be the result of negotiations. Given Manoogian's assumption, he clearly would not have objected to Martin's letter had it been any clearer. I find that given his assumption, a protest would have been improbable.

I conclude that Manoogian accepted Martin's letter for what it was and acquiesced by return letter to negotiate

wages for MAG unit employees for an increase at the 4-percent starting point. I find that he thereby accepted as a fact that MAG unit raises would be withheld pending negotiations wherein he sought retroactivity.

B. *Direct Dealing*

For undisputed compelling business reasons, Respondent determined in 1992 to reorganize its six geographic divisions. This reorganization plan was to affect certain job classifications included in the MAG unit, e.g., service planners. The change proposed that instead of being assigned to a divisional headquarters, they would now be assigned to one of several service centers to be established for each division from where they would not perform their customer service job functions, hopefully to improve that service.

The divisional headquarters originally housed engineers, power lines organizers, as well as service planners and others. The service centers were to include service planners and "tradesmen" whose function related directly to the installation and maintenance of overhead and underground power lines and included such functions as truck and other mechanical repair work. The Macomb service centers were to be located in the cities of Mount Clemens and Shelby.

On October 7, 1991, a printed announcement of the proposed changes was distributed to all divisional employees. On October 22, 1991, a second announcement was addressed to E M & D employees and informed them that E M & D staff members would communicate during the week of November 11, 1991, with each division's employees in-depth the background, rationale and substance of the E M & D organization structure, for which full implementation was hoped to be in place by January 1, 1992. As of the trial of this case, there had been no physical implementation of the plan in the divisions of Macomb, Oakland, or the "Thumb" area of the State. Only one service center had been opened in Wayne County (which includes the city of Detroit) and that is in Ann Arbor.

Inasmuch as the reorganization plan necessitated the relocation of groups of employees to service centers, Respondent decided to ascertain their preferences, if any, as to the location to be assigned to them.

In a memorandum from Macomb Division Manager James Roosen dated October 22, 1991, addressed to operations staff, engineering & planning staff which included MAG unit employees, he alluded to the proposed reorganization and the several months time required to physically prepare the service centers. Roosen then stated therein:

In meeting with you I committed to giving strong consideration to your personal location preference in this reorganization. Please fill out the tear off below with your 1st, 2nd and 3rd location preference and return to Lois Kennitz by October 31, 1991.

Respondent had neither previously notified the Union of the document nor supplied it with a copy of the memorandum. The employees thereafter communicated their preferences of location directly to Respondent.

On October 24, 1991, in Case 7-CA-32491, the Union filed an unfair labor practice charge which resulted in the complaint allegation that the October 22 memorandum issuance and work location preference elicitation constituted an

unlawful bypassing of the Union and direct dealing with unit employees.

At a negotiation meeting between the Union and Respondent representatives held on October 28, Martin raised the subject of the possible changes that would flow from the prospective reorganization and, according to Martin's testimony, Manoogian raised no objection to the October 22 memo. Manoogian admitted that the reorganization topic may have been discussed then. He testified that with respect to the October 22 memorandum to employees, there had been no notice or prior awareness and no negotiations. However, he had already filed the charge by October 28, and so I credit his testimony that at the meeting he referred to that charge, which I conclude is an obvious form of objection to the memorandum.

It is Martin's uncontradicted testimony that the next two meeting dates were canceled by the Union, and the next meeting therefore occurred on November 18 at which the work preference issue was discussed. Manoogian admitted that Martin offered to resolve the unfair labor practice charge regarding the job preference polling by tendering to the Union "something in writing." Martin's testimony on this meeting was much more specific, not contradicted generally or in detail, and therefore credible. According to him, the following occurred. Martin assured the Union that no decision had been made regarding the employee work relocation, that Respondent offered to the Union the results of employee responses, and that Respondent suggested that the employees' first choices be given deference. The union representatives refused to discuss the issue, claiming it was out of order and ought to be placed at the bottom of the list of topics to be discussed. Instead, the Union asked to discuss wages. Martin told Manoogian that Roosen and MAG unit bargaining chairman, co-negotiator with Manoogian, Garnatz, had individually discussed how the employees ought to be relocated and that Garnatz had told Roosen that the employees' preference ought to be accepted. Manoogian responded that Garnatz was not authorized to speak on behalf of the Union. The purported Roosen-Garnatz conversation was undated. Roosen did not refer to it in his testimony. Garnatz did not testify. Martin testified that at the very outset of negotiations he announced to the Union Respondent's intent to negotiate the matter of the work station relocation of MAG unit employees.

At the November 18 meeting, Martin hand-delivered to Manoogian a letter addressed to him, signed by Martin, wherein he acknowledged Manoogian's objection to the employee work location preference solicitation, inasmuch as the Union considers the work relocation a matter for negotiation. Martin then stated that "in retrospect" the October memorandum to unit employees was premature and "was not intended to bypass the Union." Martin stated therein that he understood how it could be perceived as such and regretted the "misunderstanding." He reiterated Respondent's intent to consider as negotiable "the matter of headquarters changes" for some of the MAG unit employees caused by the reorganization. He then offered bargaining at that November 18 session on the issue. There is no evidence of distribution of that letter to employees nor any basis to infer its publication or employee awareness of such.

C. *Withdrawal of Recognition*

Macomb Division Manager Roosen was approached by unit employee Ken Miller who displayed a copy of a letter to Respondent's board chairman requesting withdrawal of union bargaining agent status recognition. Miller told Roosen, according to Roosen, that he believed that the majority of employees did not want the Union's representation. Miller did not testify. Roosen told Miller it was his right to send the letter but that he would not discuss it further with him.

On October 31, Miller petitioned the Regional Director to decertify the Union as bargaining agent in Case 7-RD-2759. That petition was supported by the purported signatures of 10 unit employees. On November 12, 1991, the Regional Director, by letter, notified Miller of the deferral of processing of his petition pending the investigation of Case 7-CA-32491. On February 25, the Regional Director dismissed Case 7-CA-32491 on the grounds that no questions could be raised at that time because of the issuance of complaints but the petition was subject to reinstatement upon disposition of those complaints.

Roosen testified to the events of December 17. On that day in the morning he was requested by a group of employees to meet with them and to accept from them what on its face purports to be a request to no "longer be represented by the Union as bargaining agent" for the MAG unit, purportedly signed and individually dated by 16 of 30 unit employees whom Roosen testified without controversy were employed by Respondent from October to December 17, 1991, without addition or deletion.

The employees who presented the petition were Miller, Norman Meldrum, and Gerald Simon. Apparently they did not say much about the petition, as Roosen testified to no discussion whatsoever. Miller testified that he considered these employees to be reputable and trustworthy. It is not disclosed whether or not they they stated to him that each and every signature on that petition was authentic and/or witnessed by any of them.

Roosen testified that because MAG unit employees frequently sign their names to a multitude of papers and reports that are subject to his scrutiny, he can readily recognize their signatures. He testified that he recognized each of the 16 signatures on the petition. I consider inconclusive his failure on cross-examination to identify the identity of the handwritten date entries when accompanying signatures were covered. Indeed, many looked the same.

Roosen testified that he thereafter engaged in telephonic conversations with his superior, General Director of Union Relations James Mulrenin, to advise him of his receipt of the petition and his conclusion that the Union had thereby lost its majority status as employee bargaining agent. After this perfunctory report, Mulrenin quickly acted upon Roosen's conclusion and, in the afternoon of the same day, telephoned Manoogian and notified him of the withdrawal of recognition. Mulrenin refused Manoogian's request to inspect the evidence Respondent relied upon for its conclusion.

Counsel for General Counsel carefully led Roosen through a step-by-step description of his conduct from receipt of the petition and his communication of his conclusion to Mulrenin. Nowhere in that laborious effort did he refer to any act of verification of his capacity to identify signatures from memory such as an inspection of known genuine signa-

tures. He testified that he engaged in no other significant action in that period. At first, he testified that within 2 months of this trial, he was instructed by counsel to construct an exhibit consisting of a montage of facsimile reproduction of alleged authentic employee signatures excised from unidentified Respondent records.

After discussion ensuing between counsel as to the probative value of the proposed exhibit that Roosen identified later in cross-examination, Roosen testified that at some unspecified date in December, he instructed his secretary to assemble for him a sampling of documents containing known authentic signatures of the petitioners. Respondent thereafter in the trial introduced into evidence a variety of documents from its records which, in the course of its business, the petitioners would be required to execute. There is no foundation evidence that the signatures on those documents were actually signed by the employees. The documents were received into evidence as corroborative evidence of Roosen's testimony, i.e., if the petitioners' signatures appeared to be identical to those on documents known to be required to be signed by them, Roosen ought to be credited as reasonably concluding that the signatures on the petition were accurate. If grossly divergent, then his credibility is undermined.

Respondent offered no expert witness nor other evidence to support the reasonableness of Roosen's conclusions and no other evidence as to the authenticity of the petition, authenticity of the samples or the actual loss of majority status. No other samples, of authentic signature were introduced. Neither party adduced the testimony of the signators.

My examination of the December 17 petition leads me to conclude that a nonexpert who has had no past experience with those signatures would have difficulty on first examination to distinguish between several of them, as certain samples tend to be of the same broad sweeping stroke and angularity and thin line, e.g., Miller, Meldrum, and Simon as one group. Also, Robinette and Marries immediately thereunder are very close in appearance and the writing of the dates thereafter are almost identical. Also generally similar are the signatures and more so the written dates of Thiede and Cataldo which are separated by only one entry. They have the same general flowing, bold sweep, and angularity but differ in minor flourish and formation of letter.

It is only when compared directly with the samples of original signatures on the records identified as normally kept business records, is the examiner able to note a correspondence very close to those signatures and distinctions from other signatures, except, however, for one, i.e., Donald Cataldo. That signature on the petition is argued by the General Counsel to be a grossly obvious forgery, the import of which is the destruction of Roosen's credibility. The General Counsel has in no other way, by evidence or argument, eroded Roosen's credibility nor established forgery of the petition or actual majority status except for the rebuttable resumption of such arising by operation of law.

From the document in evidence containing his purported actual signature, Cataldo has been employed by Respondent since 1964 and has been a service planner since 1971. It would appear therefore that Roosen must have had substantial exposure to his signature, as he testified he had with respect to all signators. Yet, on first examination, the only complete document offered as containing Cataldo's signature displays a signature startlingly different from that on the pe-

tion as to pressure and sweep of stroke, formation of letter, angularity of letters, regularity of angle, firmness of impression, thickness of line, and connection of letters. The documented signature is formed by a total connection of letters. The petition signature contains a bifurcation in both first and last name. Further confusing the examination is the facsimile montage prepared for trial where a third sample of a purported Cataldo signature differs yet from the other two on many of the features noted, except that whereas the documented signatures appears to be quite crude of stroke, the facsimile is somewhat closer but not convincingly so to the elegance of the petition signature. However, it is not bifurcated and is closer in letter formation and flourish to the documented signature. The greater difference is between the signature on the petition and either of the other two samples. Not being a handwriting expert, I cannot with complete confidence conclude that the petition signature is a forgery. The physical condition of the signator and his physical surrounding could have affected the flourish and formation of a signature, i.e., was it executed on a clipboard in a plant, on a vibrating floor or in a moving vehicle at a time when the signator was subject to physical conditions affecting muscular control. Cataldo may be the type of person who, not too uncommonly, varies his own signature. No explanatory evidence was adduced. The record contains Roosen's bare assertion that he apparently immediately recognized each and every one of the petition's signatures which, on some later date in December after withdrawal of recognition, he verified by comparison with some unspecified unidentified samples. Those documented samples adduced into evidence were retrieved by Respondent from its records during trial after a question was raised as to the probative value of the facsimile exhibit. They were not identified by Roosen as the very same documents he utilized in December 1991 when he made his comparison.

Assuming Roosen's frequent exposure to 30 unit employees' signatures, because of the similarity of many of them and because of the divergence of three purported signatures of Cataldo, I conclude, in the absence of explanatory evidence and evidence of careful, specifically documented verification, that Roosen's judgment was rashly precipitous rather than reasonable. This conclusion is reinforced by the closeness of the margin of majority loss and the lack of any other evidence of majority employee disaffection to corroborate the hearsay testimony of Miller's August 1991 opinion of his fellow employees' judgment. Further, because of his unexplained ready acceptance of the genuineness of the Cataldo signature, I find Roosen's overall credibility to be impaired. I found his oblique insertion into cross-examination of a hitherto untestified verification in December to be a clever but disingenuous attempt to bolster a previously unrecognized flaw in the purported reasonableness of his conduct, as portrayed in direct examination. That flaw became apparent as Counsel for the General Counsel pursued the examination of Roosen's precise conduct on December 17. In consequence, I do not have sufficient confidence in the credibility of Roosen's testimony as to his ability to recognize signatures as that testimony also may have been exaggerated and enhanced to Respondent's favor. His demeanor, which displayed calculation and lack of conviction in place of spontaneity, further causes me to reject his credibility. Further-

more, the only evidence of the actual unit member count is his testimony, the credibility of which is suspect.

Finally, what is to be said of the reasonableness of Mulrenin's own conduct. With alacrity, he accepted his subordinate's quick judgment unquestioningly without the slightest doubt or independent verification or other evidence of employee disaffection. He did so despite the extreme closeness of the majority loss, in the absence of any evidence that he questioned Roosen as to the circumstances of the petition production or as to Roosen's conclusions of authenticity and accuracy of the petition as the reflection of an uncoerced majority.

Conclusions

Harbor Beach Unit

Respondent argues that based upon its interpretation of the contract, affirmed by arbitration decisions, that it "(1) had that right unilaterally to establish a new job classification, and (2) did not have a duty to bargain upon the subject until 30 days prior to the effective date of the new classification [and] since the Employer never decided to establish the new job, the duty to give notice to the Union and negotiate *never arose* under Article VIII, Section 9(a) of the labor agreement." Respondent argues first, that since its discussions with the affected maintenance employees arose at a time when it was merely considering the possibility of a new maintenance classification, it was privileged to do so because no bargaining obligation had yet arose by operation of the contract. Secondly, it argues that the August 20, 1991 meeting constitutes the union notice required under the contract inasmuch as Luther, who was present, was not a maintenance employee and must have necessarily been present as union representative. No evidence was submitted as to whether there was a past practice of this kind of notice, i.e., command appearance while employees are polled. Finally, Respondent argues that any violative conduct was trivial and any remedy would preclude it, when in the function of exercising its contractual prerogative, from seeking information as to affected employees' reaction in a logical and analytical manner. This final argument therefore presupposes that it is illogical and synthetic to deal with those employees' bargaining representatives for such purpose.

The evidence and Respondent's argument clearly reveal that while it reserved managerial discretion to do certain things when instituting new classifications or changing old ones, there was a point down the road when it was obliged to bargain with the affected employees' designated agent about the effects of its proposed action upon those employees. Further, it is clear that Respondent wanted to know certain things from the affected employees in advance but felt that dealing with their lawful representative was an undesirable encumbrance. Therefore, what Respondent did was to forearm itself with its employees' opinions whereby it could enhance its position when it was obliged to present its proposed expanded maintenance clarification to the union for negotiations.

Assuming that the Union had totally waived certain rights as to certain managerial actions with respect to job classifications, which we see is not the case here, the Union has not waived its position as exclusive employee representative. The Union has waived nothing whereby Respondent could deal

directly with employees even if that direct dealing falls short of actual bargaining and consists solely of elicitation of employees' sentiment over working conditions. Barring such waiver, such circumvention of the Union constitutes unlawful erosion of the Unions' representative status, even when the proposed employer action can lawfully be done unilaterally. See *Allied-Signal*, 307 NLRB 752 (1992), and cases therein. Accordingly, Respondent's conduct herein constituted conduct violative of Section 8(a)(1) and (5) of the Act. It cannot be excused because a lower echelon senior representative was compelled to be witness to the direct dealing, which it clearly was. Furthermore, Respondent's attitude with respect to direct dealing as a 'logical' and 'analytical' necessity demonstrates that the violation is not trivial.

Trenton Channel

The factual findings disclose that Respondent had negotiated to futility the SPPO conversion issue, first at the master contract negotiating level and then at the local unit level where it had been mutually referred. Respondent's objective was to revive negotiations with a sweetened offer. The credited testimony reveals that it posed that offer to the local union representatives who agreed not only to a meeting of the members to consider renewal of negotiations and the removal of a prohibition to their representatives to discuss it, but who also agreed that Respondent could convey to the members by letter what it had already proposed to them. Respondent's objective was to negotiate with those representatives by getting the members to authorize them to negotiate.

Respondent had merely informed the unit members what it had already proposed to their representative. Such conduct is not an unlawful direct dealing nor bypassing of the bargaining agent. Compare *Dubuque Packing Co.*, 287 NLRB 499 (1987), *United Technologies Corp.*, 274 NLRB 609 (1985). Moreover, in this case, the local bargaining representatives agreed to it.

Marysville Unit

Like the Trenton Channel unit, local negotiations at Marysville had stalemated, i.e., the SPPO conversion proposal had been rejected. Respondent at Marysville directly sent to unit employees the same sweetened proposal that it had communicated to Trenton Channel's employees after having proposed it to the Trenton Channel unit local bargaining representatives who agreed to its submission to members directly. At Marysville, there had been no such similar discussions with their representatives wherein the substance of a sweetened proposal was first outlined to them. Bargaining unit chairman Maynard first became aware of rumors that a renewal of negotiations were surfacing at Trenton Channel. He obtained a copy of the Trenton Channel letter from Marysville plant manager Harrison and thus was apprised of the modified offer to the Trenton unit. Subsequently, while on vacation in late August, Harrison telephoned him and described a similar letter that Respondent intended to send to Marysville unit employees. According to Maynard's uncontradicted testimony, he asked to see the letter before he could agree to it. Accordingly, Harrison personally delivered it to Maynard at his home. Clearly, the import of Maynard's testimony is that Harrison wanted Maynard's agreement to send the letter. Maynard did not give him that agreement,

and there is no evidence of any other union agreement to permit direct management communication with employees.

I agree with Respondent that it is not necessarily unlawful for an employer to accurately inform its employees what it had offered in negotiations. *Toyota of San Francisco*, 280 NLRB 784 (1986); *Dubuque Packing*, supra. This is not what Respondent did in this case with respect to the Marysville unit. I conclude that it was not reasonable or adequate notice when the local bargaining unit chairman was, within days of its issuance, presented with the newly modified SPPO offer which he first saw as described in a letter to be sent directly to the employees, almost literally while he was on a step ladder painting his house. This kind of conduct bespeaks dealing with the Union as an afterthought and amounts to a peremptory strike before Marysville negotiations. The Marysville incident contrasts sharply with the Trenton Channel negotiations. Although it may have been agreed to refer the SPPO negotiations to the local unit level, there is no evidence that the Union authorized any one local unit to waive the bargaining right of another local unit on the SPPO issue. I conclude that Respondent acted rashly by communicating its proposal directly first to the bargaining unit and thereby undermined the position of their bargaining agent. Respondent may have earnestly sought to renew negotiations with the Marysville unit representatives, but directly communicating a new offer without adequate presentation to their representative was not conducive to a proper bargaining relationship. Accordingly, I find such conduct violated Section 8(a)(1) and (5) of the Act.

The Macomb Unit

A. Direct Dealing

Respondent asserts that the issue of “whether the relocation of the Service Planner’s work stations to service centers is a mandatory subject of bargaining need not be addressed since this Respondent clearly *agreed* to collectively bargain the work relocation issue.” Respondent notes that no relocation decision was made, and the problem was reserved for future bargaining. It argues that the work relocation preference was not destructive of the “Union’s position at the bargaining table,” and tended not to erode the union position as bargaining agent.

The General Counsel pointedly asks if Respondent’s attitude was so benign, why did it not seek the employees’ attitude from their bargaining agent whom, after all, is supposed to speak for them. The answer is, as noted by Respondent’s conduct above, at Harbor Beach, going through the Union was viewed by it as an impediment to logical and analytical accumulation of information.

As with respect to the Harbor Beach analysis above, direct dealing need not constitute direct bargaining but can consist of getting employee input behind the Union’s back in preparation for forthcoming negotiations. *Allied-Signal, Inc.*, supra; *Harris Teeter Super Markets*, 293 NLRB 743 (1989); *Sparks Nugget, Inc.*, 298 NLRB 524 (1990). I find such conduct by Respondent at the Macomb unit to be violative of Section 8(a)(1) and (5) of the Act and necessarily destructive of the Union’s status as majority bargaining agent.

B. Withholding of Pay Raise

Clearly, the withholding of an annual pay raise that has been made a condition of employment, especially when in negotiations, without first timely notifying the newly certified bargaining agent of this change in practice, constitutes a violation of Section 8(a)(1) and (5) of the Act. *UARCO*, 283 NLRB 298, 300 (1987). The credited facts reveal that the Union was notified well in advance of the change in past practice by deferral of the September raise for MAG unit employees to the bargaining process. Whatever the Union’s motivation was is not relevant. The fact is the Union acquiesced in that change of past practice in September 1990. The deferral of general wage increases for MAG unit employees to the bargaining process became a condition of employment in September 1990. General Counsel’s citation of authority for the argument that the withholding of the September 1991 raise is a separate, new change of past practice for which there was no 1991 union waiver, is distinguishable, e.g., successive increases in food prices, *Rockwell International Corp.*, 260 NLRB 1346, 1347 (1982), and changes in employee purchase plans. *Owens-Corning Fiberglass Corp.*, 282 NLRB 609 (1987). The changes in those cases were successive changes. In this case, there was only one change and it occurred in 1990 when the Union acquiesced in it, i.e., the deferral of MAG unit wage increases to the bargaining process and the cessation of automatic annual September raises for MAG unit employees. In September 1991, there was no change from September 1990 with respect to MAG unit employees. The effect or consequence of the 1990 change lived on, but no new, discrete change occurred.

I agree, therefore, that it is now untimely to litigate the violation, if indeed there was one, that occurred in September 1990. What occurred in September 1991 is the continuation of a condition of employment which was instituted in 1990 and acquiesced in by the Union. I find nothing violative about the nonpayment of a September pay raise to MAG unit employees in September 1991.

C. The Withdrawal of Recognition

The Board stated over 40 years ago in *Celanese Corp.*¹

By its very nature, the issue of whether an employer has questioned a union’s majority in good faith cannot be resolved by resort to any simple formula. It can only be answered in light of the totality of all the circumstances involved in a particular case.

Respondent, however, must demonstrate that it had objective reasons for doubting the Union’s majority status, which enjoys a rebuttable presumption.² Such doubt may not be raised in a context of unfair labor practices of “such a character as to either affect the Union’s status, cause employee disaffection, or improperly affect the bargaining relationship.” *Guerdon Industries*, 28 NLRB 658, 661 (1975).

A reasonably grounded doubt of majority status justifies a withdrawal of recognition and refusal to bargain when made in good faith, upon objective consideration and in a coercion-free context. *U-Save Food Warehouse*, 271 NLRB 710, 715

¹ 95 NLRB 644, 773 (1951).

² *Laystrom Mfg. Co.*, 151 NLRB 1482 (1965), enf. denied on other grounds 359 F.2d 799 (7th Cir. 1966).

(1984); *Central Washington Health Services*, 279 NLRB 60, 65 (1985); *Hohn Industries*, 283 NLRB 419 (1987).

Respondent failed to establish credible evidence of actual loss of majority status. It also failed to establish a reasonable grounds for such belief, as discussed above in the findings of fact. The bargaining obligation was placed upon Respondent as a result of a carefully, crafted legal mechanism which incorporated secrecy of the ballot box and a "laboratory" environment conducive to uncoerced free choice. Having struggled through the legal processes to become certified, the Union was barely into the discussion of wages when the Respondent walked away from the table. Respondent did so when it peremptorily severed a bargaining relationship immediately upon receipt of a piece of paper which was purportedly signed by a bare majority of its employees. An examination of that document, as discussed above, would certainly raise some doubts, at the very least, as to the genuineness of one signature, if not several.

Respondent's alacrity in withdrawing recognition, without verification of any kind, on the face of a document which would necessarily raise doubts of authenticity, convinces me that it did so without a reasonably based good-faith motivation. Furthermore, Respondent's direct dealing with unit employees further enhances that conclusion and also taints the context of the recognition withdrawal. Accordingly, I find Respondent violated Section 8(a)(1) and (5) by withdrawing its recognition of the Union as bargaining agent for the MAG unit.

CONCLUSIONS OF LAW

1. The Detroit Edison Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 23, Utility Workers Union of America, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act and has been designated, and is, the exclusive bargaining representative for purposes of collective bargaining within the meaning of Section 9(b) of the Act for the following appropriate units consisting of:

(a) All operating and maintenance employees of the Respondent's production department at its Harbor Peach Power Plant, but excluding supervising operators, student engineers, training personnel, professional employees, technical employees, office clerical and plant clerical employees, part-time, temporary and seasonal employees, guards, foremen, assistant foremen and all other supervisors as defined in the Act, and all other employees (the Harbor Beach Power Plant).

(b) All production employees employed by Respondent at its Marysville Power Plant, but excluding all student engineers, training personnel, assistant foremen, foremen, guards, technical employees, clerical employees, part-time, temporary and seasonal employees, and supervisors as defined in the Act (the Marysville Power Plant Unit).

(c) All nonsupervisory "A" grade employees employed by the Respondent in its Macomb Division of Energy, Marketing and Distribution organization, in the classifications of Service Planner; Coordinator Contract C & P; Representative Real Estate Rights of Way and Claims; Energy Application Consultant; New Business Planner; Senior Engineering Technician; Business Analyst; Coordinator Environmental Control; Customer Business Representative; Sales Staff Assistant; Coordinator Lines Construction; Contract Coordinator Meter

Readers; Division Instructor; but excluding Senior Service Planner; Senior Representative Real Estate Rights of Way and Claims; guards and supervisors as defined in the Act and all other employees (the Macomb Division Unit).

3. Respondent has engaged in violations of Section 8(a)(1) and (5) of the Act by its bypassing of the Union and direct dealing with employees with respect to a condition of their employment in the Harbor Beach Power Plant, Marysville Power Plant, and Macomb Division bargaining units, and by its withdrawal of recognition of and refusal to bargain with the Union as the exclusive collective-bargaining agent of the employees in the Macomb Division in that unit as described above in this decision.

4. Respondent has not committed any other unfair labor practices alleged in the complaint.

5. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

ORDER³

The Respondent, The Detroit Edison Company, Macomb County, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Bypassing the exclusive employee bargaining agent and dealing directly with employees with respect to conditions of employment in the Harbor Beach Power Plant, Marysville Power Plant, and Macomb Division collective-bargaining units.

(b) Withdrawing recognition from and refusing to bargain with the exclusive employee collective-bargaining agent of the employees in the Macomb Division collective-bargaining unit.

(c) 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) Recognize and, on request, bargain in good faith with Local 223, Utility Workers of America, AFL-CIO, as the exclusive collective-bargaining representatives of the employees in the appropriate Macomb Division unit regarding rates of pay, wages, hours of employment, and other terms and conditions of employment for the employees in that unit, and, if an understanding is reached, reduce the agreement to writing and sign it. The appropriate unit is:

All non-supervisory "A" grade employees employed by the Respondent in its Macomb Division of Energy, Marketing and Distribution organization, in the classi-

³If 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.

fications of Service Planner; Coordinator Contract C & P; Representative Real Estate Rights of Way and Claims; Energy Application Consultant; New Business Planner; Senior Engineering Technician; Business Analyst; Coordinator Environmental Control; Customer Business Representative; Sales Staff Assistant; Coordinator Lines Construction; Contract Coordinator Meter Readers; Division Instructor; but excluding Senior Service Planner; Senior Representative Real Estate Rights of Way and Claims; guards and supervisors as defined in the Act and all other employees.

(b) Post at its Harbor Beach and Marysville, Michigan Power Plants and Macomb Division Headquarters and service centers in Macomb County, Michigan, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material.

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

⁴If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

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

WE WILL NOT bypass the exclusive employee bargaining agent and deal directly with employees with respect to conditions of employment in our Harbor Beach Power Plant, Marysville Power Plant, and Macomb Division collective-bargaining units.

WE WILL NOT withdraw recognition from and refuse to bargain with the exclusive employee collective-bargaining agent of the employees in the Macomb Division collective-bargaining unit.

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

WE WILL recognize and, on request, bargain in good faith with Local 223, Utility Workers of America, AFL-CIO, as the exclusive collective-bargaining representatives of the employees in the appropriate Macomb Division unit regarding rates of pay, wages, hours of employment and other terms and conditions of employment for the employees in that unit, and, if an understanding is reached, reduce the agreement to writing and sign it. The appropriate unit is:

All non-supervisory "A" grade employees employed by the Respondent in its Macomb Division of Energy, Marketing and Distribution organization, in the classifications of Service Planner; Coordinator Contract C & P; Representative Real Estate Rights of Way and Claims; Energy Application Consultant; New Business Planner; Senior Engineering Technician; Business Analyst; Coordinator Environmental Control; Customer Business Representative; Sales Staff Assistant; Coordinator Lines Construction; Contract Coordinator Meter Readers; Division Instructor; but excluding Senior Service Planner; Senior Representative Real Estate Rights of Way and Claims; guards and supervisors as defined in the Act and all other employees.

LOCAL 223, UTILITY WORKERS OF AMERICA,
AFL-CIO