

Coastal Electric Cooperative, Inc. and Local Union 485, affiliated with International Brotherhood of Electrical Workers, AFL-CIO, CLC. Cases 11-CA-14320 and 11-CA-14880

June 30, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On September 18, 1992, Administrative Law Judge William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

On a charge filed on March 18, 1991, as amended on April 23, 1991, the General Counsel issued a complaint in Case 11-CA-14320 on May 1, 1991, alleging that the Respondent had violated Section 8(a)(5) and (1) of the Act by failing to bargain in good faith with no intent of reaching agreement. On July 23, 1991, the Union filed a charge in Case 11-CA-14528 alleging that the Respondent had violated the same section of the Act by unilaterally granting merit wage increases. The Regional Director approved an informal settlement agreement executed and entered into by the parties in both cases on October 15, 1991. On February 19, 1992, the Union filed a charge in Case 11-CA-14880, amended March 24, 1992, alleging bad-faith bargaining in violation of Section 8(a)(5) and (1) of the Act. Thereafter, the Regional Director set aside the settlement agreement in Cases 11-CA-14320 and 11-CA-14528 because of the alleged violations of the agreement disclosed in Case 11-CA-14880. On March 24, 1992, the Regional Director issued an order consolidating cases, consolidated complaint, and notice of hearing in all three cases. At the hearing, the judge granted the General Counsel's unopposed motion to sever Case 11-CA-14528 and remanded that case to the Regional Director for the purpose of approving the Union's withdrawal request.

The judge found that, although the Respondent's negotiators appeared regularly at the bargaining table and that the parties' negotiations resulted in agreement on a number of subjects, the totality of the record evidence established that the Respondent, in violation of Section 8(a)(5) and (1) of the Act, was not bargaining in good faith with a view toward trying to reach a collective-bargaining agreement. The judge therefore also found that the parties' settlement agreement had been properly set aside. The Respondent excepts to these findings. We find merit to the Respondent's exceptions. Accordingly, we find that the Respondent did

not violate the Act as alleged and therefore we shall reinstate the settlement agreement.

The pertinent facts are fully set forth in the judge's decision.¹ In summary, subsequent to the Union's certification as exclusive representative of a unit of the Respondent's craft employees, bargaining began on July 16, 1990, for an initial agreement. The parties held a total of 10 bargaining sessions between July 16, 1990, and January 28, 1992. The parties agreed on a number of subjects, including dues checkoff. However, it became apparent that the parties were in disagreement on three or four key issues, including management rights,² employment-at-will, just cause, arbitration,³ seniority, and wages. The parties sought the help of mediators in November 1990, who met with the parties at three sessions. At the last of these sessions, on March 11, 1991, the parties were still unable to reach agreement on the open items. The parties met face-to-face and the Respondent's negotiator declared that the parties were at impasse on certain core issues, specifically noting that the Respondent would not sign an agreement without employment-at-will language and that the Union would not sign an agreement without a just cause provision. The union negotiator, in response to a question as to whether he would ever agree to employment-at-will, initially expressed some uncertainty but concluded that at that point he would have to say no. The session ended with the mediators offering their assistance in the future. Subsequently, the Respondent's negotiator sent a letter to the Union detailing its impasse position.

As discussed previously, the Union filed an initial unfair labor practice charge alleging that the Respondent had bargained in bad faith with no intent of reaching agreement, and this charge was settled in October 1991. The parties then resumed negotiations on November 18, 1991. At that session, the parties reached some agreement on several items, but the parties held to their respective positions on the core issues noted above.

The parties held their last bargaining session on January 28, 1992. The parties reached agreement on a drug testing program and a wage increase for a probationary employee, but there was no movement on the

¹ The Respondent notes that the judge erroneously found that its letter advising the Union about drug testing requirements for outside drivers was dated December 20, 1990, when in fact the Respondent's letter was dated December 20, 1991. The record reflects that the letter in question was dated in 1991, as the Respondent asserts. Thus, we correct this error by the judge.

² The parties agreed at the first bargaining session on the first paragraph of the Respondent's management-rights proposal, which contained a general statement, but were in disagreement over the second paragraph, which specifically set out the terms and conditions of employment over which the Respondent wished to reserve control.

³ It is undisputed that at no time did the Respondent seek a no-strike clause.

key issues of employment-at-will, just cause, and arbitration.⁴ Once again, the Respondent's negotiator told the union negotiator that there would be no agreement without the Union's acquiescence to the Respondent's maintenance of an employment-at-will policy. In response, the Union's negotiator stated that the Respondent was bargaining in bad faith by insisting on total control over employees' working conditions. The Respondent's negotiator sought to schedule another bargaining session, and the union negotiator stated that he would get back to him. The Union never responded to the Respondent's request to schedule another session and instead filed the last of the bad-faith bargaining charges discussed above.

In finding that the Respondent engaged in bargaining with no intent to reach agreement, the judge properly acknowledged that Section 8(d) of the Act, which defines the duty to bargain, does not require either party to agree to a proposal or to make a concession. In this regard the judge noted that under Board precedent a party's failure to modify its bargaining position or its adamant insistence on a position is not itself a refusal to bargain in good faith. He also correctly stated that to determine whether an employer has bargained in bad faith it is necessary to examine the totality of the employer's conduct, including conduct at and away from the bargaining table and the substance of the proposals the parties have insisted on. With respect to the last consideration, the judge quoted the Board in *Hydrotherm, Inc.*, 302 NLRB 990, 993 (1991), where it noted that an examination of the proposals is not to determine their intrinsic worth but instead to determine whether in combination and by the manner proposed they evidence an intent not to reach agreement.

In finding that the Respondent engaged in bargaining with no intent to reach agreement, the judge relied exclusively on the combination of certain of the proposals made by the Respondent at the parties' bargaining sessions. Contrary to the judge, we find that considering the totality of circumstances here the record is insufficient to establish that the Respondent's bargaining violated Section 8(a)(5).

Although the Respondent insisted throughout on a broad management-rights clause, it is well established that insistence on a broad management-rights clause is

not itself inherently unlawful or evidence of bad faith. See, e.g., *Hostar Marine Transport Systems*, 298 NLRB 188 (1990); *Logemann Bros. Co.*, 298 NLRB 1018 (1990), and *Commercial Candy Vending Division*, 294 NLRB 908 (1989). Furthermore, the first paragraph of the management-rights clause that had been agreed to early on by the parties expressly stated that management's reservation of authority was limited by whatever the parties agreed to elsewhere in their contract. With respect to the Respondent's position on employment-at-will, it is clear that the Union remained as firm in its basic position on just cause as the Respondent did on its proposal. The same can be said for the parties' respective positions on wages, although, as indicated above, there is some evidence that the Respondent was willing to discuss a mix of merit and seniority-based pay at the last bargaining session. Further, as to the Union's just cause proposal, although the Respondent adamantly refused to agree to any contractual limit or third party review of its actions, it is undisputed, as noted previously, that it never insisted that the Union waive its right to strike. Finally, the record indicates that the Respondent discussed these proposals in detail and explained its positions on many of these matters.

In sum, the Respondent's various positions, although indicative of hard bargaining, are not inherently unlawful, and its failure to make concessions, in the absence of other indicia of bad faith, is not a sufficient manifestation of bargaining with intent to avoid agreement. In this regard, we note that, as the judge readily acknowledged, the Respondent complied with the Union's information requests, met with the Union at reasonable times and places, and reached agreement on numerous proposals, sometimes after making concessions to address the Union's concerns. Further, there is no evidence of animus or conduct away from the bargaining table establishing an intent by Respondent to frustrate agreement. Thus, when the record is considered as a whole, the evidence falls short of establishing bad-faith bargaining. Accordingly, we find that the General Counsel has not met his burden of establishing that the Respondent violated Section 8(a)(5) and (1) of the Act⁵ and we shall reinstate the settlement agreement.

⁴ There appears to be some dispute in the record as to whether the parties made any progress during the final session. While the Union's negotiator indicated generally to the contrary, the Respondent's witness stated that there was some movement on two core issues at the last session. The Respondent's attorney testified that some discussion occurred narrowing down the Union's objections to the Respondent's outstanding management-rights proposal and that there was some movement on its part with respect to merit pay because it was willing to discuss a combination of merit and seniority-based pay. The judge concluded that the latter did not reflect that the Respondent had abandoned its insistence on merit pay. We find that this conflict in the testimony does not affect our decision.

⁵ We find our recent decisions in *Bethea Baptist Home*, 310 NLRB 156 (1993), and *Western Summit Flexible Packaging*, 310 NLRB 45 (1993), distinguishable from the present case. In those cases, unlike here, the combination of bargaining proposals themselves in conjunction with the context and manner in which the proposals were proffered, and independent conduct away from the bargaining table, were sufficient to support findings that the respondents engaged in bad-faith bargaining with no intent to reach agreement. Specifically, in *Bethea Baptist Home*, the Board based its finding of a violation on the respondent's use of evasive tactics to avoid providing requested information, its refusal to put agreements in writing, its pretending to make concessions while preserving its proposals in other parts of

Continued

ORDER

The complaint is dismissed and the settlement agreement in Case 11–CA–14320 is reinstated.

the contract, its declaration of impasse at a time when the parties were not at impasse, and its commission of several unfair labor practices designed to ensure that the union would have no role in representing employees, as well as its insistence on proposals leaving the union with fewer rights than provided by law without a contract. Similarly, in *Western Summit Flexible Packaging*, the finding of bad-faith bargaining was based on the respondent's bargaining proposals as well as its general antiunion attitude and various instances of conduct occurring during the course of bargaining found to be independently violative of Sec. 8(a)(1) and (5).

Patricia L. Timmins, Esq., for the General Counsel.
Stephen T. Savitz, Esq. (Gignilliat, Savitz & Bettis), of Columbia, South Carolina, for the Respondent.
E. Hans Massey, Rep., of Monroe, North Carolina, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. I heard these cases in trial in Walterboro, South Carolina, on July 8, 1992. Local Union 485, affiliated with International Brotherhood of Electrical Workers, AFL–CIO, CLC (the Union), filed unfair labor practice charges against Coastal Electric Cooperative, Inc., (the Company) in Cases 11–CA–14320¹ and 11–CA–14528 on March 18 and July 23, 1991, respectively, alleging violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). Thereafter on October 15, 1991, the Regional Director for Region 11 of the National Labor Relations Board (the Board), approved an informal settlement agreement entered into by the Company and Union. The settlement agreement provided for the posting of a “Notice to Employees” by the Company covering allegations related to the Company's unilaterally, without prior notice to and consultation with the Union, granting merit wage increases to bargaining unit employees. The agreement also called for the Company to, on request, bargain in good faith with the Union as the exclusive bargaining representative of certain of its employees in an appropriate unit.

On February 19, 1992, the Union filed a charge in Case 11–CA–14880² alleging violations of Section 8(a)(1) and (5) of the Act. On March 20, 1992, the Regional Director for Region 11 of the Board set aside the settlement agreement in Cases 11–CA–14320 and 11–CA–14528 because of the alleged violations of the settlement agreement discovered in Case 11–CA–14880, namely that since on or about August 21, 1990, and more particularly October 15, 1991, and at all times thereafter the Company negotiated with the Union in bad faith with no intention of entering into any final or binding collective bargaining agreement, and that since on or about May 15, 1991, the Company, without notice to or bargaining with the Union, granted its bargaining unit employees merit wage increases. On March 24, 1992, the Regional Director issued an order consolidating cases, consolidated

complaint and notice of hearing (the complaint), alleging the Company violated the Act by unilaterally granting its bargaining unit employees merit wage increases and by refusal to bargain with the Union in good faith.

The Company, in a timely filed answer, admits its operations are in and affect commerce, that the Board's jurisdiction is properly invoked and that the Union is a labor organization within the meaning of the Act. The Company denies having bargained with the Union in bad faith and that it has violated the Act in any manner.

At trial, I granted counsel for the General Counsel's unopposed motion to sever Case 11–CA–14528 from the other cases and I remanded that case to the Regional Director of Region 11 for the purpose of approving a withdrawal request executed by the Union. The parties consider the prior settlement agreement to have adequately remedied the issue related to the merit wage increases.

All parties were afforded an opportunity to call, examine, and cross-examine witnesses, and to present relevant evidence. I have considered the entire record, including briefs filed by counsel for the General Counsel and counsel for the Company. I carefully observed the demeanor of the three witnesses as they testified. Based on the above, and more particularly on the findings and reasons set forth below, I will conclude that the Company violated the Act essentially as alleged in the complaint.

FINDINGS OF FACT

I. JURISDICTION

The Company is a South Carolina corporation with a facility located at Walterboro, South Carolina, where it is engaged in the business of distributing electrical power to members. During the 12 months preceding issuance of the complaint here, which is a representative period, the Company received at its Walterboro, South Carolina facility goods and raw materials valued in excess of \$50,000 and during this same representative period, derived gross revenues in excess of \$1 million. It is alleged in the complaint, the parties admit, the evidence establishes, and I find the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

It is alleged in the complaint, the parties admit, the evidence establishes, and I find the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. ISSUES AND A BRIEF OVERVIEW

The principal issue raised by the pleadings is whether the Company has violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain in good faith with the Union regarding terms and conditions of an initial collective-bargaining agreement.³

³In deciding this issue, it must also be decided whether the Regional Director properly set aside the previous settlement agreement referred to earlier in this decision. Under Board law, a Regional Director may set aside a settlement agreement where independent evidence of subsequent or continuing unfair labor practices reveals a breach of the agreement. See, e.g., *Aurora & East Denver Trash Disposal*, 218 NLRB 1, 9 (1975). If counsel for the General Counsel

¹ This charge was amended on April 23, 1991.

² This charge was amended on March 24, 1992.

A secret-ballot election was conducted by the Board's Regional Office on January 8, 1990, among certain of the Company's employees more specifically described below:

All craft employees performing all overhead and underground distribution work, substation and right-of-way work, including linemen, apprentice linemen, operators, truckdrivers, substation workers, right-of-way workers, and groundman employed at the Company's Walterboro, South Carolina, facility; excluding staking technicians, janitors, power use advisors, warehousemen, office clerical employees, professional employees, and guards and supervisors as defined in the Act.

On January 11, 1990, the Board certified the Union as the exclusive collective-bargaining representative of the employees in the above unit.

The Company and Union met on July 16, 1990, for the first of 10 bargaining sessions. Prior to the first negotiating session, the Union gave the Company a copy of its proposed collective-bargaining agreement and the Company presented its proposed agreement at the first meeting.

In addition to the July 16, 1990 meeting, negotiating sessions were held on August 21 and 22, September 25 and 26, November 12, and December 19, 1990; March 11 and November 18, 1991; and January 28, 1992.

Counsel for the General Counsel contends the Company negotiated with the Union during the above-noted sessions in bad faith with no intention of entering into any final or binding collective-bargaining agreement. Counsel for the General Counsel asserts the Company's insistence on the inclusion of an "employment at will" provision in any collective-bargaining agreement taken in conjunction with the impact such a provision would have on seniority, promotions, and layoffs, along with the Company's broad management-rights clause and its insistence on a merit pay proposal made it impossible for the parties to arrive at an agreement. The Company, on the other hand, asserts it entered into the negotiations and bargained with the Union in good faith. The Company contends the parties made great strides in the negotiations and agreed to various provisions of a collective-bargaining agreement. The Company asserts the Union's insistence on a "just cause" provision that included arbitration and its own position on "employment at will" was what precluded the parties from arriving at a collective-bargaining agreement. In support of its position, the Company notes the State of South Carolina is a right-to-work state that has recognized the principle of employment at will.

can establish postsettlement violation(s), the Regional Director's setting aside of the settlement agreement will be sustained and a remedial order for all violations found will issue. On the other hand, if counsel for the General Counsel cannot establish postsettlement violation(s), the settlement will be reinstated and the complaint dismissed without regard to whether presettlement violations are found. Evidence underlying the settled allegations can be used as background to support the allegations to be litigated. Stated differently, in deciding whether postsettlement conduct was unlawfully motivated, counsel for the General Counsel may rely on presettlement conduct. *Copper State Rubber*, 301 NLRB 138 (1991), and *Laborers Local 185 (Joseph's Landscaping)*, 154 NLRB 1384 fn. 1 (1965), enf. 389 F.2d 721 (9th Cir. 1968).

IV. THE FACTS

The Company, having reviewed the Union's proposed contract before the first bargaining session,⁴ submitted its proposal for an agreement at the first negotiating session on July 16, 1990.

A comparison of the two proposals in conjunction with the testimony of the Union's chief negotiator, Hans Massey (Union Representative Massey), and the Company's chief negotiator, Attorney Julian Gignilliat (Attorney Gignilliat), reflects the parties reached agreement rather quickly on a number of issues. For example, the parties' initial proposals contained virtually identical language for a dues-checkoff provision which provision was immediately agreed to. Union Representative Massey described the first negotiating session:

What had happened when we initially started our negotiations. We both had similar language in many . . . sections . . . [s]o, when we went through those items, we didn't have any problem because we both initially had the same language.

. . . .

Things like the recognition clause, the first paragraph of the managements rights clause, some language concerning what the work week would be, vacation language—or the vacation allowance, the language in holidays—it was just numerous—probably I guess even the dues deduction language was granted the first day. . . . At the end of the contract—about the term of the agreement, the language was the same except the beginning and expiration dates.

Attorney Gignilliat described the parties' early negotiating sessions:

By virtue of the fact that we had adopted a lot of the Union's language in our first proposal, those things were naturally resolved when we first got together. And we fairly rapidly moved through a number of other issues, proposals, sections of the contract reaching agreement on large numbers of those things.

At each negotiating session, the parties "would generally start at the beginning of either the Union's proposals or [the Company's proposal] and go through and see what was still open." Attorney Gignilliat stated the parties also fairly quickly discovered "three or four core issues" that they differed on. Gignilliat testified

The Union . . . was insisting upon just cause for termination and discipline, and an arbitrator to decide whether just cause existed. The Co-op was proposing to maintain it's stated employment at will policy. The Union sought a pay plan which was a lock step, automatic increase based on length of service. The Co-op sought a pay plan which was predominantly merit oriented. There was some other proposals by the Union—what I will call penalty pay proposals with regard to such things as daily overtime—with which the Co-op

⁴The Union requested, and the Company provided, various pieces of information before the Union made its initial proposal to the Company.

did not agree, and there was dispute about the second paragraph—the management’s rights clause.

Union Representative Massey suggested in November that the parties seek help from a mediator in “working out some of the language” they differed on and to see if a mediator could help them move “a little bit closer together on some of these items” they were having problems with.

Federal mediators met with the parties at their November 12 and December 19, 1990; and March 11, 1991 negotiating sessions. The mediators asked both sides to list the issues they considered open or in dispute. Both sides did so. Union Representative Massey provided the mediators and the Company a list of open issues on December 19, 1990. The Union listed as open items management rights, employment at will, employment status, seniority, leaves of absence, disciplinary action, hours of work, sick leave, work boots, arbitration, no strike/no lockout,⁵ classification structure, and wages.

Gignilliat provided the mediators and the Union, the Company’s list of open items which, as of December 19, 1990, included management-rights, employment at will, employment status, seniority, leaves of absence, wages, and hours of work.

It would appear the parties were, as of December 19, 1990, in agreement on certain articles or language for a collective-bargaining agreement, namely, recognition article, portions of a management-rights article, vacation language, language on holidays, dues deduction, duration of the agreement, union activities language, a pledge of no discrimination, and perhaps some understandings on other matters.

On December 20, 1990, the Company advised the Union in writing that state and Federal regulations required outside drivers, such as those in the bargaining unit, to have a commercial driver’s license. The Company pointed out to the Union that part of the requirements for a commercial driver’s license involved initial as well as random, periodic and postaccident drug testing. The Company asked the Union whether it considered such regulations and requirements to apply to the unit employees and told the Union if it concluded such did not apply to submit to the Company whatever authority it was relying on. The Company advised the Union that if the Union could not persuade the Company that such testing was not required, the Company intended to abide by the law and implement a drug testing policy and procedure.

The parties next met with mediators on March 11, 1991. According to Union Representative Massey, the parties went back and forth with the mediators but were unable to reach agreement on the terms and conditions that were still open. Thereafter, the mediators brought the parties face to face and Company Attorney Gignilliat announced the parties were at impasse on certain core issues. Gignilliat stated the Company’s “employment at will” position and the Union’s “just cause” position “was completely blocking” any agreement. Gignilliat testified “Mr. Massey made it quite plain that he was not going to sign a contract that did not have just cause

language in it.” Gignilliat testified, “we had told him that we wouldn’t sign a contract that didn’t have it in it.” Union Representative Massey testified Gignilliat said the Company had nothing further to offer if the Union could not accept their “employment at will” language or at least that concept in any agreement. Massey said Gignilliat asked if he would ever agree to “employment at will” language. Massey said he told Gignilliat he wasn’t sure that they still “had numerous items . . . open” but at that point he would have to say no. The negotiating session ended with the mediators offering their assistance in the future if needed or desired.

Certain core issues unresolved as of March 11, in addition to “employment at will” and “just cause” were management rights, progressive discipline with arbitration, layoffs, seniority, leaves of absence, and wages.

Attorney Gignilliat outlined the Company’s impasse rationale and position in a letter to the Union dated March 13, 1991. Gignilliat’s letter follows:

MARCH 13, 1991

Mr. E. Han Massey
International Representative
International Brotherhood of
Electrical Workers
201 West Houston Street
Monroe, North Carolina 28110
Re: Coastal Electric Cooperative
Dear Han:

This is to confirm Coastal’s position regarding future bargaining meetings with the IBEW. I believe that we reached an impasse quite some time ago. Nothing which occurred at our meeting at March 11, 1991, caused me to believe otherwise. Indeed, it became even more obvious that we have reached a deadlock.

I do not doubt that the Union is willing to move on the outstanding economic issues. It is even possible that the Union would make some counterproposal on one or more economic issues that would cause the Co-op to change its position on that issue. The reason I think that further meetings would be fruitless is not that both parties are frozen to their respective positions on every issue, but rather that they are frozen to their positions on the central issue: employment at will.

You are aware that the Co-op feels so strongly about this issue that long before the Union came into the picture it stamped such language on every single one of its personnel policies. The Co-op’s bargaining committee has for hours on end explained its position to you and for almost as long heard your arguments in support of your position. We have relayed your feelings and explanation to the Board of Trustees. My directions are to stand firm for the Co-op’s existing philosophy.

Employment at will is not just the title of a contract proposal. It is a concept which causes our differences of opinion regarding the management rights clause, the discipline clause, the seniority clause and to the leave of absence clause, and causes our opposition to your demand for ‘just cause’ and arbitration.

The Co-op is not adamant regarding the exact wording of clauses which preserve the employment at will principle. However, it will not agree to a contract

⁵Massey testified Attorney Gignilliat told him the Company was not interested in a no-strike clause but that if the Union really wanted one, they could have it “but as far as he was concerned, there would not be any need for it because if [the Union] didn’t like what the coop manager did, the employees [could] go ahead and hit the street and he would replace every damn one of them.”

which does not preserve this principle. The issue has been fully discussed. It has been more than fully discussed. Therefore, unless and until the Union informs the Co-op—preferably in writing—that it agrees to the employment at will concept at least in principle, the Co-op will not resume negotiations.

Please note that this action is not a withdrawal of recognition.

With best personal regards and good wishes, I remain,

Sincerely,
/s/ Julian
Julian H. Gignilliat

On March 18, 1991, the Union filed with the Board the first of its charges (Case 11-CA-14320) against the Company. In Case 11-CA-14320, the Union charged the Company with refusing to bargain. The charge was amended on April 23, 1991, to allege the Company had bargained in bad faith with no intent of entering into a collective-bargaining agreement with the Union. On May 1, 1991, the Regional Director for Region 11 issued a complaint and notice of hearing charging the Company with bad-faith bargaining since on or about August 21, 1990. Thereafter, on July 23, 1991, the Union filed the second of its charges (Case 11-CA-14528) against the Company in which it charged the Company had granted wage increases without bargaining with the Union concerning such increases. Thereafter, on September 4 and October 8, 1991, the Union and Company, respectively, executed and entered into a settlement agreement in Cases 11-CA-14320 and 11-CA-14528 which settlement agreement was approved by the Regional Director for Region 11 of the Board on October 15, 1991. The settlement agreement called for the Company to, on request, bargain in good faith with the Union and to refrain from unilaterally granting merit wage increases to its bargaining unit employees.

The parties resumed negotiations on November 18, 1991, at which time they discussed all items that had been left open or unresolved. Union Representative Massey said “at that meeting we felt that finally we might be making some progress.” The parties reached agreement on sick leave wherein the Company agreed to the Union’s demand that sick leave commence on the first day of an employee’s absence due to an illness which had been the Company’s past practice prior to the advent of the Union. Compromise by both parties resulted in agreement on a leave of absence provision. Agreement was reached in favor of the Union’s proposal that called for the Company’s paying 100 percent of the cost of the employee’s work boots. In so agreeing, the Company moved from its initial position that it would bear none of the cost to 50 percent of the cost to 100 percent of the cost. Full coverage of the employee’s work boots was consistent with the Company’s past practice. Agreement was reached on insurance coverage for the employees in that the Company would, as had been its past practice, pay 100 percent of the coverage for employees. The only difference under the new agreement reached on insurance was that the Company would pay a specific amount for employees’ coverage and if the insurance carrier increased the rate for the coverage during the life of the collective-bargaining agreement, the employees would be obligated to pay the dif-

ference. In the past, the employees had not been so obligated. The Company also agreed to the Union’s proposal that the Union be notified of any changes the Company made in its rules or policies with the right to grieve any such changes if the Union so desired.

It is undisputed the parties held to their respective positions on such matters as management rights, employment at will, just cause for discipline, arbitration, seniority, and wages.

On January 15, 1992, the Company notified the Union in writing that a particular probationary employee had obtained the equivalent of a high school diploma and requested the Union’s agreement on its desire to grant the specific employee a wage increase.

On January 28, 1992, the parties met for their final negotiating session. At this session, the Union, in response to the Company’s letter on commercial driver’s licenses for unit employees, agreed that it was necessary for the Company to have a drug testing program. The Union insisted that all employees be tested and that all urine samples be split for possible subsequent retesting in the event of a positive test. The Company agreed to the Union’s conditions. The Union agreed to a wage increase for the probationary employee that had furthered his education. The Company subsequently granted the increase. The parties reached agreement on leaves of absence by “basic horse trading” and agreement was reached on maximum consecutive working hours. According to Attorney Gignilliat, the parties better understood and/or perhaps narrowed their differences on management rights and found some possible common ground on a mixture of across-the-board and merit wage increases. However, when it came to the issue of “just cause” versus “employment at will,” the parties had a parting of the ways without reaching any common ground. Attorney Gignilliat told Union Representative Massey that as long as they did not have agreement on employment at will or at least an agreement on that concept, there would be no collective-bargaining agreement. Massey responded to Gignilliat that he felt the Company was bargaining in bad faith, by insisting on total and complete control over the employees’ working conditions and rights. Massey told Gignilliat the Company’s position on management rights, discipline, seniority, no arbitration, and employment at will completely defeated the purpose of a contract and that as such the Company was not negotiating with the intent of arriving at an agreement. Attorney Gignilliat then attempted to schedule another bargaining session but Massey told him he would have to get back with him concerning future negotiations. No further bargaining between the parties has occurred since January 28, 1992.

On February 19, 1992, the Union filed the third of its charges (Case 11-CA-14880) against the Company alleging bad-faith bargaining. As earlier noted, the Regional Director for Region 11, on March 24, 1992, issued an order consolidating cases, consolidated complaint and notice of hearing in which he set aside the parties’ previous settlement agreement and outlined the unfair labor practice allegations herein.⁶

⁶As also noted elsewhere in this decision the unilateral merit increase allegations were severed out of the cases leaving only the issue of whether the Company bargained in bad faith.

V. LEGAL PRINCIPLES

Section 8(d) of the Act requires an employer (as well as employees' representatives) to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. The obligation does not, however, compel either party to agree to a proposal or to make a concession. See *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). In determining whether a party has negotiated in good faith, the Board scrutinizes the totality of the party's conduct. See, e.g., *Schaeff Namco, Inc.*, 280 NLRB 1317, 1318 (1986), and *Pipe Line Development Co.*, 272 NLRB 48, 49 (1984). The Board majority noted in *Leeds Cablevision*, 277 NLRB 103 fn. 2 (1985), an employer's conduct must be "analyzed as a series of related acts rather than as singular, isolated incidents." A party's failure to modify its bargaining position is not, however, bad-faith bargaining because an adamant insistence on a bargaining position is not itself a refusal to bargain in good faith. See *Schaeff Namco, Inc.*, supra, see also *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984). The Board looks not only at the parties' behavior at the bargaining table but also to conduct away from the table that may affect the negotiations. *Hedaya Bros.*, 277 NLRB 942, 944 (1985). In that regard, the Board examines to see if a party's conduct away from the table reveals a state of mind antithetical to the concept of good-faith bargaining or whether the party's conduct away from the bargaining table is absent of any conduct which would suggest its negotiating positions were taken in bad faith. Because there is seldom direct evidence of a party's intent to frustrate the bargaining process, the Board looks not only at conduct at and away from the bargaining table but at the substance of the proposals the parties have insisted on. *Hydrotherm, Inc.*, 302 NLRB 990 (1991). The Board in *Hydrotherm, Inc.*, noted "such an examination is not intended to measure the intrinsic worth of the proposals but instead to determine whether in combination and by the manner in which they are urged they evince a mindset open to agreement or one that is opposed to give-and-take." Appearing regularly at the bargaining table and even agreeing to various counterproposals does not preclude a finding of bad-faith bargaining based on inferences drawn from the totality of a party's conduct. *Modern Mfg. Co.*, 292 NLRB 10 (1988). Stated differently, collective bargaining is more than just formal meetings between the parties, it presupposes a desire by good faith give and take to ultimately arrive at a collective-bargaining agreement. *NLRB v. Insurance Agents*, 361 U.S. 477, 485 (1960). The Board does, however, consider whether there has been cooperation between the parties at and away from the negotiating table. In *Boaz Carpet Yarns*, 280 NLRB 40, 44 (1986), the Board held the employer therein had not bargained in bad faith and stated:

in analyzing the entirety of the Respondent's conduct, we find it noteworthy that its approach to bargaining was cooperative in that it provided information requested and counterproposals in a timely manner. Significantly, it is not alleged, nor is it apparent from the record, that the Respondent imposed any substantial, unilateral changes in working conditions during the course of negotiations. Therefore, it appears that Respondent's conduct both away from and at the bar-

gaining table does not evince a bad faith approach to bargaining.

Finally, it must always be borne in mind that good-faith bargaining may be quite hard and still be lawful. *Reichhold Chemicals*, 288 NLRB 69 (1988), affd. in pertinent parts sub. nom. *Teamsters Local 515 v. NLRB*, 906 F.2d 719, 726 (D.C. Cir. 1990).

VI. DISCUSSION, ANALYSIS, AND CONCLUSIONS

The evidence is unrefuted that the Company provided the Union the information it requested to assist it in preparing for and/or presenting its bargaining proposals to the Company. There is no contention that the Company failed to meet at reasonable times or places. No evidence was presented in support of, nor any contentions made, that the Company bore animus toward the Union. There are no contentions made that the Company engaged in any conduct away from the bargaining table that might evince an intention not to arrive at an agreement with the Union. There is no contention that any of the Company's proposals standing alone constituted bad-faith bargaining. It is undisputed that the negotiations were conducted in an amicable manner. Simply stated, counsel for the General Counsel's case that the Company engaged in bad-faith bargaining rests entirely on the combination of certain proposals made by the Company at the parties' 10 bargaining sessions.

Thus, the question here presented is whether counsel for the General Counsel's evidence, which consists of the Company's bargaining proposals and positions, is sufficient to establish the Company entered into bargaining with no real intention of concluding a final and binding collective-bargaining agreement with the Union. I conclude it is.

I find it unnecessary to review the complete history of bargaining in order to conclude the Company bargained in bad faith. In so doing, I am not unmindful that the parties agreed on numerous provisions to be included in any ultimately arrived at collective-bargaining agreement. Some areas of agreement between the parties included a recognition clause, dues checkoff, holidays and vacation language, union activities language, pledge of no discrimination language, sick leave language, leaves of absence language, insurance coverage, notification of rules and/or policies changes with the right to grieve such changes, drug testing, jury duty pay, work tools and boots, and rain suits.

From the very first negotiating session and continuously thereafter, the Company insisted on certain contract provisions which it knew were totally unacceptable to the Union and which unless withdrawn, modified, or offset by other provisions would preclude the parties from arriving at a collective-bargaining agreement. For example, the Company insisted throughout negotiations on a broad management-rights clause that reserved to itself sole and exclusive control over virtually all terms and conditions of employment not specifically precluded by other contract language. In its management-rights clause, the Company would retain sole and exclusive control over the right to move, sell, merge, or close any part or all of its facilities without any input from its employees' bargaining representative. The Company would retain the sole and exclusive right to determine and redetermine the number, locations, and types of facilities it would operate. The Company would retain sole and exclusive right

to subcontract, discontinue, or automate any and all of its facilities or operations. The Company would retain the sole and exclusive right to schedule and change working hours and working assignments, including the right to reduce working hours in any week and the right to change the terms of or to eliminate any working conditions or fringe benefits not expressly provided for elsewhere in the agreement. The Company would retain the sole and exclusive right to reprimand, suspend, demote, discharge, or otherwise discipline employees without the need to demonstrate or exercise such power in a "just cause" or "reasonable" manner. The Company would in its management-rights clause retain the sole and exclusive right to select employees for hire, layoff, promotion, or to fill vacancies, and the right to use leased employees, volunteers, and/or nonbargaining unit members to perform bargaining unit work and the right to determine the size and composition of its work force without input from the Union.⁷ The Company, by insisting on the above enumerated management rights without agreeing to language (such as just cause/arbitration) that would have limited or checked such rights, severely hampered, if not completely destroyed, the Union's exercise of its duty to represent the employees.

Still further and of almost greater significance is the Company's adamant insistence on an "employment at will" provision in any collective-bargaining agreement. Under its "employment at will" provision, the Company retained the right to terminate employees at any time and for any or no reason whatsoever. The Company adamantly and unwaveringly refused to include a "just cause" or any other standard of fairness as a limitation of its authority. Simply stated, the Company could at its whim terminate its employees without recourse on their part. The Company's "employment at will" proposal is clearly disruptive of any serious ability on the Union's part to represent the bargaining unit employees.⁸

That the above Company proposals (management rights and employment at will provisions) were advanced to preclude the reaching of any agreement is further demonstrated by the fact the Company would not agree to any provision that would allow for any independent neutral or outside review of its actions. It is clear when one views the Company's proposals on management rights and employment at will with its adamant refusal to agree to just cause arbitration that it was seeking to retain absolute power and control over its bargaining unit employees and to leave such employees without effective representation by the Union. Under the Company's grievance proposal, the final decision on all matters grieved rested with its manager. Thus, employees were left with no effective recourse to appeal the Company's ratification of its own decisions.

In viewing the Company's proposals on management rights, employment at will, and its rejection of just cause arbitration in light of its insistence that wage increases be

⁷ Although the Company explained in negotiations that it needed this particular right to, for example, continue allowing farmers to clear powerline right of ways after storms, no assurances were provided that the Company would not utilize such rights simply to eliminate the bargaining unit altogether.

⁸ The fact the State of South Carolina recognizes the principle of "employment at will" does not alter its overall impact on the negotiations here.

based on merit,⁹ one is compelled to conclude that such proposals were designed and advanced to thwart bargaining. For example, under the Company's management-rights clause, the Company retained the sole and exclusive right to determine which employees would be promoted without any objective criteria in support thereof. Under the Company's merit pay plan, it could determine which employees would get pay raises without any review of its determinations. Also, the Company could, in its sole discretion, even grant or withhold wage increases without any challenge or input from its employees' authorized representative. To make its power over its employees absolute, the Company would not, as noted elsewhere in this decision, agree to allow "just cause" to impact any of its decisions. It is clear the Company made no sincere effort to accommodate the interests of its bargaining unit employees and/or their duly designated bargaining representative.

In light of all the above, I find the Company knew its bargaining proposals on management rights, employment at will, and merit pay, coupled with its rejection of just cause/arbitration would assure it that no agreement would be arrived at with the Union. The Company, by its proposals, reserved to itself the sole and exclusive right to do just as it pleased in virtually every area of vital concern to the bargaining unit employees and left the employees' bargaining representative with absolutely no authority to effectively challenge any of these vital matters of concern. Clearly, the Company's fixed position on certain of its bargaining proposals was in direct and unequivocal opposition to the Union's responsibilities as the employees' collective-bargaining representative.

In summary, I find, that although the Company's negotiators appeared regularly at the bargaining table and that the negotiations resulted in agreement on a number of subjects, the totality of the record evidence is persuasive that the Company was not bargaining in good faith with a view of trying to reach a collective-bargaining agreement with the Union and as such the Company violated Section 8(a)(5) and (1) of the Act.¹⁰

CONCLUSIONS OF LAW

1. Coastal Electric Cooperative, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local Union 485, affiliated with International Brotherhood of Electrical Workers, AFL-CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the certified bargaining agent for the Company's employees in the following appropriate unit:

All craft employees performing all overhead and underground distribution work, substation and right-of-way

⁹ The Company's indication during the last bargaining session that perhaps the parties were getting on the "same railroad" with respect to merit pay does not reflect the Company had moved away from its insistence on merit pay.

¹⁰ Counsel for the General Counsel established the Company bargained in bad faith after the settlement agreement was entered into that required it to bargain in good faith. Accordingly, the Regional Director's setting aside of the settlement agreement was proper. Additionally, no valid impasse existed herein inasmuch as a valid impasse cannot be attained by unlawful means.

work, including linemen, apprentice linemen, operators, truckdrivers, substation workers, right-of-way workers, and groundman employed at the Respondent's Walterboro, South Carolina, facility; excluding staking technicians, janitors, power use advisors, warehousemen, office clerical employees, professional employees, and guards and supervisors as defined in the Act.

4. The Company engaged in conduct violative of Section 8(a)(5) and (1) of the Act by bargaining with the Union in bad faith with no intention of entering into any final or binding collective-bargaining agreement.

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

THE REMEDY

Having found that the Company engaged in the unfair labor practices set forth above, I recommend it cease and de-

sist from such conduct or any like or related conduct and take certain affirmative action designed to effectuate the policies of the Act. I recommend the Company be ordered, on request, to bargain collectively in good faith with the Union as the exclusive bargaining representative of its employees in the above-described unit; and in the event an understanding is reached to embody such understanding in a signed agreement. I also recommend the Company be ordered to post the notice attached hereto as "Appendix."

In order to ensure that the employees will be accorded the statutorily prescribed services of their designated bargaining agent for the period prescribed by law, I recommend that the initial year of certification begin on the date the Company commences to bargain in good faith with the Union as the bargaining representative of its employees in the above-described appropriate unit. *Modern Mfg. Co.*, 292 NLRB 10 (1988).

[Recommended Order omitted from publication.]