

**The Palace Performing Arts Center, Inc. and Local No. 74, International Alliance of the Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, AFL-CIO.** Case 34-CA-5877

September 30, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

The issue in this case is whether the judge correctly found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain in good faith with the Union and by unilaterally subcontracting unit work.<sup>1</sup> 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, as modified below, and to adopt the recommended Order.

In concluding from a review of the Respondent's total conduct that it engaged in unlawful surface bargaining with the Union,<sup>2</sup> the judge relied on several factors: (1) the critical tone of three letters written by Joel Schiavone, the Respondent's president, to the Union about the parties' negotiations; (2) Schiavone's delay in obtaining subcontracting proposals, which he had made the linchpin for bargaining about contract concessions from the Union, and his delay in notifying the Union about the proposals once he received them; (3) the failure of Schiavone to make any specific proposals until the parties' fourth bargaining session on September 16, 1992; and (4) the substance of the Respondent's proposals on that date.

We agree with the judge's conclusion that the Respondent engaged in overall bad-faith bargaining, but we find it necessary to make the following comments about the evidentiary factors supporting this conclusion. (1) Although Schiavone's letters may have been caustic and self-serving, we do not rely on them as a factor in finding that the Respondent engaged in bad-faith bargaining. (2) Not only did Schiavone delay in obtaining and transmitting the subcontracting proposals to the Union, but also the record indicates that he never proposed to the Union, at the September 16 bargaining session, the higher rates which he agreed later that day to pay subcontractor Helweg to perform unit work on the Respondent's first show of the season on September 17. In this regard, we find it significant that the Respondent had previously made clear to the Union that it did not want to subcontract its work and

that it would ask the Union during negotiations to make certain financial concessions commensurate with the rates in the competitive bids submitted by subcontractors. (3) We disavow any suggestion in the judge's decision of a general rule that a party giving notice of intent to modify or terminate an existing agreement bears the initial burden of making specific proposals in ensuing contract negotiations. In the context of this case, however, we agree that Schiavone, having said that concessions were needed, undermined the bargaining process by failing to make any specific proposals for concessions, despite the Union's repeated requests for same, until the bargaining session on September 16. Then, he essentially presented the Union with an ultimatum to reach agreement at that meeting or he would subcontract unit work for the show on September 17. (4) Finally, we agree that the substance of the Respondent's September 16 proposals is a factor supporting a finding of overall bad-faith bargaining under *Reichhold Chemicals*, 288 NLRB 69 (1988). These proposals were not merely "unacceptable" to the Union, as the judge noted. Considered in the context of the other conduct discussed above, the Respondent's proposal objectively indicated the Respondent's intent to frustrate negotiations by proposing an extreme limitation on the expired contract's scope by "gutting" the contract and converting it to a half-page document containing three flat rates.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, The Palace Performing Arts Center, Inc., New Haven, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

*Michael A. Marcionese, Esq.*, for the General Counsel.  
*Robert B. Mitchell, Esq.* and *Stephanie Lane, Esq. (Durant, Sabanosh, Nichols & Houston)*, for the Respondent.  
*Burton M. Weinstein, Esq. (Weinstein, Weiner & Shapiro, P.C.)*, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on March 8 and 9, 1993, in Hartford, Connecticut. The complaint, which issued on November 20, 1992,<sup>1</sup> and was based on an unfair labor practice charge and an amended charge filed on October 8 and November 19 by Local No. 74, International Alliance of the Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, AFL-CIO (the Union), alleges that The Palace Performing Arts Center, Inc. (Respondent) violated

<sup>1</sup>On June 9, 1993, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief.

<sup>2</sup>See generally *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984).

<sup>1</sup>Unless indicated otherwise, all dates referred to relate to the year 1992.

Section 8(a)(1) and (5) of the Act by failing and refusing to meet and bargain in good faith with the Union, the collective-bargaining representative of certain of its employees, and by subcontracting the work of all its unit employees, without prior notice to or bargaining with the Union.

#### FINDINGS OF FACT

##### I. JURISDICTION

Respondent, a Connecticut nonprofit corporation with its office and place of business in New Haven, Connecticut (the facility), has been engaged in the operation of a theatre for the performing arts. During the 12-month period ending October 31, Respondent derived gross revenue in excess of \$500,000. During the 12-month period ending November 30, Respondent purchased services valued in excess of \$5000 which were furnished to Respondent at its facility directly from points outside the State of Connecticut. Respondent admits, and I find, that it is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

##### II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

##### III. THE FACTS

As stated above, Respondent operates a nonprofit theatre in the city of New Haven, Connecticut. The theatre presents shows produced by others, principally rock or other musical shows, but not Broadway-type shows. The theatre's season runs from mid-September to mid-May. The principal individual involved is Joel Schiavone, Respondent's president, who established it in 1984 to operate the theatre. Schiavone is also the principal shareholder in other corporations that own real estate in the vicinity. The building in which the theatre is located is owned by a joint venture of which Schiavone is a 95-percent owner and the FDIC, which took over from a failed bank. At the present time, and for at least about a year, Respondent has employed only one or two full-time employees. In addition, Respondent employs the necessary crew for each event it presents. These crews include stagehands, electricians, soundmen, wardrobe attendants, and others that may be needed for the show. Since 1984, and up to September 16, Respondent recognized the Union and employed its members in these job classifications, at the facility.

After the original contract between the parties, they executed a contract on May 11, 1988, that was effective for the period September 1, 1987, through August 31, 1990. The next contract between the parties was not entered into until about April and was effective for the period August 1, 1991, through July 31; the new rates were retroactive for a few weeks. The protracted negotiations that ultimately lead to the execution of this agreement (and the final agreement, so far, between the parties) featured Schiavone as the negotiator for Respondent for the first time. One reason for the protracted discussions was that Respondent had been suffering losses since it first opened, its cumulative deficit was about \$2 million and Respondent was seeking concessions from the Union during these negotiations. Schiavone testified that Respondent got no concessions in this contract: "But at least

we didn't go way ahead like we have in the past." By letter dated April 8, from Schiavone to Edward Mangini, the Union's president and an employee of a nearby theatre in New Haven, both signed off to clear up an ambiguity in the letter. By letter of the same date, which was attached to a copy of the new agreement that Mangini was to pick up at Schiavone's office, Schiavone wrote:

Reviewing these negotiations I find that we have given a substantial increase in wages, in benefits and annuities all of which have made the theatre essentially more expensive to operate. We have not received any concessions back in return. While you've accomplished all of your objectives with the signing of this contract, we've accomplished none of ours. Operating this theatre is an overwhelming financial burden under the best of circumstances; this new contract has made it worse. We all have a responsibility to put a substantial amount of effort into changes in working conditions so that the theatre can operate again this fall.

When Mangini arrived at Schiavone's office to pick up the contract, he was given this letter, which he refused to accept because he considered it insulting and inappropriate. By letter dated April 13, Schiavone wrote to Mangini:

My trusty secretary tells me that you were insulted with the attached letter. I'm not sure what's insulting about it, as it says quite simply that its going to cost me much more to run the theatre this year and next year than it did before. There have been absolutely no concessions back to make it easier to run our facilities. Being the negotiator, you should be pleased with these results, not insulted.

The only purpose of sending it is to remind you that this battle is not over. We cannot afford to operate this theatre on the present basis. We'll have to spend a lot of time this summer working on it.

Sorry for the insult, but these are certainly the facts.

On April 20, Respondent sent the required 60-day notice of its intention to terminate the contract and negotiate a new agreement to the Union and FMCS. The letter refers to Respondent's desire "to terminate the contract on that date and its desire to negotiate amended terms and conditions of employment to become effective on August 1." By letter dated May 22 to Schiavone, the Union requested him to contact them to set up a mutually agreed meeting date. The Union did not request that the 1991-1992 contract be reopened because they had just concluded a "long tedious negotiations . . . and we thought that it might be better in this case to let the contract just run another year."

Schiavone was asked by General Counsel whether he formulated any contract proposals or modifications prior to the first meeting. He testified:

We had always relied on the Union to present us with a proposal. Over the years they had always walked in and told us what we were going to have to pay. So it never occurred to me to frame a proposal because we had never framed one before.

He testified further that the April 20 letter was one that:

they send out every year . . . when our contract expired. It was a standard form letter. And they would always come back and tell us what they had to have. That was the phrase: "we have to have this for next year." So I just assumed that they would walk in with a proposal.

He testified: "I never did anything over the years in terms of preparing for the Union. We were always told by the Union what we would have to pay."<sup>2</sup> He then testified that he had not been involved in negotiations with the Union prior to 1991-1992 and "assumed" that the letter was a standard one that came from their files.

The first meeting, on July 30, and the second and third, as well, lasted for only about an hour. It was attended by Schiavone for Respondent, and Mangini and Union Business Agent Dick Johnson for the Union. As to whether he presented any proposals to the Union for changes that he wanted in the contract, Schiavone testified:

I presented in very broad but very specific detail on the fact that we were not making any money at the theatre and we needed changes across the board in the Union contract, work rules, hourly rates, everything. And I tried to make as clear as I could that we had to come up with some sort of approach to this problem because there was a significant ongoing financial problem for the theatre and for me and we had to address all of these issues. And I asked them for a response on all these issues. So we didn't have a specific proposal on each item, but I certainly made it clear that all these items had to be negotiated and reduced.

Mangini responded by asking Schiavone for specific suggestions of where the Respondent wanted changes or relief. Schiavone was surprised by Mangini's request because: "he'd never asked me that question before. He always told me what I was supposed to pay." Schiavone then said: "This is the amount of money we're losing in the theatre. Whatever contribution you can make to that would be very helpful." Schiavone gave the Union no specific proposals at this meeting.

Mangini testified that at this first meeting, Schiavone began by telling them of the theatre's financial difficulties and his difficulties with the fire department, the police department, and the tax people in the city of New Haven; with all his losses, he could not continue to lose money and stay in business. He said that he would like to talk about some things that would make the theatre more operable for him and mentioned a figure of \$50,000. Mangini said that he didn't think that Respondent's yearly payroll equalled that amount, but that he understood the theatre's financial problems, "and that we were perfectly willing to talk about any changes or avenues he might want to take." Schiavone shrugged his shoulders and said he thought it was a good idea. Mangini told him to "put some things together" for their next meeting so that the Union would know where they

could save him money from the old contract: "Give me some specifics and we'll sit down and talk about them."

By letter to the Union dated July 29, Schiavone wrote:

This will notify you in advance that sometime this week we will be mailing out requests for proposals for handling the stage management at the Palace Theatre. These will be sent to a variety of individuals and corporations in the northeast.

We can discuss this further at our meeting on Thursday.

Attached to this letter was a letter stating that Respondent was "looking for a contractor to handle all its requirements for stage functions. Proposals should be submitted by August 15, 1992 to [Respondent]." The letter states that the contractor "would be required to handle all aspects of show production for all performances" and that they may have to utilize from 1 to 45 stagehands. It continues that the "contractor must represent that it will handle the stage production with qualified employees, e.g., licensed electricians, sound people, lighting people, spot operators, carpenters, wardrobe personnel, riggers, loaders and experienced stagehands," and that it will provide workmen's compensation and other payroll requirements. The requested bids are for Respondent's season, which runs from September 11 through June 30, 1993.

The second meeting, apparently, took place on August 6 with the same participants. Respondent had not sent out the request for proposals to potential bidders by this time. At this meeting Schiavone made no proposals to the Union. He had no idea how much it would cost to subcontract the work and he therefore told the Union that it wouldn't be fair to ask them for specific givebacks until he got the information back from the potential subcontractors. After testifying in that manner, he testified that he did this because the Union would not give him a proposal: "they made it clear that they couldn't do much of anything." He told the Union, in response: "If you won't give me a proposal, what else can I do?" Schiavone testified further that in the prior negotiations for the contract that was signed 4 months earlier:

We went through all aspects of the contract. They understood very well where all the changes were that we needed in terms of the contract improvement. They knew specifically chapter and verse and what we were asking for, all of which they ignored. And so we went back into the original again of the negotiating and discussion of it. They knew precisely what I would like in terms of a proposal. They didn't choose to give me any of those answers back. They put the burden on me. So I said, "Fine. If you will not give me anything . . . . If you're not going to talk this time, then I've got to do something which is fair and reasonable rather than be arbitrary and just quote figures. I'll go out and get a price and get back to you."

He also testified:

I did not give them a written type list. But I had a very engaging philosophical discussion about all of these things [work rules, minimum rates, hourly rates and health and welfare], all of which they didn't seem inter-

<sup>2</sup>It should be noted that in addition to Schiavone's position with Respondent and the realty corporations in the city of New Haven, he is the vice president of Connecticut Limousine Corporation, which provides transportation to the New York area airports.

ested in talking about except saying, "Give us a specific proposal."

At these sessions, he told Mangini that Respondent couldn't afford the minimum rates, the staffing, and work rules specified in the contract. "I went through all these things time and time again and I didn't get any response whatsoever." The only response he did get was: "We can work on that. We'd like a proposal on that." He told the Union that he would send out the requests for proposals and when they were returned he would meet with the Union to see if they would make similar concessions and that he would not hire a subcontractor until he met with the Union and discussed the bids that he received.<sup>3</sup> He testified:

I was very specific. I said that we were going to use a subcontracting proposal so that we could come back and get our negotiations back on track. We never had any attempt to subcontract this work. And I made that very clear. And, in fact right up to the last minute we said to them, "We do not want to sub-contract this work. We want to work something out." So it was only an attempt to get a price fix on this whole negotiating process.

Schiavone summarized the second meeting in this manner:

But my speech was: "I need some concessions. You've got to come back to me with some suggestions as to how we can get this thing on the right track." And their speech was: "Make us an offer."

Mangini testified that he received Schiavone's July 29 letter a few days before the second scheduled meeting; this was the first time that Schiavone had mentioned the idea of subcontracting. At the beginning of the meeting, Mangini asked Schiavone for an explanation of the letter. He said that he was looking for someone "to come in and run the theatre for him; that he was not a theatre person and that he might be able to find someone to come in and manage the theatre." Mangini thought that was a great idea because Schiavone was not a theatre person and didn't fully understand theatre management. Mangini testified that he did not understand this to mean that Respondent was going to replace the bargaining unit employees, only the management of the theatre.<sup>4</sup> Mangini asked Schiavone if there were any specific areas that the Union could give him some assistance; "he had nothing." He said that he would send out the requests for proposals "and then we'd be able to talk when he had something concrete." Schiavone told Mangini that when he got the bids, the Union could then make a proposal or a bid for the work and that if the Union were successful he would stay with the Union.

By letter dated August 6 (presumably, written at the conclusion of the second meeting) Schiavone wrote to Mangini:

I would like to meet with you again as soon as possible regarding our continuing discussions on the Palace

<sup>3</sup> He did not send out the requests for proposals until after the next meeting on August 15.

<sup>4</sup> In an affidavit given to the Board, Mangini stated (regarding Schiavone's July 29 letter): "This is the first time that the Union was ever notified that the Palace Theatre was intending to subcontract our work."

Theatre. As you know, we are considering a decision to mail out a request for a proposal to a variety of corporations and individuals asking for quotations on a contract to operate the theatre's stage for this next season.

In light of our long relationship, the Theatre offered you, on behalf of the Union, an opportunity to propose something which would affect our decision. However, something means considerable concessions and reductions in our contract. We mentioned this last year during our negotiations, and I'm sure you are not surprised.

Assuming you would like to pursue this, let's meet as soon as possible. We have a deadline of August 15th for wrapping up negotiations with you one way or another. After that, we need to make our decision and proceed with preparations for operating the Theatre for this Fall. I'm sure you will understand why time is of the essence.

The third meeting took place on August 15, attended by the same three individuals. Schiavone told the union representatives that he had not yet sent out his request for proposals from stage subcontractors; he told them that he was in the process of mailing it out now and would have the information back in about a week. The Union asked him for specific proposals for concessions or givebacks and he said that he had none at that time. Mangini testified that at this meeting he asked Schiavone about the requests for proposals from the subcontractors and Schiavone said that he had not yet sent them out. Mangini asked him for proposals that they could discuss, but he had none since he had not sent out for the proposals. This meeting lasted less than an hour and they agreed that when Schiavone received the proposals he would immediately notify the Union.

On August 23, Respondent placed ads in New Haven and Bridgeport newspapers stating:

STAGEHANDS—THE PALACE THEATRE—a contractor is sought to handle all Palace Theatre stage functions. Information can be obtained by calling [Schiavone's telephone number]; proposals must be submitted by 8/28/92.

Schiavone testified that he placed the ads in the two newspapers in the hope of locating a local subcontractor. He received no responses to the ads. Mangini and Johnson saw the ads and contacted the International Union. As a result, Mangini was informed that he should have counsel with him at the next meeting with Schiavone.

By letter dated August 28, Schiavone wrote to Mangini:

As I promised a follow-up from our last meeting. Just so I will have something in the file reflecting what transpired. I indicated that it is unacceptable for the theatre to open this year and lose money. We obviously have to go over all of our expenses in order to eliminate our deficit. IATSE wages are a significant proportion of our Theatre expenditures each year and therefore something we have to look at carefully.

You indicated you were willing to discuss the entire contract, but doubted if large-scale reductions in the wages or the fringe benefits are possible. You also indi-

cated you were not willing to negotiate unless you knew the extent of the concessions I was requiring.

I then suggested that we proceed with the plan we had proposed weeks before, namely getting quotations from outside contractors. These would give us an indication of exactly the savings we could achieve. I would then give you this information with the understanding you would get back to me, within a short period of time, regarding your willingness to meet these concessions. The reason for the short period is obviously the opening of our Theatre in mid-September.

Finally, so there is no confusion, there is nothing in the preceding suggesting that we will be deterred from sub-contracting out stagework in the Palace even if you were willing to make substantial wage and benefit concessions. There are a substantial number of other issues regarding the work required in the theatre over and above the financial.

I will be back in contact with you shortly with some firm figures for negotiation and a firm deadline for proceeding.

As to whether the contents of this letter accurately reflects what had occurred at the prior three negotiating sessions, Mangini testified: "Yes and no." When Schiavone states in the second paragraph of the letter that Mangini said that he doubted that large scale reductions were possible, Mangini testified that the only discussion of money that they had during these meetings was Schiavone's comment about a \$50,000 figure; Mangini responded that he didn't believe that the payroll for the year equaled that amount. In addition, the letter states that when Respondent obtained the information from the subcontractors he would give the information to the Union in the hope that they would get back to him in a short time with a willingness to meet regarding these concessions. Mangini testified that he didn't want this letter read to the effect that the Union had previously been unwilling to talk about concessions: "we were ready and willing to talk about concessions or any ideas that he had in reaching an agreement."

Schiavone testified that he wrote the August 28 letter because he "was in the habit of writing a letter after each time we met." The letter was meant to be a summation of his thoughts about what transpired at the meeting and meetings. As regards the next to final paragraph of the letter, what he meant was that wages were not the problem; for example a 20-percent wage reduction would save Respondent only \$3400. The real problem was the Union's work rules which had to be changed if Respondent were to survive.

Sometime shortly before August 28, Schiavone sent out requests for proposals to a number of potential subcontractors. He received two written proposals on about September 1; both are undated, but one, apparently, was faxed to Respondent on September 1. He also received some inquiries by phone which came to naught. On September 9, Schiavone called Mangini and told him that he had received proposals from potential subcontractors. He testified that he offered to tell Mangini what the proposals were, but Mangini said that he had already contacted a mediator to assist in their next meeting, and the Union's attorney told him not to speak to Schiavone. After this telephone call, Schiavone wrote to Mangini, *inter alia*:

the labor contract expired on July 31, 1992. At or about the same time, Palace management notified you that it was considering a decision to subcontract operation of the Theatre during the 1992-1993 season. Commencing on July 30, several meetings have been held during which we have bargained regarding that decision and the union has been given several opportunities to propose changes in working conditions which would affect the subcontracting decision. Indeed, at the conclusion of the most recent meeting, I was left with the distinct impression that the union was willing to consider major changes in working conditions, after comparing the savings that the Theatre could realize by subcontracting out the work. That's why, as explained to you in my letter of August 28, 1992, I proceeded to obtain outside quotations.

Today, however, you indicated that you were not interested in meeting and reviewing this information as matters were being turned over to your attorneys and to the Federal mediator and would be discussed with their participation.

You must understand that these machinations cannot be allowed to delay the Theatre's sub-contracting decision. We have told you from the outset that the timing of this decision is tied to the scheduled opening of the Theatre's season. We have already postponed action once, from the August 15 date mentioned in an earlier letter, to give the union more time to consider what input it might want to make. Further postponements are not feasible.

The parties met next on September 16. In addition to the participants at the prior sessions, present were Burton Weinstein, counsel for the Union, George Nichols, counsel for Respondent, and the mediator, Tom Carroll. At this meeting, Schiavone gave the Union a document stating the following:

Stagehands: Flat fee of \$85 to include electricians and soundmen.

Riggers: \$105 for load-in and load-out; showcalls will be an additional \$20.

Production Manager: \$175 including showcall; this will be a flat rate, regardless of the amount of hours worked in one day.

The above proposal includes all benefits including Workmen's Compensation.

This document differs from the proposal submitted by Impanel Helweg, which was chosen by Schiavone for, at least, the first show of the season. It states:

The following is a proposal for the contract of Stage production personnel in your venue.

Stage Manager	\$18.00 hr.
Licensed Electrician	15.00 hr.
Riggers	16.50 hr.
Stagehand (loaders, cars, elect)	11.00 hr.

\* A flat fee of \$45 per show is required for all SHOWCALL personnel (spot-ops/wardrobe/deckhands). If there are any questions regarding these wages, please feel free to contact me at my home.

Schiavone testified that the meeting began with the parties reviewing the expired contract clause by clause. After about a half hour of this, Respondent's representatives asked the union representatives whether this was "the usual exercise or are there substantial cuts at the end of this work because we don't want to go through and argue over work rules and everything . . . unless we have a sense that we are going to achieve something as a result of this." At about this point the meeting "kind of blew up and everybody got very excited." At this time, Schiavone gave the Union the flat fee schedule set forth above. Schiavone was asked why he gave the Union a flat fee proposal when Helweg's accepted proposal was on an hourly fee basis. He testified that after receiving this proposal from Helweg, he requested a flat fee proposal and he negotiated the flat fee agreement with Helweg on about September 9, although he did not write to Helweg confirming this agreement until October 6 and it was never confirmed in writing by Helweg. Schiavone testified that at this meeting he told the Union that if they could not reach agreement at that meeting, he was prepared to subcontract the stage work for the show on the following day. The Union offered to continue negotiations and work under the terms of the expired contract, Schiavone refused this offer. He testified that Union Attorney Weinstein characterized his position as wanting to completely gut the contract, but he responded by saying that he was prepared to discuss everything. Schiavone testified that he made clear to the Union that the proposal that he had agreed to with Helweg was not yet binding, and was only for the show the following day. Even if they could not reach agreement that day, they could negotiate at a later date for the next show. The negotiations ended at about noon; within an hour, Schiavone called Helweg and finalized the agreement for the show on the following evening.

Mangini testified that when the meeting began, the Union asked why they had not received a call to be prepared for the show the following day; they learned of the show earlier from an ad in the newspaper. The Union also asked for proposals and offered to bargain day and night, if necessary, to work out an agreement. There were allegations of bargaining in bad faith and "things broke down a little bit in the talks" and the mediator called for separate caucuses. When they returned from caucus, Schiavone gave them the flat fee proposal,<sup>5</sup> and "we were trying to find out exactly what this meant . . ." He testified that he was "confused" by it. The union representatives asked what the \$85 meant: was it for a show, a day, or an hour? They were told that it was just a flat fee of \$85 for each event, not show.<sup>6</sup> They asked what a production manager did, but, again, were given an unsatisfactory explanation. They asked what portions of the expired agreement would remain in effect, and Schiavone said that no aspect of the old contract would apply. The Union asked what controlled overtime work and weekend work, and "we're just told that this was the proposal and this is what we have to deal with." The Union asked about work rules and Schiavone said that there would be no work

rules as no aspect of the old contract would apply. The Union asked about staffing of the shows, and Schiavone said that it would be at the employer's discretion, "and that even if we were to accept this as an agreement, there would be no guarantee that bargaining unit employees would be used." That would also be at his discretion. He testified that, by the conclusion of this meeting, he knew that the rates listed on Respondent's flat rate proposal was the entire contract. There would be no work rules, union-security clause, grievance procedure, minimum manning requirements, etc. When asked on cross-examination what his position was on this offer, he initially testified that he was willing to sit and bargain all day and night to negotiate an agreement. When pushed by counsel for Respondent, he testified that this offer was not acceptable, although the Union was willing to consider changes in work rules. The mediator then suggested another caucus; when they returned Nichols stated that the Respondent decided to use the subcontractor for the show on the following day. Mangini told them that he was willing to continue bargaining until show time the following day, and that the union members would continue to work under the expired agreement, but this offer was refused by Respondent. He testified that the meeting ended because Respondent's counsel Nichols told them that Schiavone had to leave; they left at about 1.

Attorney Nichols also testified about this meeting. He testified that they submitted the flat rate proposal to the Union: "This was presented as a proposal which had been made by a potential subcontractor and that the contractor was telling us that this is what he would do the stage work for." "We asked the Union if they would make a proposal to us, now that they had a chance to examine this document and discuss it. The Union refused to make a proposal and said that they felt it was incumbent upon us to make a specific proposal instead." A caucus followed. He testified that during this caucus, he and Schiavone "decided to try a different approach." This involved some "off the record" discussions, first with the mediator and then with the mediator and Attorney Weinstein. This "approach" involved an "arrangement" at some theatres in New England, which Schiavone informed him of, but, admittedly, he did not know all the details of this arrangement. In these situations, the theatres hire "as more or less full-time employees a few union members as department heads." The theatre is run by these employees with nonunion stagehands brought in to work individual shows. Weinstein asked some questions about this arrangement, caucused with the union representatives, and returned to say "that the Union was not interested in that sort of arrangement." The union representatives did say that they were willing to work under the terms of the expired agreement while negotiations continued. At about that time the meeting ended because Attorney Weinstein had a previously scheduled appointment that he had to attend to. At that time Nichols told the union representatives that Respondent would be using a subcontractor for the following day's performance. About 1 or 2 p.m. that day he called Helweg and told him that they would be the subcontractor on the Spin Doctor show the following day.<sup>7</sup> Admittedly, the rates paid to

<sup>5</sup> He testified: "I understood this to, maybe, be part of a bid that he would have received from someone else."

<sup>6</sup> He testified that Schiavone told them that the rates specified would cover up to a 24-hour period, whereas a "show" would indicate that the rate would cover only the actual period of the performance.

<sup>7</sup> There was an extensive amount of testimony produced by counsel for Respondent to attempt to establish that it would have been

*Continued*

Helweg for the show were higher than those specified in Respondent's flat rate proposal. This proposal provided for a flat fee of \$85 for electricians and \$20 for show calls. The billing for the September 17 show establishes that Respondent paid Helweg \$110 for one electrician and \$25 for each of four show calls. No riggers were used on this show. In shows produced in October, Respondent paid Helweg \$145 for each rigger, \$20 to \$40 more than is provided in its flat rate proposal given to the Union on September 16.

In about November, Respondent discontinued using Helweg as a subcontractor operating the theatre. By letter to Mangini dated November 18, Schiavone stated:

We have replaced our first contractor at the Palace with a new contractor. I wanted to keep you informed of the financial aspects of the relationship in case the Union wants to change its position and make a proposal:

Crew Head:	\$14/hr.
Heads:	\$12/hr.
Stagehands:	\$8/hr.
Loaders:	\$8/hr.
Wardrobe:	\$8/hr.

Fifteen percent (15%) on top of these rates for all fringe benefits, including FICA, Workmen's Comp and all employer insurances paid by the contractor.

The Palace Theatre will reimburse contractor for statutory premium he is required to pay if crew member works in excess of 40 hours per week. Week runs Monday through Sunday.

The Palace Theatre, in conjunction with the producer, determines the size of the crew for any show and when workers will be needed, from the beginning of load-in to the end of load-out. The contractor directs the workers in all other respects.

If there are any questions, I'd be happy to answer them at the negotiating session scheduled for Wednesday, November 25.

Mangini testified that when he received this letter he called Schiavone and asked him if he could consider it a proposal to the Union. Schiavone said that it should not be so considered, that it was for his information only.

The next meeting (the first since September 16) of the parties took place in mid-December, with the same individuals who were present at the prior meeting. At this meeting Respondent gave the Union a summary of its position on most of the articles of the prior agreement. The information was given to the Union:

to consider in determining whether and in what manner to respond to the sub-contract arrangement that the Palace is considering. We list below those portions of the contract that expired on July 31, 1992, which we would agree to include, in whole or in part, in a new contract with Local 74, as an alternative to the sub-contract arrangement. Of course, we would expect that any new

more expensive to produce this show under the terms of the expired union agreement as compared to subcontracting the show to Helweg. On reconsideration, I find this evidence irrelevant and, for that reason, it will not be considered.

contract will meet the Theatre's financial needs. All other provisions of the expired contract are not acceptable and have been omitted from the following list:

Mangini testified that the union representatives considered this proposal and determined that "effectively, this proposal negates our contract altogether." The Union then proposed a 10-percent reduction across the board with an increase in health and welfare costs. Nichols and Schiavone caucused and returned saying that they found the Union's offer would save Respondent between \$1000-\$2000 a year and therefore was unacceptable. Schiavone testified that the subcontractor's costs were a third to a half less than this. He testified that at this point Attorney Weinstein said that the parties were at an impasse. Attorney Nichols asked him: "Are you saying that we're at an impasse?" Weinstein answered: "Yes, we're clearly at an impasse. We can't make any more progress. We're too far apart." That was the extent of the meeting.

Respondent's operation had been losing money since it began; its tax return for 1991 shows a loss of \$85,000. Schiavone testified that prior to 1992 Respondent had made all the cuts it could think of; the theatre, at one time, had 12 to 15 employees. By 1992, this number had been reduced to one and a half regular employees, with additional employees hired for each show. In addition, Respondent cut down on advertising and promotion. He testified that by the time of negotiations: "there really wasn't much left. They only had one item really on the agenda and that was the Union." At the negotiations, Schiavone said that he was looking to save \$50,000, but this was not solely from the Union. It couldn't be because the union employees' payroll casts probably did not equal this amount. Other than this figure, he never informed the Union how much of a savings he was seeking from them.

Schiavone testified that when Respondent asked for bids from subcontractors, it was originally not to obtain a contractor to perform the union employees' work, but was to assist him in the negotiations:

I didn't know enough about theatres in detail to be able to give them a fair proposal. [The Union asked for offers] and I said, "I don't have the expertise at the moment. I have a general understanding and I think we're out of line by a lot. But I really don't know precisely. So the only way I could think to get to this is for me to go get bids." Subcontracting was not an option. It was something that we were using to get facts to help us deal with this particular situation with the Union.

Schiavone also testified:

We used the sub-contracting to get a bead . . . on these negotiations so we could get a fix on what was possible in what I call the real world.

He testified that one reason he didn't want to subcontract the work was that it was "too complicated." The present employees knew the theatre and the equipment. It would be difficult for somebody new to learn all the equipment in the theatre.

Schiavone testified that his purpose in meeting with the Union on the five occasions specified above was to negotiate a new collective-bargaining agreement. However, in his affi-

davit given to the Board, he stated that he told the union representatives at the first, third, and fourth bargaining session that he was not there negotiating on a new contract. Rather he was negotiating over his decision to subcontract out the stage management of the theatre. Nichols testified that his understanding was that Respondent's purpose in meeting with the Union was to negotiate over its decision to subcontract bargaining unit work; the purpose of the meetings was not for collective-bargaining negotiations for a new contract.

#### IV. ANALYSIS

There are two allegations: that Respondent failed and refused to bargain in good faith with the Union for a contract to succeed the one that expired July 31, and that Respondent subcontracted the unit employees' work without prior bargaining with the Union, each in violation of Section 8(a)(1) and (5) of the Act. The bad-faith bargaining allegation will be discussed first.

Whether an employer has engaged in bad-faith bargaining is a difficult determination. In making this determination, the judge and Board must look at the employer's activities both during, and away from, the bargaining table. As the Board stated in *Atlanta Hilton & Tower*, 271 NLRB 1600 (1984): "It is necessary to scrutinize an employer's overall conduct to determine whether it has bargained in good faith." There are two aspects of Respondent's overall conduct away from the bargaining table that deserve inspection in determining whether it engaged in bad-faith bargaining: its letter writing and its delay in obtaining subcontracting proposals.

In about April, Schiavone and Mangini reached agreement on the 1991-1992 contract after many months of hard bargaining by both sides. When Mangini went to Schiavone's office to pick up the signed agreement, attached to it was a letter from Schiavone which stated that under the agreement the theatre was more expensive to operate and: "You've accomplished all of your objectives with the signing of this contract, we've accomplished none of ours." The letter continued by stating that the contract made the burden of operating the theatre even more difficult, ending: "We all have a responsibility to put a substantial amount of effort into changes in working conditions so that the theatre can operate again this Fall." Mangini refused to accept this letter because he considered it insulting and inappropriate; I agree. The parties had just concluded protracted negotiations and signed the resulting agreement. At the same time that Schiavone signed the agreement he was criticizing it. If he didn't approve of the contract, why did he negotiate and sign it? It appears to me that this letter was the initial indication of Respondent's actions over the next few months. Schiavone's letters to Mangini of August 28 and September 9, while not as insulting, are self serving and do nothing to assist the collective-bargaining process. Rather, it appears to me, that if Schiavone were as direct in the actual negotiations as he was in his letters to Mangini, the parties' negotiations would have been more fruitful.

Another indication of Respondent's attitude toward the negotiations was its delay in obtaining the subcontracting proposals. By letter dated July 29, prior to the first bargaining session, Schiavone told Mangini that Respondent would be mailing out requests for subcontracting proposals "sometime this week." However, it wasn't until a month later that

Schiavone sent out the requests for proposals, which he received on about September 1. Also unexplained is Schiavone's delay in transmitting these proposals to Mangini. He waited until September 9 to tell Mangini that he had the proposals. I also find puzzling the fact that the proposal from Helweg was based on hourly rates while the proposal that Schiavone presented to the Union on September 16 was a flat rate proposal. Schiavone testified that he renegotiated a flat fee proposal on about September 9, but, apparently, this was not in writing because it was never introduced at the hearing. Considering Schiavone's repeated appeals to the Union of the urgency in Respondent obtaining financial assistance and concessions, I find that his delay in obtaining the subcontracting proposals, and his further delay in notifying the Union of the proposals, is an additional factor establishing his lack of good faith in the negotiations.

The principal method of determining a parties good (or bad) faith in collective bargaining is its activities at the bargaining sessions between the parties. As the Board stated in *J. D. Lunsford Plumbing*, 254 NLRB 1360 (1981), quoting from *West Coast Casket Co.*, 192 NLRB 624, 636 (1971): "From the context of an employer's total conduct, it must be decided whether the employer is lawfully engaging in hard bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement." The parties met on four occasions: July 30, August 6 and 15, and the final session was on September 16. General Counsel alleges that Respondent's bad faith in these bargaining sessions is established by the fact that Respondent never presented any proposals to the Union until September 16, when it presented the flat rate proposal it allegedly had negotiated with Helweg. I should initially note that as between Mangini and Schiavone, I found Mangini to be the more direct and credible witness. I found that Schiavone was very reluctant to make any admissions and attempted (unsuccessfully) to explain every inconsistency in his testimony and his affidavit. I found Mangini to be more credible. Aside from his conflicting testimony about not understanding early during the negotiations that Schiavone meant to subcontract the entire theatre operation, I found him to be a credible witness who attempted to answer the questions put to him in an honest and direct manner.

In *Chevron Chemical Co.*, 261 NLRB 44, 45 (1982), the Board stated:

Determining whether parties have complied with the duty to bargain in good faith usually requires examination of their motive or state of mind during the bargaining process, and is generally based on circumstantial evidence, since a charged party is unlikely to admit overtly having acted with bad intent. Hence, in determining whether the duty to bargain in good faith has been breached, particularly in the context of a "surface bargaining" allegation, we looked to whether the parties' conduct evidences a real desire to reach an agreement—a determination made by examination of the record as a whole, including the course of negotiations as well as contract proposals.

Further, the Board stated: "The Board does, of course, with Court sanction, consider the content of bargaining proposals

as part of its review when making a determination as to the good faith of parties negotiating a contract.”

It is clear that Section 8(d) of the Act does not compel either party to agree to a proposal or make any concessions in bargaining. However, as the Supreme Court stated in *NLRB v. Insurance Agents' Union*, 361 U.S. 477, 498 (1960):

The Board has been afforded flexibility to determine . . . whether a party's conduct at the bargaining table evidences a real desire to come into agreement . . . . And specifically we do not mean to question in any way the Board's power to determine the latter question, drawing inferences from the conduct of the parties as a whole.

In *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134 (1st Cir. 1953), the court stated that an employer is “obliged to make some reasonable effort in some direction to compose his differences with the union, if Section 8(a)(5) is to be read as imposing any substantial obligation at all.” *Port Plastics*, 279 NLRB 362, 381 (1986), citing *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960), stated: “There seems to be universal agreement about what the obligation to bargain in good faith entails. It means that a party must ‘enter into discussion with an open and fair mind and a sincere purpose to find a basis of agreement.’”

By letter dated April 20, Respondent notified the Union that it wished to terminate the contract and negotiate new terms and conditions of employment for its employees effective August 1. Yet throughout the first three bargaining sessions Respondent never made a bargaining proposal to the Union, despite Mangini's invitations to Schiavone to do so. Schiavone spoke of Respondent's financial difficulties, and the Union recognized the problem. Only 4 months earlier, Respondent and the Union had concluded the prior negotiations with the resulting contract which Schiavone quickly criticized in his April 8 letter. Schiavone was certainly, by then, familiar with the issues and the contract's terms, and could easily have formulated contract proposals to help alleviate Respondent's financial difficulties. He failed to do so, without explanation. Rather, he appeared to be waiting for the Union to make a proposal. I find that because he moved to reopen the contract and negotiate a new agreement, he was obligated to make proposals, which the Union would then have to respond to. In this situation, it was not the Union's obligation to make the initial proposals. Such an obligation would place the Union in an unfair position. In *United Technologies Corp.*, 296 NLRB 571, 572 (1989), as one factor in finding that the employer refused to bargain in good faith with the union, the Board found that: “Respondent has not presented any economic proposals, despite repeated prompting from the Union, and has never even internally discussed its economic demands.”

It was not until the fourth meeting, on September 16, that Respondent made its first bargaining proposal. At that time, Respondent gave the Union the flat rate proposal that was, allegedly, agreed to with Helweg. Even absent the confusion caused by these rates (whether they were for each event or each show), it is difficult to view this as a serious proposal. The expired contract was a 20-page document. This “proposal” listed three classifications with a flat rate for each.

Schiavone told the union representatives that this proposal represented the entire agreement, there would be no work rules, no union-security agreement, and no requirement that he employ members of the Union. No portion of the prior agreement would remain in effect. They were told that “this was the proposal and this is what we have to deal with.” It could not have surprised Schiavone that the Union refused this “offer,” while offering to continue bargaining. I find that this “proposal” was so one-sided that Schiavone had to be aware that no union could accept it. As stated above, under Section 8(d) of the Act neither the employer or the union is obligated to agree to a proposal or make a concession. However, the parties must act in a way that indicates that they truly wish to reach an agreement with the other side. As the court stated in *NLRB v. Mar-Len Carpets*, 659 F.2d 995, 999 (9th Cir. 1981): “proposal content supports an inference of intent to frustrate agreement where . . . the entire spectrum of proposals put forward by a party is so consistently and predictably unpalatable to the other party that the proposer should know agreement is impossible.”

In *Reichhold Chemicals*, 288 NLRB 69 (1988), the Board referred to a statement it made in the original case in that matter at 277 NLRB 639, 640 (1985): “The Board will not attempt to evaluate the reasonableness of a party's bargaining proposals, as distinguished from bargaining tactics, in determining whether the party has bargained in good faith.” In discussing this statement, the Board stated:

On further reflection, we conclude that this statement is an imprecise description of the process the Board undertakes in evaluating whether a party has engaged in good-faith bargaining. Specifically, the quoted sentence could lead to the misconception that under no circumstances will the Board consider the content of a party's proposal in assessing the totality of its conduct during negotiations. On the contrary, we wish to emphasize that in some cases specific proposals might become relevant in determining whether a party has bargained in bad faith. The Board's earlier decision in this case is not to be construed as suggesting that this Board has precluded itself from reading the language of contract proposals and examining insistence on extreme proposals in certain situations.

That we will read proposals does not mean, however, that we will decide that particular proposals are either “acceptable” or “unacceptable” to a party. Instead, relying on the Board's cumulative institutional experience in administering the Act, we shall continue to examine proposals when appropriate and consider whether, on the basis of objective factors, a demand is clearly designed to frustrate agreement on a collective bargaining contract.

Indeed, the fundamental rights guaranteed employees by the Act—to act in concert, to organize, and to freely choose a bargaining agent—are meaningless if their employer can make a mockery of the duty to bargain by adhering to proposals, which clearly demonstrate an intent not to reach an agreement with the employees' selected collective-bargaining representative. The Board will not have fulfilled its obligation to look at the whole picture of a party's conduct in negotiations if we

have ignored what is often the central aspect of bargaining, i.e., the proposals advanced by the parties.

In the situation here, at the fourth bargaining session, Respondent made its first proposal to the Union, a proposal that would have “gutted” the contract and converted it to a one-half-page document containing three flat rates. Respondent must have been aware that this proposal would be unacceptable to the Union. I therefore find that Respondent has failed to bargain in good faith with the Union, in violation of Section 8(a)(1) and (5) of the Act.

It is also alleged that Respondent violated Section 8(a)(1) and (5) of the Act by subcontracting the stage work for the September 17 show featuring the Spin Doctors, as well as later shows, without proper notice to, and bargaining with, the Union. By letter to the Union dated July 29, Schiavone told Mangini that Respondent “that sometime this week we will be mailing out requests for proposals for handling the stage management at the Palace Theatre.” This was not a clear notification of its intent to subcontract the employees’ work because for a number of years the theatre had been run by Brian Alden and his company, Live Productions. At the first meeting, Schiavone told Mangini that he was looking for someone to “run the theatre for him” because he was not a theatre person. Schiavone’s letter to Mangini of August 6 stated that Respondent was “considering a decision to mail out a request for a proposal . . . asking for quotations on a contract to operate the theatre’s stage for the next season.” This letter then asks the Union to propose considerable concessions which would affect their decision. I find that this letter cleared up any ambiguity in Schiavone’s prior letter and his statements to Mangini at the first meeting; the Union was then on notice of Respondent’s interest in subcontracting all the work at the theatre.

In *NLRB v. Eltec Corp.*, 870 F.2d 1112 (6th Cir. 1989), the Court stated that in *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964):

The Supreme Court has found several facts significant in determining the propriety of collective negotiation concerning the decision to subcontract work. These facts are: (1) whether the decision has altered the company’s “basic operation”; (2) whether the decision contemplated substantial capital investment; and (3) whether imposing a bargaining requirement would “significantly abridge” the employer’s “freedom to manage the business.” An essential fact is whether labor problems contributed to the employer’s decision to subcontract—such a connection indicates “that collective bargaining in advance of the decision might have produced a union offer which could have affected the decision to transfer the jobs.” *NLRB v. Production Molded Plastics*, 604 F.2d 451, 453 (6th Cir. 1979).

In *Otis Elevator Co.*, 269 NLRB 891, 893 (1984), the Board stated: “The appellation of the decision is not important. *Fibreboard* ‘subcontracting’ must be bargained not because the decision turns upon the label, but because in fact the decision turns upon a reduction of labor costs.” In *Storer Cable TV of Texas*, 295 NLRB 295, 296 (1989), the Board stated: “Indeed, as the decision to subcontract existing unit work here turned on the desire to reduce labor costs, the Union had control over this labor-related factor and could

have offered alternatives such as wage reductions or expanding the scope of the employees’ duties.” In *Mountaineer Petroleum*, 301 NLRB 801, 815 (1991), the administrative law judge stated:

In the instant situation, as in *Fibreboard Corp.*, employees in the bargaining unit were replaced with those of an independent contractor to do the same work under similar conditions of employment. The decision to contract out the work did not turn on a change in the basic direction or nature of the enterprise as the contractors continued to be dispatched by Respondent to petroleum pickup points, and the petroleum products were thereafter delivered to Respondent’s facilities involved herein. Moreover, as the Respondent’s avowed object was to accomplish the work at lesser costs . . . the decision was particularly amenable to resolution within the collective bargaining framework.

The facts fall squarely within the facts set forth in these decisions. This was not a change in the nature or direction of Respondent’s business. It was only a substitution of a subcontractor’s employees (at first, Helweg) to perform the work previously performed by Respondent’s employees who were members of the Union. The subcontractor’s employees were performing the identical work that Respondent’s union employees had performed months earlier, and the only reason they were performing the work was, allegedly, because it was less expensive for Respondent to operate in that manner. As discussed above, this is a classic example of a subject amenable to collective bargaining; if Respondent had bargained in good faith with the Union the parties might have been able to work out an agreement that was acceptable to both sides, and saved Respondent some money as well. I therefore find that Respondent was obligated to give proper timely notice to the Union about its intent to subcontract the work, and then to bargain with the Union in good faith about this subject.

I have previously found that Respondent notified the Union of its interest in subcontracting the theatre work by letter of August 6. As stated above, this letter said that Respondent was “considering a decision” to requests proposals. The next notification that the Union received was not at the next meeting (Respondent had no proposals to make at this meeting and had not yet sent out the request for proposals), but in a newspaper ad that they saw on August 23 stating that Respondent was looking for stagehands at the theatre and another newspaper advertisement for the Spin Doctor Show.

Schiavone received two responses to his request for proposals on about September 1. He called Mangini on September 9 and offered to tell him about these proposals. Mangini refused this request and counsel for Respondent, in his brief, uses this refusal as a defense. I disagree. About a month after negotiations began, and after the third bargaining session, Mangini saw the August 23 ad for employees to operate the theatre. His reaction of notifying the International Union of this event was not unreasonable, nor was their response of supplying the Union with an attorney. By September 9, a mediator had been assigned to the negotiations. Mangini’s response of refusing to speak directly to Schiavone was a prudent one, all facts considered. Additionally, if Schiavone was so anxious for the Union to see Helweg’s proposal, as modi-

fied, he could have enclosed it in his September 9 letter to Mangini; he did not do so.

It was not until the September 16 bargaining session that Respondent showed the Union the flat rate proposal; this was the first opportunity that the Union had to bargain about the subject. Also at this meeting, Schiavone told the Union that unless an agreement was reached at that meeting, he would subcontract the stage work for the Skin Doctor's show the following day. His proposal to the Union was Helweg's flat rate proposal, period. The Union refused this offer, while offering to work under the existing agreement and continue negotiations. Schiavone refused this offer and subcontracted the stage work the following day and thereafter.

It is not enough to notify the union of your intention to subcontract; the employer must also "afford the Union an adequate opportunity to bargain concerning the decision . . . ." *Mountaineer Petroleum*, supra. In *NLRB v. Eltec Corp.*, supra at 1117, the Respondent defended that it gave the union full opportunity to bargain about its move. The court rejected this argument, stating:

The Board was justified in concluding that respondent hadn't seriously intended to bargain before moving, when it waited until February 11 to announce its plans to move, plans it began to formulate in December and January. The Board was entitled to find a notice of five business days was insufficient time to allow a meaningful exchange under all the circumstances here.

In the instant matter Schiavone gave the Union the flat rate proposal for the first time on September 16. He told the Union: "Accept this or the work on tomorrow's performance will be performed by Helweg's employees." This is not bargaining envisioned by the Act. Respondent therefore violated Section 8(a)(1) and (5) of the Act by subcontracting this work without proper notice and bargaining.

#### CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:
 

All carpenters, electricians, property men, flymen, curtainmen, frontlight operators, lighting board operators, soundmen and wardrobe personnel employed by the Respondent as stagehands at its theatre located at 246-248 College Street, New Haven, Connecticut; but excluding all other employees (including Motion Picture Projectionists), all managerial and confidential employees, all guards and supervisors as defined in the Act.
4. At all times since 1984, the Union has been the exclusive collective-bargaining representative of these employees.
5. Since on or about April 8, 1992, Respondent has failed and refused to bargain in good faith with the Union, in violation of Section 8(a)(1) and (5) of the Act.
6. On about September 17, 1992, Respondent subcontracted work previously performed by its employees rep-

resented by the Union, without having previously bargained in good faith with the Union over its intention to do so.

#### THE REMEDY

Having found that Respondent has engaged in acts and conduct in violation of Section 8(a)(1) and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. I have found that Respondent has failed and refused to bargain in good faith with the Union. As a remedy, I shall order that Respondent be ordered, on request, to resume bargaining with the Union and to do so in good faith, and, in the event an agreement is reached, embody such agreement in a signed contract. I have also found that Respondent violated Section 8(a)(1) and (5) of the Act by subcontracting the stage work at the theatre without first bargaining in good faith with the Union about the subject. In order to remedy this violation, I shall recommend that Respondent be ordered to cancel its subcontracting agreements and to directly employ its former employees as it had done prior to September 17, 1992. I shall also order that Respondent, on request, bargain with the Union in good faith about its decision to subcontract this work. If and when a valid impasse occurs in the course of this bargaining, Respondent shall be entitled to resume subcontracting this work. In addition, I shall recommend that Respondent be ordered to make whole those employees who lost their jobs with Respondent due to the unlawful subcontracting of the stage work at the theatre by paying to these employees a sum of money equal to the amount they would have earned absent Respondent's unlawful activity, less interim earnings. This backpay will end when Respondent makes a valid offer of reinstatement to them or they obtain equivalent employment elsewhere. This amount shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>8</sup>

#### ORDER

The Respondent, The Palace Performing Arts Center, Inc., New Haven, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Bargaining in bad faith with Local No. 74, International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, AFL-CIO as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All carpenters, electricians, property men, flymen, curtainmen, frontlight operators, lighting board operators, soundmen and wardrobe personnel employed by the Respondent as stagehands at its theatre located at 246-248 College Street, New Haven, Connecticut; but

<sup>8</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

excluding all other employees (including motion picture projectionists), all managerial and confidential employees, all guards and supervisors as defined in the Act.

(b) Unilaterally subcontracting work previously performed by these bargaining unit employees without prior bargaining with the Union.

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

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

(a) On request, bargain in good faith with the Union as the exclusive bargaining representative of the employees in the appropriate unit described above concerning rates of pay, wages, hours of work, and other terms and conditions of employment, and if an agreement is reached, embody it in a signed contract.

(b) Offer to its bargaining unit employees whose jobs were lost as a result of the unlawful subcontracting, full and immediate reinstatement to their former positions of employment, or if those positions no longer exist, to substantially equivalent positions of employment, without prejudice to their seniority or other rights and privileges previously enjoyed.

(c) Make these employees whole for any loss of earnings they suffered as a result of their being replaced by the subcontractor's employees, in the manner set forth in the remedy section of this decision.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records or other records necessary to analyze the amount of backpay, and the names of the discriminatees, under the terms of this Order.

(e) Post at its facility in New Haven, Connecticut, copies of the attached notice marked "Appendix."<sup>9</sup> Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately on receipt and shall be maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

<sup>9</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

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

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

WE WILL NOT refuse to bargain collectively and in good faith concerning rates of pay, hours of employment, and other terms and conditions of employment with Local No. 74, International Alliance of the Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, AFL-CIO (the Union) as the exclusive representative of the employees in the bargaining unit described below:

All carpenters, electricians, property men, flymen, curtainmen, frontlight operators, lighting board operators, soundmen and wardrobe personnel employed by us as stage hands at our theatre located at 246-248 College Street, New Haven, Connecticut, but excluding all other employees (including motion picture projectionists), all managerial and confidential employees, all guards and supervisors as defined in the Act.

WE WILL NOT unilaterally subcontract stage work at our theatre without previously bargaining in good faith with the Union about this subject.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the free exercise of your rights under Section 7 of the National Labor Relations Act.

WE WILL, on request, bargain with the Union and put in writing any agreement reached on terms and conditions of employment for our employees in the above bargaining unit.

WE WILL, on request, bargain in good faith with the Union concerning our decision to subcontract the stage work at our theatre.

WE WILL offer to our employees who lost their jobs due to our subcontracting the stage work at the theatre beginning on September 17, 1992, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and WE WILL make those employees whole for any loss of earnings and other benefits they may have suffered as a result of their unlawful discharges.

THE PALACE PERFORMING ARTS CENTER, INC.