

Lower Bucks Cooling & Heating, Inc. and Sheet Metal Workers' International Association, Local No. 19, AFL-CIO. Cases 4-CA-21913, 4-CA-22365, 4-CA-22469, and 4-CA-22502

January 20, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND COHEN

On September 23, 1994, Administrative Law Judge Karl H. Buschmann issued the attached decision. The General Counsel filed an exception and a supporting brief.

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

The Board has considered the decision and the record in light of the exception and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.

In his exceptions the General Counsel requests a 1-year extension of the certification year to remedy the Respondent's unlawful refusal to bargain in good faith. We find merit in this exception.

The Respondent has from the outset of the certification year bargained in bad faith and without an intent to reach agreement. In these circumstances we find it appropriate to modify the recommended Order to include specific affirmative language extending the certification year for a period of 1 year from the date that good-faith bargaining begins. *Bethea Baptist Home*, 310 NLRB 156, 157 (1993); *Enertech Electrical*, 309 NLRB 896 fn. 1 (1992); *Glomac Plastics v. NLRB*, 592 F.2d 94, 100-101 (2d Cir. 1979), enfg. in pertinent part 234 NLRB 1309 fn. 4 (1978).¹

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Lower Bucks Cooling & Heating, Inc., Croydon, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Add the following as paragraph 2(b) and reletter the subsequent paragraphs.

(b) "Remove from the files of Joseph Carosi, Louis Picuri, and Daniel White any reference to the Respondent's unlawful refusal to recall and reinstate them, and notify Carosi, Picuri, and White in writing

¹Member Cohen notes that the bad-faith bargaining in this case occurred throughout the entire certification year. He therefore finds it unnecessary to pass on the cited cases insofar as they hold that the certification year is fully extended where the employer bargains in bad faith for a portion of the certification year.

that this has been done, and that the unlawful refusals will not be used against them in any way."

2. Substitute the following for relettered paragraph 2(d).

"(d) On request, bargain collectively in good faith concerning wages, hours, and other terms and conditions of employment with Sheet Metal Workers' International Association, Local No. 19, AFL-CIO, as the designated representative of the employees in the above-described appropriate unit and, if an understanding is reached, embody it in a written, signed agreement. The Union's certification year shall extend 1 year from the date that good-faith bargaining begins."

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

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT refuse to recall or reemploy or otherwise discriminate against Joseph Carosi, Louis Picuri, and Daniel White because they supported the Union.

WE WILL NOT require our service employees to have their own vehicles or require them to sign a "noncompetition" clause or otherwise change their working conditions without prior notice to Sheet Metal Workers' International Association, Local 19, AFL-CIO and affording the Union the opportunity to bargain collectively on behalf of the employees in the following unit:

All HVAC service technicians and service mechanics employed by Lower Bucks Cooling & Heating, Inc., excluding all other employees, office workers, managers, guards, and supervisors as defined in the Act.

WE WILL NOT bypass the Union and deal directly with our unit employees with respect to benefits and other terms or conditions of employment.

WE WILL NOT fail or refuse to bargain in good faith with the Union on behalf of our unit employees.

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

WE WILL offer Joseph Carosi, Louis Picuri, and Daniel White 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 any other rights or privileges previously enjoyed and we will make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to our unlawful refusals to recall these employees and notify them in writing that this has been done and that the unlawful refusals will not be used against them in any way.

WE WILL reestablish the status quo ante and cancel and destroy all "non-competition" forms executed by our unit employees and cancel our policy requiring our unit employees to have their own service vehicles.

WE WILL, on request, bargain collectively in good faith concerning wages, hours, and other terms and conditions of employment with the Union as the designated representative of the employees in the above-described appropriate unit and, if an understanding is reached, embody it in a written, signed agreement. The Union's certification year shall extend 1 year from the date that good-faith bargaining begins.

LOWER BUCKS COOLING & HEATING,
INC.

David Faye, Esq., for the General Counsel.

William F. Kershner, Esq. (Pepper, Hamilton & Scheetz), of Berwyn, Pennsylvania, for the Respondent.

Bruce E. Endy, Esq. (Spear, Wilderman, Borish, Endy, Spear & Runckel), of Philadelphia, Pennsylvania, for the Union.

DECISION

STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. This case was tried on May 31, June 1 and 2, 1994, in Philadelphia, Pennsylvania. Upon charges filed by the Union, Sheet Metal Workers' International Association, Local No. 19, AFL-CIO, a consolidated complaint issued on April 28, 1994, alleging that the Respondent, Lower Bucks Cooling and Heating, Inc., violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act) by refusing to recall three employees, because they supported the Union, by unilaterally bargaining with the unit employees, changing their working conditions, and by engaging in certain conduct during the negotiations with the Union which showed a failure to bargain in good faith. The Respondent's answer filed on May 9, 1994, admitted the jurisdictional aspects of the consolidated complaint, but denied that the Company had engaged in unfair labor practices.

Upon the record as a whole, including my observation of the witnesses and the well written briefs filed by the General

Counsel, the Respondent, and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

Lower Bucks Cooling and Heating, Inc. (the Respondent or the Company) is a Pennsylvania corporation located in Croydon, Pennsylvania, where it is engaged in the installation and maintenance of heating, air-conditioning, ventilation, and refrigeration systems, and in the fabrication of duct work. With goods valued in excess of \$50,000 directly to points outside the State of Pennsylvania, the Respondent is admittedly an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

David Ripka, its president and owner, is an admitted supervisor within the meaning of Section 2(11) of the Act.

The Union, Sheet Metal Workers' International Association, Local No. 19, AFL-CIO, is admittedly a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

On March 1, 1993, the Union was certified as the exclusive bargaining representative of the following unit among the employees of the Respondent:¹

All HVAC service technicians and service mechanics employed by Respondent; excluding all other employees, office employees, managers, guards and supervisors as defined in the Act.

The union campaign began in late August 1992. At that time, the Respondent employed six service department employees: Gary Bush, Francis Lepone, Louis Picuri, Joseph Carosi, Peter Cassano, and Daniel White (Tr. 47-48, 105). Carosi called Mark Summerville, the union organizer, on August 31, 1992, and expressed the employees' interest in being represented by the Union. Summerville gave Carosi several union authorization cards. He distributed them to all of his fellow workers, except Bush who was known to be against the Union. The five employees signed the cards and returned them to Summerville in September 1992. Summerville subsequently met with the employees at a diner in Bristol, Pennsylvania, on October 7, 1992, for a briefing about the Union. The employees visited the Union's training center on October 13, 1992.

Sometime in October, Respondent's president, David Ripka, saw Picuri and Carosi at a deli near the plant and said that "he believed it was his installers they [the Union] were trying to organize" (Tr. 76, 105). The employees did not reply.

In October, Ripka began to hold regular meetings with the service department employees after work to discuss customers, sales, or problems at work. During one meeting in October 1992, Ripka told the group that he had heard about the Union in his shop and that he suspected that the employees in the installation department were for the Union. At similar meetings in late October and in November, he informed the same group of service employees that he had discovered that it was they, the service employees, who favored

¹The employees in the installation department were not included.

the Union, and that he wanted them to stop and to get their cards back. He asked them what benefits they wanted. (Tr. 59–60, 77, 107.) The employees mentioned raises, health benefits, training, better trucks, and uniforms. Ripka promised them the benefits if the employees abandoned their efforts on behalf of the Union. He offered to prepare letters for them to that effect.

In the meantime, on October 26, 1992, the Union had filed its petition for representation of the service employees. The notice was mailed to the Respondent on October 27, 1992.

At yet another weekly meeting with the service department employees, employee Gary Bush proclaimed that he would never sign a union card and that all the guys except him favored the Union. After Bush expressed his hostility toward the Union with even more emphasis, Ripka told him, “Gary will always have his job.” (Tr. 61, 79, 108.) Ripka, saying that Bush was the only one who does not want the Union, promised to fight for him and informed the employees generally that “he will never negotiate with the Union. He would close his doors before he negotiated with Local 19.” (Tr. 61, 80, 109.) Ripka repeatedly said that he would never negotiate with the “fucking union.” Ripka again urged the employees to write to the Union to get their cards back and stated that, on the advice of counsel, he was prohibited from writing letters for them or assisting them to get their union cards back. Stephanie Sloan, secretary and office coordinator, testified that she had actually prepared such letters. (Tr. 462.)

The representation hearing scheduled for November 10 and rescheduled for November 12, 1992, was withdrawn by the Union, because the employees were unavailable. A new petition was filed on November 20, 1992, and a hearing on the representation petition was scheduled for December 4, 1992.

At Ripka’s behest, employee Picuri went to the other employees in late November and polled them to find out whether they were still interested in the Union. Picuri, after speaking to three employees, reported back to Ripka stating that they still supported the Union. Employee Bush, also prompted by Ripka, instructed the employees that they should meet on December 3, 1992, and take a vote concerning the Union. The six employees met on that day, they first discussed the Union, and then listened to Bush express his strong opposition to the Union. Nevertheless, after a secret vote was taken, the count favored the Union. Bush promptly informed Ripka by car phone that the Union had the support of the employees. (Tr. 33, 47–48, 63, 112.) Ripka, thereafter, agreed to negotiate a stipulation for a consent election. This obviated the hearing scheduled for December 4, 1992. One day after the straw vote favoring the Union, Ripka assembled the six service employees and informed them that after a 20-year history without a layoff, half of the service department would be laid off, because “the company is not doing well” (Tr. 33, 63, 84, 113). The Company’s installation employees were not affected. Ripka initially asked for volunteers, but when no one came forward, he selected White with the comment that he could “use a vacation,” and then Carosi with the remark “you got a cold anyway” and finally Picuri saying, “You too.” (Tr. 34, 64, 85, 115.) Ripka, indicating that more layoffs were possible, insisted that the laid-off employees immediately clean out their trucks. During this process he took photographs of the trucks and its contents, while his secretaries, including Stephanie Sloan, recorded the inventory items

taken from the trucks. (Tr. 64, 85, 116, 315.) The employees felt humiliated by this process, because Ripka and his secretaries joked and laughed while they watched the three employees empty out their trucks to leave their employment. (Tr. 36, 64–65, 86, 117, 324.)

Pursuant to the stipulated election agreement, the election was held on January 7, 1993, in a unit composed of the six service department employees. (G.C. Exhs. 31, 32, 34.) The Respondent, characterizing the layoffs as permanent, challenged the votes of the three laid-off employees. The Union, without challenging the objections, was then elected by a vote of two to one and was ultimately certified on March 1, 1993. (G.C. Exhs. 35–38.)

Shortly after the election in January 1993 and prior to its certification, the Union attempted to commence negotiations with Ripka. In spite of numerous telephone calls and messages left by Mark Summerville, the Union’s negotiator, the attempts were without success. (Tr. 150–151.) Summerville had expected to negotiate with Ripka on favorable terms and therefore decided not to challenge the permanency of the layoffs (Tr. 224–225). Ripka termed the layoff of the employees as permanent in his letters, dated December 28, 1992, to White, Picuri, and Carosi. (G.C. Exhs. 8, 11, 17.)

For more than a year, the Union’s efforts to negotiate a contract were without success. By certified letter, dated February 10, 1993, Summerville proposed certain dates in February to commence bargaining. (G.C. Exh. 39, Tr. 151.) Ripka replied by letter of February 16, 1993, suggesting that the Union “send in writing any suggestions for contract negotiations” or “a copy of an existing contract” with another service company and if “an actual meeting must be set” Ripka suggested an “early morning or a late evening appointment” (G.C. Exh. 40). Summerville, in his letter of February 23, 1993, agreed “to meet in the early morning on any day” Ripka would suggest. (G.C. Exh. 41.) But Ripka failed to respond, explaining during his testimony that he was not obliged to negotiate prior to the Union’s actual certification. (Tr. 325.) By certified letter of March 8, 1993, Summerville renewed his request and reminded Ripka of the numerous, yet unsuccessful efforts to set up a negotiation meeting. Summerville stated that he would file charges with the National Labor Relations Board if he did not get a reply by March 15, 1992. (G.C. Exh. 42.) Ripka still did not reply.

A meeting was finally scheduled through the efforts of the attorneys for the respective parties. But pursuant to Ripka’s request, the meeting had to be rescheduled to March 24, 1993. Ripka was accompanied by his business partner and suggested at the first negotiation session that a contract be negotiated between the Union and Anaconda Controls, another company partially owned and controlled by Ripka. (Tr. 156, 425–427, 430.) Summerville provided Ripka with a proposed contract which had been specifically prepared by the Union with the assistance of counsel. The parties made no progress and agreed to meet again on March 29, 1992.

The next scheduled meeting was also rescheduled at Ripka’s request. At the meeting on April 6, 1993, Ripka again urged that the parties negotiate with Anaconda Controls instead of the Respondent, a suggestion which Summerville rejected because the Union was not elected by the employees of the Company. When Summerville referred to the Union’s proposal, Ripka stated that he had misplaced the Union’s proposal and not read it. (Tr. 158.) Summerville pro-

vided Ripka with another copy of its proposal. The parties scheduled their next meeting.

The parties met again on April 12, 1993, at the same diner as in the past in Bristol near the Respondent's facility. Again, Ripka had not yet read the Union's proposal and was also unable to agree to another meeting because he did not have his calendar. (Tr. 160.)

The fourth meeting was held on April 27, 1993, at the diner near the plant. Ripka, accompanied by his partner, again expressed his intention to negotiate on behalf another firm. He had still not read the Union's proposal, nor was he prepared to schedule another meeting because he did not have his calendar. (Tr. 16.)

The May 12 meeting was held at the union hall, because Summerville wanted to introduce Ripka to Tom Kelly, the Union's president, and tour the Union's training center, including the service school. (Tr. 162.) Again the meeting ended without negotiating any proposals, because Ripka had not read the Union's proposal. Another meeting could not be agreed upon, because Ripka had forgotten his date book. (Tr. 161.) Kelly and Summerville told Ripka unequivocally that the parties could not negotiate a contract on behalf of a company where the Union was not elected to be the employees' bargaining representative.

The May 19 meeting, convened at Summerville's suggestion at the union hall, ended in the same fashion, without negotiations. In a vain attempt to accommodate Ripka, Summerville had introduced Ripka to the building manager of a high rise building at Penn Center who had indicated his willingness to give Ripka the service work in the building. (Tr. 163.) Yet Ripka was still trying to substitute the Respondent with his Anaconda Controls company (Tr. 377-338).

Summerville called Ripka on June 1, 1993, stating that he had demonstrated his good faith and that he needed Ripka's commitment and cooperation to sign an agreement. Ripka's replied with a suggestion of yet another company, explaining that he would never sign a contract on behalf of the Respondent, Lower Bucks. (Tr. 164.)

By certified letter of June 9, 1993, Summerville reminded Ripka of his obligation to bargain on behalf of the Respondent, suggesting a certain date and time. Ripka called Summerville, setting July 7, 1993, as the date and insisting that the meeting be limited to 1 hour. (G.C. Exhs. 43, 44.)

Prior to the next bargaining session, Ripka met with the service employees on June 30, 1993, and asked them to sign a statement entitled "Non Competition Clause" (G.C. Exh. 2, Tr. 19-20). The employees signed the form, because they felt that they had no choice in the matter and "feared for [their] job at that time." (Tr. 20, 38-40.) The Union was not aware of these developments until February 1994. (Tr. 200.)

On July 7, 1993, the parties met again. In addition to Summerville, the Union was also represented by its attorney. As in the past meetings, Ripka informed the Union that he had not read its proposal. (Tr. 167-169.) Ripka insisted again that Anaconda Controls be the negotiating party. Again the Union informed him that the proper party was the Respondent, Lower Bucks. Two significant issues were raised at this meeting by the Union. First, the Union wanted to know why the Company had hired two new service employees, one on April 23 and one on June 10, 1993, instead of recalling any of the three laid-off employees. (Tr. 167, 218, 249.) The Union also demanded the names of the newly hired employ-

ees. Ripka replied that these three people on layoff were notified by letter of April 30, 1993, offering them reinstatement. (G.C. Exhs. 7, 12, 18, Tr. 168.) All three laid-off employees denied ever receiving Respondent's letter. (Tr. 66, 89, 95, 118.) Admittedly, the letters were not sent by certified mail. (Tr. 505.) Respondent had hired Joseph Musiowsky on April 23 and Eugene Zurybida on June 10, 1993. On January 10, 1994, Ripka hired Paul McEowan. None of the laid-off employees were recalled. (Tr. 36, 133, 505.)

The other issue raised at the July 7 meeting concerned a newly implemented policy concerning vans for the employees. While two of the service employees had retained their company vans for their work, the two newly hired service employees were required to have their own trucks. (Tr. 170.) The Company had adopted a new policy after the election, namely, service employees were required to have their own service vans. (Tr. 168, 219, 255.) The Union advised Ripka that he had changed the conditions of employment for the employees without bargaining with the Union. (Tr. 170.)

By letter of July 13, 1993, Ripka canceled the next meeting scheduled for July 27, 1993, and proposed instead August 12, 1993. (G.C. Exh. 45.) This delay, according to Ripka, would provide them "with enough time to go over the contract in full detail and be prepared for the 27th meeting." (G.C. Exh. 45.)

On August 12, 1993, the parties met and discussed for the first time the individual provisions of the Union's proposal. (Tr. 173.) Although the first 10 of the 27 proposals were reviewed, the parties failed to agree to any of them. Moreover, Ripka revealed that he was undergoing psychiatric treatment, that he suffered from migraine headaches, and that he was learning disabled. He accordingly declared the meeting concluded after 2 hours of discussions. (Tr. 173.) The next meeting was set for August 27.

In the meantime by letter of August 13, 1993, addressed to Ripka, the Union demanded copies of all written offers of employment made to the laid-off employees as well as the documents showing that Picuri, one of the laid-off employees, was incompetent as earlier claimed by the Respondent. (G.C. Exh. 46.) Ripka responded by letter of August 19, 1993, providing only some of the requested information. (G.C. Exh. 47.) The Union, agreed by letter of August 26, 1993, that the August 27 scheduled bargaining session be postponed to September 1, 1993. (G.C. Exh. 491.)

On that day the parties met at Respondent's facility. They covered several more paragraphs of the Union's proposal without reaching an agreement on any one significant issue and without obtaining a counteroffer. (Tr. 177-179, 259-260.)

The Union wanted to resume negotiations as soon as possible, but Ripka insisted that he could not meet any sooner than October 11, 1993, Columbus day. (Tr. 180-181.) The Union protested the 6-week delay as well as the late timing during the day. Ripka prevailed as usual, and the parties met on October 11, 1993. (G.C. Exhs. 51-53, Tr. 181-184.) Neither Ripka, nor his secretary who was present had their notes from the prior meetings. Accordingly, after they finished going through the remaining paragraphs of the Union's proposal, Ripka suggested that they start from the beginning. (Tr. 185.) Ripka suggested that the Union should be prepared to give up some of its proposals. In any case, Ripka would

not agree to even a tentative agreement on anything. (Tr. 266.) Ripka, accompanied by his secretary, Sloan, objected to most proposals and frequently vacillated or changed his mind on items which had appeared acceptable to him. (Tr. 270, 276.)

Ripka by letter of September 2, 1993, to the Union requested that it revise its proposal "to delete and/or modify Articles in order for us to begin the process again." (G.C. Exh. 54.)

The next session was held on November 8, 1993. Again, the Union had protested that the interval was too long. Ripka again was unprepared to make any counterproposals which the Union had urged during the prior meeting. (Tr. 187.) Summerville requested that the next meeting be held at the union hall. Ripka rejected the idea stating that it would be too dangerous for him in downtown Philadelphia. (Tr. 188.) Stephanie Sloan, testified that it was her fear which prompted Ripka's attitude in this regard. (Tr. 482, 515.) Ripka suggested November 29, 1993, as the date for the next session.

Ripka in a lengthy letter of November 15, 1993, to the Union expressed his disbelief that the Union had filed unfair labor practice charges with the Board. He blamed his difficulties on the pressures of his business. He renewed his concern for his staff's feeling of fear in the downtown area and demanded that the bargaining sessions be recorded. (G.C. Exh. 55.) The Union responded by letter of November 17, 1993, informing the Respondent that the Union's downtown location was safe and that the tape recording of negotiations would not be acceptable. (G.C. Exh. 56.)

The meeting on November 26, 1993, was held at Ripka's facility and, in accordance with his demand at 5 p.m. The parties did not make any progress and the meeting was frequently interrupted by telephone calls by Ripka. (Tr. 191, 247.) The Union requested the next meeting to be held at the union hall. Ripka refused, stating that he was unable to meet sooner than December 14, 1993. (Tr. 192-193.)

The meeting on December 14, 1993, was held at Ripka's shop, because "he would never come to the union hall, he would only negotiate at his shop" (Tr. 193). Nevertheless, the Union requested that the next meeting be held at the union hall, because Tom Kelly, the Union's president could be present. Again, Ripka refused to meet there or any time earlier than January 25, 1994, because he would be on vacation. (Tr. 194.)

On January 25, 1994, the parties, including Kelly, met at the Respondent's plant to bargain. Discussed were employee benefits. Ripka refused to accept the Union's proposal for employee benefits contained in "Schedule A." (G.C. Exh. 57, Tr. 195.) Instead, he informed the union negotiators that he had his own plan, a "cafeteria plan," which had already been presented to the employees directly at a prior meeting on December 20, 1993. (G.C. Exh. 58, Tr. 196.) That meeting was attended by all employees, except Lepone. (Tr. 29.) The benefit package devised by the Respondent was presented to the assembled employees on December 20. Lepone received the substance of the information at a later date from Respondent's office coordinator. (Tr. 27-28.) The Union's attorney advised Ripka during the January 25 meeting that his direct dealing with the employees about their benefits constituted an unfair labor practice. (Tr. 197.) Ripka replied that one of his employees had given him the plan and suggested by letter dated January 25, 1994, that the Union sign

the plan (Tr. 197, G.C. Exh. 58). The Union refused, stating that it had proposed its own plan.

The next negotiation session was held on February 23, 1994, at Ripka's plant. The Union asked for shift differential pay for its employees, but Ripka replied that he did not pay it now and would not in the future (Tr. 200). The Union's counsel inquired whether Ripka would be willing to change any terms of employment through negotiations. Ripka replied that he "wouldn't give up anything that he already has" and that the employee should be glad to have a job (Tr. 201).

During the following meeting on March 25, 1994, at Ripka's facility, the Union was represented as usual by Summerville, as well as Kelly and Attorney Bruce Endy. They hoped to go over parts of the agreement with Ripka. However, Ripka complained of a migraine headache and stated that he was under medication and again reminded everyone that he had a learning disability, and could not take the pressure. (Tr. 202.)

By this time, the Union had filed its respective unfair labor practice charges with the Board alleging that the Respondent failed to recall the three laid-off employees because of their union support, that the Respondent had failed to bargain in good faith with the Union, and that the Respondent had unilaterally changed the employees' working conditions. At this juncture, the parties had not agreed to any of the Union's proposals consisting of 21 articles. (Tr. 284-285.)

At the suggestion of the Union's president, Kelly, the parties ultimately agreed to meet at the offices of the Federal Mediation and Conciliation Service. (Tr. 247.) Federal Mediator Thomas Washington participated in the negotiations and met with the parties separately. The Union's proposal was reviewed from the beginning. The negotiators finished reviewing the first six articles. (Tr. 277, 281-283.) For the first time, the Respondent initialed his agreement with several provisions. (C.P. Exhs. 2, 3, 4, 5; Tr. 271, 283.) The parties agreed to a next session scheduled for June 13, 1994.

Analysis

The record fully supports a finding of violations of the Act. The Respondent's antiunion animus was amply shown by Ripka's statement to the employees. The layoff of White, Picuri, and Carosi is not disputed, nor can it be gainsaid that they were not reemployed. After the Union's certification, Ripka dealt directly with the employees about their benefits and put into effect new conditions of employment, without bargaining or even notifying the Union. Finally, Ripka, as he had threatened, did not agree to any terms of a union proposal, much less sign an agreement and only reluctantly attended bargaining sessions.

The Respondent relied upon a defense that Ripka, the chief executive of this and various other companies is a novice, an unsophisticated individual, totally inexperienced in dealing with the Union, and that he is mentally disabled, suffering from dyslexia and a learning disability since childhood. (Tr. 11, 292.) Ripka testified that he and his family have a history of depression, that he had suffered numerous strokes, and is generally afflicted with memory losses, migraine headaches, and visual problems, requiring medication such as Prozac. (Tr. 293.)

While I agree that Ripka's recollection of the relevant events, particularly the discussion about the bargaining sessions, was less accurate and less reliable than the testimony

of Summerville, I am not convinced that Ripka demonstrated less ability than other business executives or a lack of sophistication. To the contrary, I observed an alert and fully responsible individual who, by his own record, has demonstrated financial success and professional achievement in a complicated and competitive environment. In spite of his memory lapses, he impressed me as a shrewd and clever executive who can easily maneuver complicated events to his advantage. In addition, the record shows that Ripka was assisted by counsel at least during the latter part of the negotiations. In his testimony Ripka agreed with many of the salient facts provided by the witnesses called by the General Counsel, as for example the Respondent's knowledge of the employees' union support, his assurances of job security for Gary Bush, the unilateral changes in working conditions, his dealings with the employees' and certain conduct during the negotiations. However, numerous observations in Ripka's testimony were implausible or exaggerated and several responses were uttered in anger and unreliable. I have accordingly credited his testimony only to the extent that it corroborated the more detailed and reliable accounts provided by Summerville and the three employee witnesses.

Moreover, I have little faith in the reliability of Stephanie Sloan's testimony. Not only was she associated with Ripka on a professional basis as his office manager, but she was also at times referred to as Ripka's girlfriend. Her testimony impressed me as clearly biased in favor of the Respondent and generally lacking sincerity. For example, I observed her bursting into tears while testifying about the "inevitable" layoff so close before the Christmas season. (Tr. 464-465.) Yet when asked whether she also cried during the time while she witnessed the actual layoff, she answered, "[N]o" (Tr. 518). The record contains other examples of responses which appear vague and inconsistent. I have therefore not relied upon her testimony.

Responding to the General Counsel's allegation of unfair labor practices, the Respondent argues in substance; (1) the Respondent "LBCH was under no obligation to 'recall' the three service employees who had been permanently laid off" and it "did not discriminatorily refuse to rehire the employees," (2) the "service employees were not required to sign the non competition clause as a term and condition of employment," (3) the requirement of "new employees to provide their own trucks. . . . was the involuntary result of the forbearance agreement between LBCH and the bank," (4) "[n]o persuasive evidence was presented to show that LBCH proposed the cafeteria plan directly to bargaining unit employees," and (5) "LBCH has not failed or refused to bargain in good faith" and any mistakes were the results of Ripka's inexperience.

Even though the Respondent may have had an economic justification for the layoff of the three employees, it is well settled that the refusal or failure to recall the employees because of their union support constitutes a violation of the Act. Here, the record shows that Carosi, Picuri, and White had supported the Union and that the Respondent knew it. Ripka had requested Picuri on November 30, and Bush on December 4, 1992, to poll the employees about their union sentiments. The two employees reported back that the employees supported the Union. During meetings with the six employees, Ripka promised benefits to the employees, if they would forego their union support. He offered to help them

withdraw their union cards and promised to fight for Bush, the only employee who openly professed his antagonism to the Union Ripka clearly knew that all the other employees supported the Union. Even without the clear evidence of knowledge by the Employer, I can also infer that the Respondent was aware of the employees' union support under the "small plant doctrine."

The record reveals in stark terms the Respondent's antiunion animus, when he threatened that he would never negotiate with the Union and would rather go out of business than deal with the Union. With such a hostility towards the Union, it is not surprising that Ripka would rather hire someone off the street than to recall Carosi, Picuri, or White. Indeed, on April 23, 1993, he hired Musiowski, and on June 10, 1993, an employees by the name of Zuribyida and on January 10, 1994, the Respondent hired McEowen.

Ripka claimed to have sent letters on April 30, 1993, to the three laid-off employees offering them reinstatement. However these letters were not received by them. Ripka testified that he instructed his office coordinator, Sloan, to send certified letters. (Tr. 413, 497.) Sloan testified, however, that she did not send them by certified mail and when asked whether she may have forgotten to mail them at all, she replied: "No, I don't think so." (Tr. 517.) Her somewhat uncertain response, as well as her demeanor as a witness convinces me that the letters were never sent. In any case, the letters merely stated that positions were available and that the recipient had to "apply for either position." (G.C. Exh. 7.) The letters also required the applicants to have their own vehicle. In short, these letters, even if sent, were not offers to recall the employees. The same conclusion applies to the certified letters, dated November 1, 1993. (G.C. Exh. 19.) Not only were these letters sent after two new employees had already been hired, but the letters also indicated that interviews were necessary and that the applicants were required to have their own service vehicle. Indeed, Carosi responded to the letter, was interviewed on December 8, 1993, but was not hired. According to the Respondent, Carosi may not have been "qualified for the position, or met the requirement of having his own truck." (R. Br. 48.) Clearly then, the Respondent failed to reinstate the three employees.

The conclusion is inescapable that the Respondent's motive for his refusal to reinstate White, Picuri, and Carosi was their union support. Significantly, Ripka expressed his intention to discriminate against them, when during the meeting with the service employees, he assured Gary Bush that he would always have a job with him after Bush had expressed his opposition to the Union. (Tr. 79, 108.) Ripka said, "That's why I'll fight for you, because you're the only one who doesn't want the Union. I'll fight for you." (Tr. 109.) The import of Ripka's message is that those who favor the Union are dispensable and those that are opposed to the Union are indispensable.

The General Counsel has established a prima facie case of violations of the Act. *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The Respondent has failed to show that even in the absence of their union support the result would have been the same. The Respondent made a weak attempt to show that Picuri was incompetent. However, the record does not support such an argument. The record does not contain any evidence of disciplinary actions. To the contrary, Picuri had a

reputation as an excellent employee who had received merit raises, who was rehired in 1989 and had his picture in a company brochure. As already stated, Ripka's professed attempts to rehire the employees was disproven under closer scrutiny. Finally, suggesting that the layoff was permanent is not a defense to his disparate treatment of the laid-off employees, none of whom were recalled. Yet other individuals were hired in preference to the ones on layoff. It is also clear that the Respondent considered hiring Picuri, White, and Carosi but ultimately failed to do so. I accordingly find that the Respondent violated Section 8(a)(1) and (3) of the Act.

The Unilateral Actions

The record discloses that on January 30, 1993, after the Union's certification, the employees were requested to sign a "noncompetition clause." The employees signed the forms out of fear that otherwise they would have lost their jobs. The Union was unaware of this action until February 1994. In addition, on or about April 23, 1993, the Respondent adopted a new policy whereby new service employees were required to have their own service vehicle (Tr. 219). The Union did not know about this change in the employees' working conditions until July 7, 1993. Finally, the record shows that the Respondent dealt directly with the bargaining unit employees and offered them a cafeteria benefit plant on December 20, 1993. The Respondent submitted a proposal of this type to the Union on January 25, 1994. It is clear therefore that the Respondent by bypassing the Union and by dealing directly with the unit employees violated Section 8(a)(1) and (5) of the Act. Furthermore, by unilaterally changing the working conditions of the unit employees (even if prompted by economic necessity) without prior notice to the Union and without affording the Union to bargain about the unilateral changes, the Respondent violated Section 8(a)(5) and (1) of the Act.

The Failure to Bargain

The Respondent has shown in several ways that it refused to bargain in good faith. To make a determination whether or not a party has violated Section 8(a)(5) and (1) of the Act, the Board looks to the totality of the Respondent's conduct not only during the negotiations but also to the conduct away from the bargaining table. *Overnite Transportation Co.*, 296 NLRB 619 (1989), *enfd.* 938 F.2d 815 (7th Cir. 1991). Initially, the records show that the Respondent expressed in no uncertain terms that it had no intention to bargain with the Union. In graphic language, Ripka told the employees prior to the Union's election that there was no way that he would negotiate with "the expletive Union" and that he would close his doors before he would ever bargain with the Union. (Tr. 61, 80, 109.) Ripka had effectuated his intentions by his subsequent conduct. As already discussed, he bypassed the Union and dealt directly with the employees and unilaterally changed their working conditions. For a period of more than 1 year, he has avoided any meaningful dialogue with the Union, he has frustrated the bargaining process by attempting to negotiate on behalf of another company, by canceling bargaining sessions, by failing to read the Union's proposal, by refusing to meet at a certain place, by refusing to set times for future meetings, by limiting the duration of the negotiations, by delaying the scheduling of future meetings and by

blaming his conduct on his inexperience and his disability. More specifically, Ripka avoided any contact by telephone during January 1993 with Summerville. In spite of numerous calls to the Respondent's office, Ripka was unavailable. (Tr. 150-157.) In answer to a certified letter by the Union, Ripka suggested bargaining by mail or meetings in the early morning or late in the evening. When Summerville accepted the proposal to meet early or late, Ripka failed to respond at all. The Union finally retained counsel, who was able to schedule a meeting in late March. But Ripka rescheduled that meeting. He similarly canceled meetings scheduled for June 25 and 27, 1993. On other occasions (March 24, April 12 and 27, May 12 and 19, 1993) Ripka failed to bring his calendar or his date book and for those reasons refused to schedule another bargaining session. On numerous occasions, Ripka was indisposed to schedule meetings within a reasonable time and insisted that he could not meet any sooner than October 11, November 8 and 29, December 14, 1993, and January 25, 1994.

Particularly frustrating was Ripka's failure to even review the Union's proposal for the first six or seven meetings. After finally reviewing the proposal during the August 12 and September 1 sessions, Ripka suggested during the October 11, 1993 meeting that they commence from the beginning of the document, because he and his secretary had forgotten their notes from the prior meetings. (Tr. 185.) In addition, Ripka proposed that the Union should be ready to give up some of the proposals.

Another example of bad-faith bargaining was Ripka's repeated insistence during meetings on March 24, April 6 and 27, May 12, June 1, and July 7, that they bargain on behalf of another company in order to maintain the nonunion status of the Respondent. (Tr. 339-340.)

Ripka refused on several occasions to meet with the Union at the union hall, insisting that the meetings be scheduled at his shop. Indeed, Ripka flatly refused even to negotiate at the union hall, arguing that the downtown area of Philadelphia was unsafe. (Tr. 188.) The Union was usually forced to accede to Ripka's demands for time and place in order to schedule any negotiations. Ripka stated during the February 23 meeting that he would not change the terms or conditions of employment for the unit employees pursuant to negotiations. The only ray of hope to his intransigence was the one meeting with the federal mediator on May 10, 1994, more than a year after the certification of the Union. Considering that the bargaining unit consists of only a few employees, ranging from three to six, it is clear that the Union has struggled for too long. Both parties were represented by counsel which should have obviated this protracted course of conduct. It is my finding, considering the totality of the circumstances, including the Respondent's antiunion animus, Ripka's expressed intentions not to negotiate with the Union, his other violations of the Act and his uncompromising conduct during the bargaining process, that Ripka has skillfully and cunningly failed and refused to bargain in good faith.

CONCLUSIONS OF LAW

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees were found to constitute an appropriate bargaining unit:

All HVAC service technicians and service mechanics employed by Respondent, excluding all other employees, office workers, managers, guards and supervisors as defined in the Act.

4. By refusing to recall or reemploy Joseph Carosi, Louis Picuri, and Daniel White because they supported the Union, the Respondent violated Section 8(a)(3) and (1) of the Act.

5. By requiring its new employees to have their own service vehicles, and by requiring its employees to execute a "non-competition clause," without prior notice to the Union and without affording the Union an opportunity to bargain, the Respondent violated Section 8(a)(5) and (1) of the Act.

6. By bypassing the Union and dealing directly with its unit employees by offering them a "cafeteria" benefit plan, the Respondent violated Section 8(a)(5) and (1) of the Act.

7. By its overall conduct during the negotiations and away from the bargaining table, including its proposals to bargain under the name of a different employer, its cancellations of bargaining sessions, its failure to review the Union's proposals, its delaying tactics to schedule future bargaining sessions, its repeated insistence to schedule bargaining sessions at times and places convenient only for the Respondent, its statements that it would not negotiate with the Union and not agree to change any terms or conditions of employment for the unit, the Respondent failed to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I recommended that it cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act. It also having been found that the Respondent failed and refused to recall or reemploy Joseph Carosi, Louis Picuri, and Daniel White because of their union support, the Respondent must be ordered to offer them immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially similar positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, dismissing if necessary, any employees hired to fill those positions, and make them whole for any loss of earnings they may have suffered by reason of the failure to recall or reemploy them, less net earnings during such period. Backpay is to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

It should further be ordered that the Respondent reestablish the status quo ante and cancel and destroy the noncompetition clauses, and further that the policy requiring employees to have their own vans be canceled.

With reference to the Respondent's failure to bargain in good faith, a bargaining order is necessary, requiring the Respondent to bargain collectively in good faith with the Union as the exclusive bargaining representative of the employees in the above-described unit, and in the event an understanding is reached to embody such understanding in a signed agreement. The Respondent must also be ordered to post an

appropriate notice attached hereto as appendix (omitted from publication).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The Respondent, Lower Bucks Cooling and Heating, Inc., Croydon, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recall or reemploy or, otherwise discriminate against, Joseph Carosi, Louis Picuri, and Daniel White, because of their union support.

(b) Requiring its employees to have their own service vehicles or requiring them to execute noncompetition clauses or otherwise changing the employees' working conditions without prior notice to the Union and without affording the Union an opportunity to bargain with the employees in the following unit:

All HVAC service technicians and service mechanics employed by Lower Bucks Cooling and Heating, Inc., excluding all other employees, office workers, managers, guards and supervisors as defined in the Act.

(c) Bypassing the Union and dealing directly with the unit employees with respect to benefits and other terms or conditions of employment.

(d) Failing and refusing to bargain in good faith with the Union on behalf of the unit employees.

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

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

(a) Recall and reinstate Joseph Carosi, Louis Picuri, and Daniel White to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs without prejudice to their seniority or other rights and privileges, dismissing if necessary any employees hired to fill these jobs, and make the three employees whole for any loss of earnings they have suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(b) Concerning the unlawful unilateral changes, reestablish the status quo ante and cancel and destroy the noncompetition clauses signed by the employees and cancel the policy requiring its unit employees to have their own service vehicles and notify the affected employees that this has been done.

(c) Bargain in good faith with Sheet Metal Workers' International Association, Local No. 19, AFL-CIO on behalf of the employees in the above-described bargaining unit, and in

²If 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.

the event an understanding is reached embody such an understanding in a signed agreement.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Croydon, Pennsylvania facility copies of the attached notice marked "Appendix."³ Copies of the notice,

³If 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

on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."