

Serramonte Oldsmobile, Inc., d/b/a Serramonte Oldsmobile, Serramonte Pontiac, Serramonte G.M.C. Trucks and International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 190, Local Lodge No. 1414

Transcar Leasing, Inc., d/b/a Serramonte Service Plaza and Machinists Automotive Trades District Lodge No. 190 of Northern California, Peninsula Automotive Mechanics Local Lodge No. 1414, International Association of Machinists and Aerospace Workers, AFL-CIO

Serramonte Oldsmobile, Inc., d/b/a Serramonte Oldsmobile, Serramonte Pontiac, Serramonte G.M.C. Trucks and Transcar Leasing, Inc., d/b/a Serramonte Service Plaza and International Association of Machinists and Aerospace Workers Peninsula Lodge No. 1414, International Association of Machinists and Aerospace Workers, AFL-CIO. Cases 20-CA-24875, 20-CA-25475, 20-CA-25096, and 20-CA-25718

July 31, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND BROWNING

On August 9, 1994, Administrative Law Judge Burton Litvack issued the attached decision. The Respondents and the Charging Party filed exceptions and supporting briefs. The General Counsel and the Respondents filed answering briefs.¹

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

The Board has considered the decision and the record in light of the exceptions and briefs and has de-

¹ The Charging Party filed a motion to strike the Respondents' answering brief, and the Respondents filed a brief opposing the motion to strike. In its motion, the Charging Party asserts that, rather than responding to the Charging Party's exceptions, the Respondents' answering brief only contains a reargument of its case.

Sec. 102.46(d) of the Board's Rules and Regulations states in pertinent part:

The answering brief to the exceptions shall be limited to the questions raised in the exceptions and in the brief in support thereof. It shall present clearly the points of fact and law relied on in support of the position taken on each question. Where exception has been taken to a factual finding of the administrative law judge and it is proposed to support that finding, the answering brief should specify those pages of the record which, in the view of the party filing the brief, support the administrative law judge's finding.

We find that the Respondents' answering brief is in substantial conformity with the requirements of Sec. 102.46(d), and we therefore deny the Charging Party's motion.

cided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Serramonte Oldsmobile, Inc., d/b/a Serramonte Oldsmobile, Serramonte Pontiac, Serramonte G.M.C. Trucks; and Transcar Leasing, Inc., d/b/a Serramonte Service Plaza, Colma, California, their officers, agents, successors, and assigns, shall take the action set forth in the Order.

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

Jonathan J. Segal, Esq., for the General Counsel.

Robert Hulteng, Karen Rubenstein, and Robert Leinwand, Esqs. (Littler, Mendelson, Fastiff, Tichy & Mathiason), of San Francisco, California, appearing on behalf of the Respondents.

David Rosenfeld, Esq. (Van Bourg, Weinberg, Roger, & Rosenfeld), of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. Peninsula Automotive Mechanics Local Lodge No. 1414 of Machinists Automotive Trades District Lodge 190, affiliated with the International Association of Machinists and Aerospace Workers, AFL-CIO (the Union), filed the original and first amended unfair labor practice charge in Case 20-CA-24875 on September 3 and October 5, 1992, respectively, and the unfair labor practice charge in Case 20-CA-25475 on July 9, 1993; based upon the unfair labor practice charges, on October 15, 1992, and September 2, 1993, respectively, the Regional Director for Region 20 of the National Labor Relations Board (the Board), issued complaints, alleging that Serramonte Oldsmobile, Inc., d/b/a Serramonte Oldsmobile, Serramonte Pontiac, and Serramonte G.M.C. Trucks (Respondent Serramonte Oldsmobile), engaged in acts and conduct violative of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The Union filed the unfair labor practice charge in Case 20-CA-25096 on January 7 and February 25, 1993, the Regional Director for Region 20 of the Board issued a complaint, alleging that Transcar Leasing, Inc., d/b/a Serramonte Service Plaza (Respondent Serramonte Service Plaza), engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act. On November 1, 1993, the Union filed the unfair labor practice charge in Case 20-CA-25718, and on December 23, 1993, the Regional Director for Region 20 of the Board issued a complaint, alleging that Respondent Serramonte Oldsmobile and Respondent Serramonte Service Plaza jointly had engaged in

acts and conduct violative of Section 8(a)(1) and (5) of the Act. As to the allegations of the complaints in Cases 20-CA-24875 and 20-CA-25475, Respondent Serramonte Oldsmobile timely filed an answer, denying the commission of any unfair labor practices; as to the allegations of the complaint in Case 20-CA-25096, Respondent Serramonte Service Plaza timely filed an answer, denying the commission of any unfair labor practices; and, as to the allegations of Case 20-CA-25718, Respondent Serramonte Oldsmobile and Respondent Serramonte Service Plaza (collectively called Respondents), timely filed an answer, denying the commission of any unfair labor practices. Pursuant to a notice of hearing, a trial was held on January 4 through 7 and 10, 1994, in San Francisco, California. At the trial, all parties were afforded the opportunity to examine and to cross-examine all witnesses, to offer any relevant evidence into the record, to argue their legal positions orally, and to file posthearing briefs. The latter documents were filed by all parties and have been carefully considered. Accordingly, based upon the entire record, including the posthearing briefs and my observation of the testimonial demeanor of the several witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, until, at least, December 31, 1992, with an office and place of business in Colma, California, Respondent Serramonte Oldsmobile has been a California corporation operating an automobile dealership, where it has been engaged in the retail sale and servicing of automobiles. During the 12-month period ending December 31, 1992, in the normal course and conduct of its business operations described above, Respondent Serramonte Oldsmobile derived gross revenues in excess of \$500,000 and purchased and received at its Colma, California sales and service facility goods and products valued in excess of \$5000, directly from sources outside the State of California. At all times material, with an office and place of business in Colma, California, Respondent Serramonte Service Plaza has been a California corporation operating an automobile dealership, where it has been engaged in the retail sale and servicing of automobiles. During the 12-month period ending November 30, 1993, in the normal course and conduct of its above-described business operations, Respondent Serramonte Service Plaza derived gross revenues in excess of \$500,000 and purchased and received at its Colma, California automotive service facility goods and products valued in excess of \$5000, directly from sources outside the State of California. Respondents admit that each has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondents admit that, at all times material, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. ISSUES

The complaints in Cases 20-CA-24875, 20-CA-25475, and 20-CA-25718 allege that Respondent Serramonte Oldsmobile engaged in conduct violative of Section 8(a)(1) and

(5) of the Act by, unilaterally, in the absence of a legally cognizable impasse in bargaining with the Union as the collective-bargaining representative of its service technicians, instituting changes in its service technicians' terms and conditions of employment, by failing and refusing to provide necessary and relevant bargaining information to the Union or failing to timely provide such information, and by bypassing the Union and dealing directly with its service technicians. The complaints in Cases 20-CA-25096 and 20-CA-25718 allege that Respondent Serramonte Service Plaza engaged in conduct violative of Section 8(a)(1) and (5) of the Act by, unilaterally, in the absence of a legally cognizable impasse in bargaining with the Union as the collective-bargaining representative of its service technicians, implementing changes in its service technicians' terms and conditions of employment, by withdrawing recognition from the Union as the service technicians' collective-bargaining representative, and by failing to timely provide necessary and relevant bargaining information to the Union. Respondents denied the commission of the alleged unfair labor practices. In this regard, Respondent Serramonte Service Plaza argues that it bargained to impasse with the Union on the terms of an initial collective-bargaining agreement, that recognition was withdrawn from the Union based upon its actual loss of majority status or, at least, upon Respondent Serramonte Service Plaza's good-faith doubt that the Union represented a majority of its service technicians, and that any requested information was provided to the Union as swiftly as possible. As to Respondent Serramonte Oldsmobile, it likewise contends that an impasse in bargaining existed between itself and the Union and, alternatively, that the Union waived its right to bargain or that the Union's tactics of avoidance and delay privileged the unilateral implementation of Respondent Serramonte Oldsmobile's final offer and that any requested bargaining information was provided to the Union in a timely manner.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Respondent Serramonte Oldsmobile and Respondent Serramonte Service Plaza are commonly owned by Tom Price, who has an ownership interest in several related automobile dealerships in the Serramonte area, which is located a few miles south of the city of San Francisco. The record discloses that, at least until January 1993, Respondent Serramonte Oldsmobile operated a typical self-contained automobile dealership, with a facility encompassing retail sale, office, and service areas, and that Respondent Serramonte Service Plaza, which is located less than a mile from the Respondent Serramonte Oldsmobile facility, is a complex of two buildings, housing four separate vehicle servicing areas,¹ each having its own car service pods, equip-

¹ The record reveals that, in September 1991, one of the service areas was utilized for the servicing of Chrysler-Plymouth automobiles, one service area was utilized for servicing Nissan-Isuzu vehicles, and one was utilized for the servicing of Lincoln-Mercury automobiles; that, subsequently in November 1992, the Lincoln-Mercury service operations were transferred to a facility, which had been utilized for the servicing of Mitsubishi automobiles, and Mitsubishi vehicle service operations were moved into the area of Respondent

Continued

ment, offices, and work areas. The record further discloses that the Union has represented the service technicians, employed by Respondent Serramonte Oldsmobile, since, at least, 1977 and that the most recent collective-bargaining agreement between the parties was effective from July 16, 1989, until July 15, 1992.

1. Respondent Serramonte Service Plaza's unilateral implementation of changes in terms and conditions of employment

On August 9, 1991, the Union was certified by the Board as the exclusive bargaining representative of Respondent Serramonte Service Plaza's Chrysler-Plymouth/Lincoln-Mercury service technicians and Nissan-Isuzu service technicians, PDI technicians, apprentices, utility mechanics, trainee mechanics, and working technical foremen, and, within a week, Respondent Serramonte Service Plaza granted recognition to the Union and offered to bargain with it. Thereafter, as the record establishes, commencing on September 4, 1991, and continuing through September 14, 1992, and encompassing no less than 27 negotiating sessions, the parties engaged in bargaining for one year over the terms of an initial collective-bargaining agreement. Representing Respondent Serramonte Service Plaza during the bargaining were its attorney, Robert Hulteng,² and Barry DeVincenzi, the parts and service director for Respondents; the Union's bargaining representatives were Don Barbe, a union business agent, and Nick Shmatovich, a business agent of Machinists Local Lodge 1305,³ who was assigned to assist Barbe during bargaining with Respondent Serramonte Service Plaza.⁴ At the first bargaining session on September 4, 1991, each party presented an initial contract proposal. According to Hulteng, the Union's proposed contract language was similar to its existing automotive dealership collective-bargaining agreements, including proposals for a union shop clause, hourly wage rates compensation, employee health insurance coverage through participation in the Automotive Industries (AI) welfare fund, and employee pension coverage through participation in the AI pension trust fund, the latter funds being Taft-Hartley fringe benefits trust funds. In contrast to what was sought by the Union, Respondent Serramonte Service Plaza's initial contract proposal contained significant language changes from existing union contracts, included no union-security language and voluntary union membership,

Serramonte Service Plaza formerly occupied by Lincoln-Mercury; and that, in or about March 1993, the service operations of Respondent Serramonte Oldsmobile were moved to the vacant service area of Respondent Serramonte Service Plaza.

² He was assisted by another attorney, Karen Rubenstein.

³ The record establishes that, although nominally separate entities, Local Lodge 1305 and the Union have their respective offices in the same building; however, each has its own office and professional staff and telephone number. Apparently, the professional offices of the Union are on one side of the facility and the staff offices of Local Lodge 1305 are on the other side.

⁴ Glenn Gandolfo, who has been assigned as a business agent to the Union since 1985 and who has been responsible for all matters involving Respondent Serramonte Oldsmobile, had been assigned to lead the organizing and election campaigns involving Respondent Serramonte Service Plaza's bargaining unit employees; however, as he was scheduled to begin a "long term medical leave," Gandolfo was relieved of his bargaining responsibilities with the latter.

and offered a flat-rate compensation system⁵ and a "cafeteria benefits plan," which included a comprehensive health insurance plan and a retirement savings 401(k) plan as options.⁶ As the bargaining over the next several months progressed, while the parties reached agreement on a few relatively minor provisions, compensation and fringe benefits, which Attorney Hulteng continually labeled as being the most critical issues, apparently became the principal points of contention between the parties and, according to Respondent Serramonte Service Plaza's representatives, dominated the bargaining and assumed the highest significance to the success or failure of the bargaining.⁷ In fact, the often contentious discussions of these issues seem to have exacerbated the differences between the parties rather than providing the bases for agreement. Thus, during this period, Barbe announced, at one negotiating session, that the Union had conducted a poll of the bargaining unit employees as to their position on flat-rate and the proposed 401(k) retirement savings plan and that 95 percent desired hourly compensation and a "defined benefit" pension plan and all subsequent union wage proposals were based upon continuation of the existing hourly compensation system for the bargaining unit employees; despite extensive discussion and employer spread sheet presentations at another session as to why investments in the 401(k) savings plan would grow at a faster pace than the AI pension plan, the Union continued to insist upon the latter; and the Union continued to demand acceptance of the AI health insurance proposal, which established the same monthly contribution rate for each employee, and refused to accept Respondent Serramonte Service Plaza's argument that the proposed "cafeteria" plan would be less costly as the Em-

⁵ Under an hourly rate compensation system, no matter how long it takes for an employee to complete a job assignment, he is paid for the time spent on the work. In contrast, under a flat-rate compensation system, the work is assigned a set time for completion, and the employee is paid the same amount no matter how long it takes him to complete the work. Thus, under the former system, if an employee earns \$20 per hour and takes an hour and a half to complete his work, he earns \$30; however, under the latter system, if a job is assigned a completion time of an hour and the employee takes an hour and a half to complete it, he will be paid just \$20.

Attorney Hulteng testified that, in his experience, flat rate had never previously been proposed to the Union but that such had previously been a subject of bargaining with Shmatovich.

⁶ Apparently, as part of its employee benefits package, Respondent Serramonte Service Plaza already offered the proposed 401(K) retirement plan to all of its employees, including the service technicians. Attorney Hulteng denied that, during bargaining relationship with the Union, Respondent Serramonte Oldsmobile had ever accepted fringe benefits plans other than standard Taft-Hartley fringe benefits trust funds. On rebuttal, however, Glenn Gandolfo asserted that the Union's 1983 through 1986 collective-bargaining agreement with Respondent Serramonte Oldsmobile provided for a company health insurance plan and an IRA retirement savings plan.

⁷ Except for the September 14, 1992 bargaining session, Respondent Serramonte Service Plaza's witnesses were uncontroverted as to what was said and occurred during the bargaining between it and the Union. In particular, I note that neither the counsel for the General Counsel nor counsel for the Union explained the failure to call Don Barbe as a witness during rebuttal, and neither called Shmatovich as a witness during rebuttal despite his presence in the hearing room during the last day of the hearing.

ployer would be able to contribute different amounts per employee depending upon the chosen coverage.

In March 1992, with the parties resolutely adhering to their initial bargaining positions, they agreed to continue negotiations with the assistance of a mediator from the Federal Mediation and Conciliation Service (FMCS), and, on April 21, 1992, a negotiating session was held at the FMCS office. According to Attorney Hulteng, prior to the start of formal across-the-table bargaining that day, he and Nick Shmatovich had a "fairly extended" conversation in the building's parking lot during which Hulteng said that, if the parties were to make progress, they had to discuss the "bottom line issues" and proposed that, if the Union accepted flat-rate compensation, Respondent Serramonte Service Plaza would accept the Union's health and pension trust funds provided that caps on costs were included. Hulteng added that he believed the parties also could reach agreement upon union security. Shmatovich replied that such a concept was "interesting" and would speak to Mike Day, the chief officer of District Lodge 190, about it. Later, during formal bargaining, Hulteng added an additional qualification—that whatever agreement was reached with the Union regarding Respondent Serramonte Service Plaza would have to be applicable to the upcoming negotiations between Respondent Serramonte Oldsmobile and the Union.

The record evidence discloses that, between the close of that meeting and a bargaining session on August 7, the Union delayed in responding to Hulteng's proposed bargaining compromise. During this interim period, meetings were held on May 18 and June 2; however, Shmatovich had no response to Hulteng's proposal and, while indicating that the Union would proceed with "our approach at the table," again promised he would speak to Mike Day regarding Hulteng's proposal. Then, after a series of posturing letters between Hulteng and Shmatovich, Hulteng and Barry DeVincenzi had an "off-the-record" meeting with Shmatovich, Barbe, and Day at the Union's office on July 10. According to Respondent Serramonte Service Plaza's attorney, Day said he was unfamiliar with the state of the bargaining, and Hulteng said that the company was "very intent" on having certain items, including flat-rate compensation and health insurance and pension plans, which enable it to remain competitive and reduce costs, in a contract. Thereupon, the attorney explained his compromise bargaining position to Day, who replied that he would need time to review the proposal and promised to respond by July 17. Notwithstanding Day's commitment, however, no response from the Union was forthcoming, and, with bargaining in this amorphous state, another negotiating session was scheduled for August 7. Hulteng and Shmatovich, who was accompanied by Nick Antone, an associate of Mike Day, were the spokespersons at this meeting and, after Hulteng began by demanding a response from the Union and adding that Respondent Serramonte Service Plaza was ready to go to "final position," Shmatovich asked to have an off-the-record conversation. Thereupon, Antone, Shmatovich, Hulteng, and DeVincenzi walked out to the parking lot, and Antone began by saying that the company should appreciate the significance of what Shmatovich was about to propose. Shmatovich then said that, as a counterproposal, the Union would accept flat-rate, as proposed by the company, in exchange for the AI health insurance and pension plans without caps and with

"maintenance of benefits"⁸ and at a slightly higher cost than to other employers. According to Hulteng, Shmatovich added that Respondent Serramonte Service Plaza would have to accept the existing Respondent Serramonte Oldsmobile contract language, including the union-security provision, and that the Union wanted the parties' agreement only to be applicable to Respondent Serramonte Service Plaza.

Another bargaining session was scheduled for August 19, and, in the interim, Respondent Serramonte Service Plaza undertook an analysis of the costs attendant to the Union's proposal and to possible counterproposals. Then, at the outset of the scheduled meeting, Hulteng announced that he wanted to state the Company's response to the Union's counterproposal and said he understood that accepting flat-rate was a "major move" by the Union. He then announced that Respondent Serramonte Service Plaza would change its position and accept the Union's position on union security. With regard to the remaining Respondent Serramonte Oldsmobile contract language, Hulteng said that, given the 11 months of bargaining and agreements on different language, acceptance of the existing Respondent Serramonte Oldsmobile contract language would be impossible. Also, Hulteng said that limiting the agreed-upon language to Respondent Serramonte Service Plaza was a "problem" for the employer, and its position remained—"the same terms, both stores." Finally, with regard to health insurance and pension, Hulteng emphasized that the Company felt it absolutely necessary to cap health insurance and retirement costs and could not accept the Union's proposals. Hulteng added that Respondent Serramonte Service Plaza's new position represented much thought and was its "best shot," and "I told them as far as we were concerned . . . we were at final position and that our proposal on the table, with the union security language, would stand." Thereafter, according to Hulteng, discussion centered on the proposed AI health insurance and pension trust funds with Antone asking if the company had philosophical objections to such being in a contract. After a caucus, Hulteng explained that the problem was the cost difference, which was calculated as between \$150 to \$200,000 per year. Shmatovich asked about including the AI plans with some sort of caps, and Hulteng replied that such would not be considered if the caps were set at current levels. Shmatovich then asked if Respondent Serramonte Service Plaza would consider the AI plans if the cost issues could be resolved, and Hulteng replied, "possibly." Then, after another caucus, Hulteng announced that Respondent Serramonte Service Plaza could accept the AI health insurance plan and either the AI pension trust fund or the 401(k) retirement savings plan but at the cost levels proposed by the Company, including a lower amount the first year and increases in the next 2 years of the contract term. With regard to overall economics, however, Hulteng said, the Company was "at final position on money . . . that the money on the table is all the employer was going to spend." Thereafter, on August 20, Shmatovich wrote to Hulteng, confirming that "it is the bottom of the ninth inning" but adding that, as there were approximately 63 unresolved issues, many of which had not even been dis-

⁸Such means that the cost to the employer would be calculated at whatever was necessary to maintain the level of existing coverage.

cussed, “[W]e are not going to be intimidated by your insistence that you have reached final position.”⁹

Further bargaining sessions were scheduled for and occurred on September 8 and 9. The former began with Hulteng announcing that he was present only because the Union indicated it wanted to explore whether the costs of the AI health insurance and pension trust fund plans could be capped at levels acceptable to Respondent Serramonte Service Plaza. Shmatovich stated that the Union had agreed to accept flat-rate because it believed that the Company would, in turn, agree to the AI health insurance and pension trust funds. After disputing Shmatovich on that point, Hulteng returned to his original point, asserting, “We’re in final position on all other issues and what do you have to tell us on . . . health and welfare.” Shmatovich replied that there were other issues to discuss; Hulteng disagreed, saying that the parties were in the last half of the ninth inning, that, if the Union had any proposals, the Company would listen, but that Respondent Serramonte Service Plaza was at final position at this point. Hulteng asked for counterproposals, and Shmatovich said the Union wished to speak about work assignments, free drinks, and items from the vending machines and wanted its attorney to be present. The latter asked Hulteng how urgent were the negotiations to him, and Hulteng replied, “It’s beyond urgent. We’re at final position.” Hulteng added that if the Union had any counterproposals, these should be presented that day. The remainder of the meeting was consumed with a discussion of the cost differences between Respondent Serramonte Service Plaza’s proposed health insurance and 401(K) savings plan and the Union’s proposed AI health insurance and pension trust fund plans. The parties resumed bargaining the next day with Hulteng, DeVincenzi, Shmatovich, and Barbe having an extended off-the-record conversation regarding health insurance and pension costs and the compatibility between Respondent Serramonte Service Plaza’s cost levels and the Union’s proposed AI health insurance and pension trust funds. According to Hulteng, various contract language and money figures were discussed, with Hulteng maintaining that the Company was “not going to just throw out 12 months of negotiations . . . and go with [unacceptable language]” With regard to the cost figures, Hulteng rejected the Union’s proposed figures as being “far in excess of what we were proposing.” During the formal meeting that day, Hulteng announced that the Company was “extremely frustrated” with the Union’s bargaining attitude and reiterated that Respondent Serramonte Service Plaza was at “final position.” He added that the Company would explore all of the Union’s cost concepts but said there was no more money, “and there was going to be no more movement from us in terms of the package.” The bargaining session ended with Hulteng agreeing to one more meeting on September 14 but stating that, unless the Union had “something dramatic” to offer, he saw no reason to go any further in negotiations. DeVincenzi added that the Union had “better” have its final offer; Shmatovich asked if such constituted a warning, and DeVincenzi confirmed it.

⁹While himself calling attention to Shmatovich’s letter, Attorney Hulteng never denied that several areas of the proposed contract remained unresolved, with many of these not even having been discussed.

The parties agree that, whether eventual impasse was reached in the bargaining or whether Respondent Serramonte Service Plaza engaged in extensive unfair labor practices following the end of bargaining, are dependent upon analysis of what transpired at their September 14, 1992 bargaining session, their final meeting. It was held at the Union’s office, and there is no dispute that the start of across-the-table bargaining was delayed while Barry DeVincenzi and Don Barbe held an extensive off-the-record conversation regarding the “key areas” of disagreement and the Company’s August 19 counterproposals. According to DeVincenzi, who was uncontroverted, with regard to contract language, “I indicated that it needed to be . . . not all what had been in the old Oldsmobile contract. Don indicated that it had to be the old Oldsmobile contract.” Then, DeVincenzi reiterated that the Company “needed to have . . . a similar agreement for both [Respondents’] bargaining units, and Mr. Barbe maintained that he could not do that.” Regarding health insurance and retirement, DeVincenzi repeated that Respondent Serramonte Service Plaza had only a certain amount of dollars to spend, and he and Barbe “tried to see if . . . there was some middle ground and ultimately . . . it wouldn’t work.” At the conclusion of their meeting, according to DeVincenzi, “we looked at each other and said, look, we gave it our best shot. Shook hands.”

Thereupon, formal, across-the-table bargaining began with Hulteng representing Respondent Serramonte Service Plaza and Attorney David Rosenfeld representing the Union. The latter testified that Hulteng began, saying that the Company was “standing” on its prior proposals. Rosenfeld, who testified his understanding of the state of negotiations was that the parties were “pretty close to resolving the agreement,” with the Union conceding on flat-rate and Respondent Serramonte Service Plaza agreeing to join the AI health and pension trust funds, responded, “that I didn’t think we were at an impasse, and Mr. Hulteng said that absent some counterproposals . . . from the Union he saw no reason . . . to continue negotiations.” Then, as he believed such had not been previously discussed in detail, Rosenfeld suggested discussion of section 22.2 of Respondent Serramonte Service Plaza’s most recent contract proposal, which concerned termination for just cause, and, in particular, possession of intoxicants, and said that this “was a reasonable place to begin negotiations . . . to see if we could get that kind of an issue resolved.” Thereupon, a discussion ensued regarding the definition of intoxicant, the types of drugs to which the Company referred, and what would constitute being intoxicated. As to the definition, Hulteng suggested using the State’s definition of .08 blood alcohol level; Rosenfeld said such was acceptable to the Union and suggested that language, reflecting this definition, should be included in the contract. Hulteng, however, “refused to put that understanding in the contract.” According to Rosenfeld, at one point, Hulteng referred to the Union’s insistence about discussion of that proposed contract section as “very picky.” The discussion then turned to flat rate, and, according to Rosenfeld, “I remember telling [Hulteng] that the Union had indicated that it would accept flat rate” but it was “unresolved” where individual employees would be placed. Hulteng responded that the Union had been given the list of the employees’ placement order the previous October; Rosenfeld replied that not all employees were included, that the Union had not bargained

over placement, and that the Union needed to know the Employer's criteria for placement. This led to a discussion of the latter point, with DeVincenzi listing several factors which had been considered in placing service technicians at various wage levels, and to a discussion of the placement of a particular individual. At this point, after DeVincenzi mentioned that evaluations were done on each employee, Rosenfeld requested copies of each, but Hulteng said that the evaluations were not used for purposes of placing employees at various levels. Bargaining then turned to Respondent Serramonte Service Plaza's proposed 401(k) plan, and, according to Rosenfeld, he "began" by requesting information, including a copy of the plan itself, the plan's financial statements, and information regarding whether the plan met Internal Revenue Service requirements for "key" employees. Hulteng responded "that the Union had been provided all the information which the employer had, and . . . I told him that we didn't have this particular information . . . needed to evaluate the 401(k) plan." Rosenfeld then asked if the plan had been audited to ensure compliance with all I.R.S. mathematical tests; Hulteng replied that he did not know. Next, Rosenfeld testified, the parties discussed the proposed "cafeteria" health insurance benefits plan. Rosenfeld requested a copy of the plan, and Hulteng responded that the Company did not have one but did have "a menu or list of the benefits." Rosenfeld was not certain whether he then or in a later letter renewed his request for the health insurance plan itself. With regard to other contract subjects, according to Rosenfeld, "I think I said more than once . . . that we were prepared to accept a large part of the employer's proposal; but we wanted to work out the details." He also recalled that there were a number of occasions when Hulteng requested bargaining proposals from the Union. At one point, Hulteng said, "unless we get substantial proposals from you we see no reason to continue these negotiations . . . and my response[s were] . . . that there were many things we could agree upon, that we had to work out the details, or I responded by talking about specific sections that I knew had not been resolved." Towards the end of the session, Hulteng "once again [said] that [the Company] wanted substantial or significant counterproposals from the Union" and Rosenfeld replied that he did not believe that the Company could condition bargaining upon counterproposals and that there just was no impasse. The meeting ended with Hulteng again saying that, absent proposals, he saw no reason to meet again but would leave it up to the mediator as to the efficacy of a subsequent meeting. Rosenfeld suggested September 21, but Hulteng reiterated the foregoing comment. During cross-examination, Rosenfeld denied that the intent of his appearance was mainly to dispute impasse and admitted that he was the one who requested to end the September 14 meeting.

With regard to the September 14 bargaining session, Hulteng testified that, aware of the result of the off-the-record conversation between DeVincenzi and Barbe, as the formal meeting began, he stated his conclusion that "the parties had given it their best shot" and "all prospect of agreement had been exhausted." He then asked for proposals from the Union, and Rosenfeld made a proposal as to blood alcohol level and asked that his definition of intoxicants be added to the contract. Hulteng rejected the proposal, saying the Union had accepted the Company's language previously and Rosenfeld was being "picky" in that the major issues ap-

peared to be unbridgeable. He then accused Rosenfeld of using "time killing tactics" when he knew the parties had exhausted all prospects for agreement and renewed his demand for "some real substantive proposals" from the Union. Rosenfeld said that the Union required time in which to evaluate company proposals and that the Union could still make proposals. According to Hulteng, he expressed doubt as to Rosenfeld's sincerity, and the latter asked why. Hulteng responded that negotiations had been ongoing for a year and he truly believed that the parties could go no further. As to the specifics of Rosenfeld's testimony, Hulteng confirmed that the former had asked for more information on the proposed 401(k) plan and had asked questions regarding the slotting of individuals into positions for flat-rate compensation. Rosenfeld said that he wanted another date for bargaining, and Hulteng replied that he saw no need for further bargaining unless Rosenfeld could convince him of a reason and accused Rosenfeld of engaging in a "charade" that day.

Karen Rubenstein corroborated Hulteng that the latter accused Rosenfeld of "just wasting time" and said that he really didn't see any need for further bargaining and that Respondent Serramonte Service Plaza would only agree to meet "if the Union provided us with substantial proposals ahead of time" During cross-examination, Rubenstein said she could not recall the Union ever accepting flat rate unconditionally and specifically denied that Rosenfeld ever made such a statement on September 14; however, she conceded that, with regard to the proposed 401(k) retirement savings plan, Rosenfeld said that the Union wanted to take a closer look at the proposal because it looks as though AI isn't going to happen and that, before the Union could either accept or reject the 401(k) plan, it needs to see the plan and a financial statement. Further, she stated that while, as of the final bargaining session, the Union had not accepted much of Respondent Serramonte Service Plaza's proposed contract language, at one point during the September 14 meeting, Rosenfeld said that the Union would accept many of the provisions which it felt were bad for the employees and that Rosenfeld's statement was a concession from the Union. Barry DeVincenzi testified, on direct examination, that, during the formal bargaining, Rosenfeld discussed flat rate, saying "something to the effect of we can accept flat rate conditioned on the acceptance of the health plan . . . and retirement." During cross-examination, he reiterated that Rosenfeld insisted upon AI health insurance in return for flat rate but, at that point, was unable to recall whether Rosenfeld also mentioned the AI pension trust fund. Later, DeVincenzi said he had no recollection of Rosenfeld saying we are now accepting flat rate but did recall the attorney saying that, "since we're accepting flat rate, it's time to take a hard look at it." Also, DeVincenzi conceded that Rosenfeld said that the Union would accept many of the proposed contractual terms but doubted the attorney's sincerity in that regard.

According to the respective testimony of Hulteng and DeVincenzi, each believed that the negotiations between Respondent Serramonte Service Plaza and the Union were at impasse. The former dated the deadlock as occurring at the end of the August 19 bargaining session, and DeVincenzi believed such existed at the close of his private conversation with Barbe on September 14. Whatever the state of the bargaining, 3 days after the close of the parties' final meeting, echoing his comments at the conclusion of the session,

Hulteng sent a letter to Rosenfeld¹⁰ which, in part, stated: "Let me remind you that the Employer is at final position and does not foresee any further movement. In the event the Union has any substantial proposals, however, I urge you to present them immediately so that the Employer can then consider whether any purpose will be served by meeting on . . . September 14 . . ." One day later, on September 18, Rosenfeld wrote a letter to Hulteng, in which he rejected the claim of impasse and stated that the Union was willing "to continue negotiations as long as it takes"; that "there are many issues left to be discussed based on your proposals"; and "that the union has indicated a willingness to agree to flat rate." On September 25,¹¹ Hulteng responded to Rosenfeld, once again stating that "there is no reason to meet further unless the Union has substantial new proposals" and that "all possibility of an agreement has been exhausted" and terming the Union's tactics a "charade." Five days later, on September 30, Rosenfeld responded in writing to Hulteng, again asserting that the parties were close to reaching agreement as "the Union . . . has indicated their willingness to accept a flat rate proposal and, in fact, indicated its willingness to accept your client's current proposal. At the same time, you indicated a willingness to accept [AI] Health and Welfare and Pension."¹² Also, in his September 30 letter, Rosenfeld wrote that he had not yet received a copy of the proposed 401(k) retirement savings plan and that such was necessary in order to evaluate the proposal. On October 8, Hulteng responded to Rubenstein, writing that the Union had done nothing with the information, which had been provided pursuant to the Union's request, and that "I believe that your inaction confirms that the Union has no substantial proposals to offer, and that further bargaining would be fruitless." Thereafter, on October 12, Hulteng sent a letter, via facsimile, to Rosenfeld in which he stated: "Based on the impasse reached at that most recent meeting, together with the absence of any proposals from the Union since that time, the Employer has decided to implement certain sections [of its final contract offer] to the Union" excluding provisions such as health insurance and the retirement savings plan. Subsequently, within days of Hulteng's letter, Respondent Serramonte Service Plaza did, in fact, implement most of the terms of its final contract proposal, thereby unilaterally, without the agreement of the Union, affecting the bargaining unit employees' terms and conditions of employment in the following manner: changing the pay rates of working technician foremen, changing the wages and

¹⁰ Apparently, certain of the information, which Rosenfeld requested at the September 14 bargaining session, was provided to the Union, by on or about October 1. Such information included a copy of the 401(k) retirement savings plan, which had been hand-delivered to a bargaining unit employee on September 24 for delivery to Don Barbe, and all related financial statements. Apparently, no copy of a "cafeteria benefits" plan exists, and such was not provided. On October 16, Rosenfeld wrote to Rubenstein that he had received the 401(k) retirement savings plan and other information but that the requested information, regarding key individuals, had not been provided.

¹¹ No bargaining session occurred on September 21. Although the parties are in disagreement over which one caused the cancellation, I do not believe it necessary to resolve this dispute.

¹² Rosenfeld attached a condition to the Union's willingness to accept flat rate—"there are many details which need to be worked out as well as other issues which need to be worked out."

wage rate system for service technicians and working technician foremen by instituting a flat-rate system of compensation, changing the overtime system from overtime being paid for daily hours in excess of 8 to overtime being paid for weekly hours in excess of 40, eliminating 3 paid holidays, changing the method by which employees selected vacations, requiring employees to pay a copayment for the laundering of their uniforms, forbidding employees to hold a job other than that with Respondent Serramonte Service Plaza, and imposing new requirements and conditions concerning employees' travel expenses and for obtaining licensing. Finally, in letters dated October 16, 20, and 21, Rosenfeld demanded that Hulteng continue bargaining and, in the latter letter, stated his belief that the implementation was unlawful. On October 22, Hulteng wrote to Rosenfeld that, as Respondent Serramonte Service Plaza believed that the Federal Mediator was "best equipped" to make the judgment as to the efficacy of further meetings, Respondent Serramonte Service Plaza would agree to meet and bargain only "if [the Federal Mediator] determines that an additional meeting would be fruitful."

2. Respondent Serramonte Service Plaza's withdrawal of recognition and unilateral implementation of additional changes

The record establishes that, on or about December 17, 1992, Earl Taylor, a master Nissan service technician, who had never wanted to be represented by the Union for purposes of collective bargaining and who, by mid-December, had "decided to do something about it," went to Barry DeVincenzi's office at Respondent Serramonte Service Plaza and "told him of my concern that I didn't want representation by the Union and how I would go about getting it out." DeVincenzi replied that "he wasn't at liberty to tell me much, but he told me I would have to circulate a petition and gave me some wording for it. . . . something like we, the undersigned employees of the Serramonte Auto Plaza, do not want representation by Local No. 1414."¹³ Taylor noted the necessary language on a yellow note pad, which he had brought with him to DeVincenzi's office, and DeVincenzi instructed him to bring the signed petition back to his office. According to Taylor, after leaving DeVincenzi's office, that same day, he went to the various service shops in the complex and solicited the signatures of service technicians.¹⁴ Ac-

¹³ DeVincenzi corroborated Taylor, stating that he told Taylor that it would be necessary to have a majority of the service technicians indicate that they did not want to be represented by the Union.

¹⁴ There is no dispute that, although part of the same price dealership group as Respondent Serramonte Service Plaza, Serramonte Mitsubishi is a separate corporate entity; that, in approximately mid-November, the service department operation of Serramonte Mitsubishi, which was housed in a facility located a quarter mile from the Respondent Serramonte Service Plaza facility, was relocated to the latter complex; and that the Mitsubishi service technicians were stationed in the service area, which was formerly occupied by the Lincoln-Mercury service technicians, who were, in turn, relocated to the aforementioned Serramonte Mitsubishi facility. While there is no record evidence as to whether they continued to be employed by Serramonte Mitsubishi or were somehow transferred to the payroll of Respondent Serramonte Service Plaza, Barry DeVincenzi testified, without contradiction, that, after the move to the Respondent Serramonte Service Plaza facility, the Serramonte Mitsubishi employees worked under the same terms and conditions

According to Taylor, it took him 2 days to obtain signatures¹⁵ from all the bargaining unit employees, including Serramonte Mitsubishi service technicians, who agreed to sign the petition. Respondent's Exhibit 7,¹⁶ and, after the last of 19 individuals signed, he took it to DeVincenzi's office and placed it under the latter's desk blotter. DeVincenzi discovered the petition the next day, counted the signatures, and compared the number to the total number of service technicians in each of Respondent Serramonte Service Plaza's departments, including Serramonte Mitsubishi, in order to determine whether a majority of the bargaining unit employees had signed the petition. DeVincenzi concluded that the number of signatures represented a majority of bargaining unit employees,¹⁷ for, on December 23, Hulteng wrote a letter to Rosenfeld, in part stating:

This will . . . advise you that Serramonte Service Plaza has received objective evidence that a majority of the employees in the bargaining unit no longer wish to be represented by [the Union]. Based on that objective evidence, Serramonte Service Plaza doubts in good faith that the Union continues to represent the employees in the bargaining unit.

Accordingly, by this letter, Serramonte Service Plaza withdraws recognition of [the Union] as the representa-

of employment as did all the Respondent Serramonte Service Plaza bargaining unit employees and that, after their move to the former Serramonte Mitsubishi service facility, the Lincoln-Mercury service technicians experienced no change in their terms and conditions of employment.

On November 17, Attorney Hulteng wrote to Attorney Rosenfeld, informing him of the above, stating Respondent Serramonte Service Plaza's view that Mitsubishi employees therefore had become a part of the existing bargaining unit, and inviting Rosenfeld to "just let me know" if he had a contrary view and wished to discuss the matter. Also, while disputing their continued inclusion in the certified bargaining unit, Hulteng stated that the Employer accepted the presumption that the Union continued to be the collective-bargaining representative for the Lincoln-Mercury service technicians. There is no record evidence that Rosenfeld ever directly responded to Hulteng's letter. There are, however, subsequent letters in which Rosenfeld stated his desire to negotiate over issues, involving Respondent Serramonte Service Plaza, but, due to several factors, including Shmatovich's illness, no bargaining sessions were scheduled.

¹⁵ On December 17, Taylor spent an hour and a half collecting signatures from Chrysler-Plymouth, Nissan, and Mitsubishi employees, and, according to him, he did no work and was not compensated for the time spent. On December 18, during a break period, Taylor went to the Lincoln-Mercury service shop. According to Taylor, he drove his own truck the quarter of a mile to the latter facility; however, Ronald Contraras, a Nissan service technician, testified, during rebuttal, that he observed Taylor drive to the Lincoln-Mercury facility in the black Nissan Stanza, owned by the Nissan service manager.

¹⁶ Taylor denied that any management employees were present when he solicited signatures and that he uttered no promises or threats in doing so. There is no record evidence to the contrary.

The petition, dated December 17, bears the following heading: "The undersigned employees of Serramonte Auto Plaza do not want to be represented by Machinists Lodge 1414, District Lodge 190, I.A.M."

¹⁷ DeVincenzi conceded that he did not attempt to authenticate the signatures on the petition.

tive of the employees in the Service Plaza bargaining unit.¹⁸

There is no dispute that the proposed bargaining unit employees' health insurance and retirement savings plans, which had been part of Respondent Serramonte Service Plaza's final contract offer to the Union were not implemented along with other portions of the final offer in October 1992. Then, prior to its above-described withdrawal of recognition, by letter dated November 13, Attorney Hulteng informed the Union's attorney Rosenfeld that the Company proposed various changes in its prior benefits plans proposal, offered to bargain over them, and suggested several dates for bargaining to Rosenfeld. Having no response from Rosenfeld, Hulteng wrote to Rosenfeld on December 3, reiterating his availability to bargain over the aforementioned proposed changes. Thereafter, over the next 3 weeks Hulteng and Rosenfeld apparently were unable to arrive at a mutually convenient date for a resumption of bargaining.¹⁹ Then, on December 23, on behalf of Respondent Serramonte Service Plaza, Hulteng sent the above-described withdrawal of recognition letter to Rosenfeld, and no further bargaining between the parties ever occurred. Subsequently, in or about February or March 1993, Respondent Serramonte Service Plaza, unilaterally and without the consent of the Union, implemented changes in its bargaining unit employees' health insurance and retirement savings plans.²⁰

¹⁸ Utilizing that portion of R. Exh. 11 reflecting the payroll period ending November 23, I note that, as of December 18, there were 11 Nissan service technicians, 6 Lincoln-Mercury service technicians, 12 Chrysler-Plymouth service technicians, and 10 Mitsubishi service technicians working and that 9 Nissan service technicians, 6 Mitsubishi service technicians, and 4 Chrysler-Plymouth signed R. Exh. 7. Respondent Serramonte Service Plaza asserts the Union's loss of majority status by including the Serramonte Mitsubishi and excluding the Lincoln-Mercury service technicians from the bargaining unit. I further note, however, that the Union never agreed to the change in the bargaining unit; that, excluding the Mitsubishi service technicians, 13 of the 29 employees in the certified bargaining unit signed the petition; and that, including the Mitsubishi service technicians in the certified bargaining unit, fewer than 1 more than half, or only 19, of the 39 bargaining unit employees executed the petition.

¹⁹ Although Respondent Serramonte Service Plaza's attorney Hulteng eagerly blamed the Union for the parties' failure to meet, one might legitimately question his sincerity in offering to bargain. Thus, in letters dated December 14 and 18, while asserting that prior union health insurance and pension proposals had been "totally unacceptable" to the Company but that it would "entertain" any new union proposals, he carefully added, in the latter letter, that the Company "[was] absolutely committed to the benefit plans it ha[d] proposed to the Union" and that there was "no possibility" that Respondent Serramonte Service Plaza would change its position. For his part, the Union's attorney Rosenfeld continually insisted that he wanted to engage in bargaining and blamed scheduling conflicts for the parties' failure to meet.

²⁰ There is no contention that the changes do not correspond to what was offered to the Union both by Respondent Serramonte Service Plaza's final offer and the changes set forth in Hulteng's November 13, 1992 letter.

3. Respondent Serramonte Oldsmobile's unilateral implementation of changes in terms and conditions of employment

During late 1991 and the first half of 1992, Glenn Gandolfo, who, since approximately 1985, had been the Union's business representative assigned to represent the bargaining unit employees of Respondent Serramonte Oldsmobile in grievances, arbitrations, and contract negotiations, had been relieved of his duties due to a medical leave of absence and subsequent reassignment. Believing that Nick Shmatovich, with whom he had been conducting ongoing negotiations for the Respondent Serramonte Service Plaza collective-bargaining agreement, would represent the Union in bargaining with Respondent Serramonte Oldsmobile,²¹ and as the latter's existing collective-bargaining agreement was due to expire on July 15, in accord with the contract's termination and revision language,²² Attorney Hulteng wrote a letter, dated April 17, to Shmatovich, stating that Respondent Serramonte Oldsmobile desired to terminate its existing contract with the Union and, along with Respondent Serramonte Service Plaza, was prepared to engage in "coordinated" contract bargaining with the Union. On April 22, 5 days later, while rejecting the concept of coordinated negotiations, Shmatovich wrote to Hulteng that the Union would negotiate a new collective-bargaining agreement with Respondent Serramonte Oldsmobile "in the very near future" and that Hulteng should "contact me" to arrange dates and times. In the first week of May, Gandolfo resumed his business representative duties for the Union and, according to him, upon returning to work, had a conversation with J. B. Martin, the area director for Machinists Locals 1414 and 1305, who informed Gandolfo that the latter would be in charge of the anticipated contract negotiations with Respondent Serramonte Oldsmobile and that he (Martin) had informed Robert Hulteng of Gandolfo's responsibility for said bargaining.²³ During a May 14 telephone conversation, 2 weeks later, Shmatovich informed Hulteng that he was not the bargaining representative for Respondent Serramonte Oldsmobile, and, on May 15, Hulteng wrote to Shmatovich, protesting that the latter had misled him as to his authority.

Hulteng sent a copy of his May 15 Shmatovich letter to Gandolfo, who denied having seen either Hulteng's April 17 letter to Shmatovich or Shmatovich's April 22 letter to Hulteng, a copy of which was sent to Gandolfo, prior to July 29 and asserted his assumption, at that time, was that Respondent Serramonte Oldsmobile "had not opened up the

²¹ Hulteng testified, without contradiction, that, during the March 30, 1992 bargaining session between Respondent Serramonte Service Plaza and the Union, in response to a question from DeVincenzi, Nick Shmatovich said "at this point" he would be negotiating the upcoming Serramonte Oldsmobile collective-bargaining agreement.

²² Sec. 17 of the July 16, 1989 through July 15, 1992 collective-bargaining agreement states that it shall remain in effect for "year terms" after expiration "subject, however, to revision by notice in writing by either party to the other of a desire to terminate or revise . . . not less than sixty (60) days prior to the anniversary date."

²³ Martin was not called as a witness in order to corroborate Gandolfo's testimony, and, while conceding engaging in a telephone conversation with Martin during which they discussed Gandolfo, Hulteng testified that Martin merely told him that Gandolfo had been assigned to organizing duties in the East Bay and would not return to the Union until July 15.

contract in a timely fashion because I never received any communications from [Hulteng]."²⁴ Upon reading Hulteng's May 15 letter,²⁵ Gandolfo went to J. B. Martin and "asked him what the hell was going on because he had . . . told me . . . I was the one who was going to handle the [Respondent Serramonte Oldsmobile negotiations]. And he said that . . . Nick was out to lunch. Everybody knew I was in the negotiations, and he reiterated again to me [that he told Hulteng that I would be handling the negotiations] and I was the Serramonte Oldsmobile negotiator." Thereupon, on May 22, Gandolfo wrote to Hulteng, stating that he was the Union's representative for bargaining with Respondent Serramonte Oldsmobile, that Hulteng had not served notice of Respondent Serramonte Oldsmobile's intent to reopen the contract in a "timely fashion" and that, therefore, the existing contract would remain in effect for another year.

Hulteng responded to Gandolfo in a letter, dated June 8, in which the attorney stated his belief that the Union was "unwilling" to meet and bargain with Respondent Serramonte Oldsmobile and his "hope" that negotiations might begin within 2 weeks. On June 22, 2 weeks later, Gandolfo wrote to Hulteng, stating that, upon "checking with Mr. Shmatovich," the attorney had never been misled as to who would be representing the Union in bargaining with Respondent Serramonte Oldsmobile,²⁶ reiterating the Union's legal position, and suggesting arbitration if Hulteng disagreed with the Union's position. On July 7, Hulteng wrote to Gandolfo, rejecting any delay in bargaining pending arbitration of the Union's "untenable" claims, and, a week later on July 14, Gandolfo sent Hulteng a letter, which, the former stated, was the Union's formal grievance "that the contract was not properly opened in due form, and . . . under Section 17 . . . [would remain in effect for a year term]." A day later, Gandolfo wrote again to Hulteng, reiterating the Union's legal position but adding "without waiving our rights to this position, we are prepared to meet and bargain with you until this matter can be resolved."

²⁴ According to Gandolfo, prior to receiving a copy of Hulteng's May 15 letter, he had no idea that any union official had discussions with any representative of Respondent Serramonte Oldsmobile. This was important to Gandolfo as, based upon what he had learned at a May staff meeting, he had decided not to give notice to Respondent Serramonte Oldsmobile of the Union's intent to reopen the existing contract for revision and to take the position that, absent notice to reopen from Hulteng, the existing contract would "roll-over" for a year. On this point, Gandolfo testified that, at said staff meeting which had been attended by Shmatovich and Barbe, he had been informed that Hulteng "intended to give the same, exact contract proposal to [the Union] . . . that you were negotiating with the [Respondent Serramonte Service Plaza]." Notwithstanding this information, Gandolfo denied inquiring as to the terms of the contract proposal to the Union from Respondent Serramonte Service Plaza as "I assume[d] I'd see it from [Hulteng]."

²⁵ In his pretrial affidavit, Gandolfo swore that he had not seen the May 15 letter until after bargaining with Respondent Serramonte Oldsmobile began but, at the hearing, stated "that's an error."

²⁶ During cross-examination, Gandolfo denied speaking with Shmatovich prior to July 29 and asking if the latter had misled Hulteng as to who would be representing the Union in bargaining with Respondent Serramonte Oldsmobile. Confronted with his June 22 letter, Gandolfo conceded, "I obviously must have had a quick conversation with him where I asked him, 'Did you tell Rob that you represent 1414. . . .' He must have said 'No, I didn't.'"

The record establishes that the parties did, in fact, commence bargaining for a successor collective-bargaining agreement and that three bargaining sessions were held. The initial meeting occurred on July 29 at the FMCS office in Burlington; representing the Union were Gandolfo and Chuck Wetherby and representing Respondent Serramonte Oldsmobile were Hulteng, Rubenstein, and DeVincenzi. According to Gandolfo, the meeting began with Hulteng giving him a copy of the Respondent Serramonte Oldsmobile's initial contract proposal.²⁷ Then, the business representative testified, there was a "heavy discussion," which consumed a major portion of the time, regarding the Union's position on the rolling over of the 1989-1992 contract and its obligation to bargain in good faith. As to this, Hulteng said, "that the Union could not take two positions, one . . . that the contract had . . . rolled over for another year because of the untimely opening . . . and the other . . . that the Union was there to bargain in good faith for a new agreement. He said you can't take both positions"; you had to take one or the other. To this, Gandolfo replied that he believed that the prior contract hadn't been opened "in a proper fashion" and that he disagreed "that I couldn't take both positions." Gandolfo added, with regard to his first point, that Respondent Serramonte Oldsmobile had not given notice of its intent to open "prior to the 60 day . . . period prior to the expiration." Hulteng responded that he had properly opened the contract verbally and in writing to Shmatovich and "that Shmatovich had led him to believe that he was the bargaining representative or the one with authority to enter in negotiations with [Respondent Serramonte Oldsmobile]." Regarding substantive bargaining that day, Gandolfo testified that Hulteng termed Respondent Serramonte Oldsmobile's proposal as "almost identical" to the proposal the Union had been given for Respondent Serramonte Service Plaza and "that they felt . . . they shouldn't have to review the proposal in detail for me because it had already been the product of . . . year long negotiations with . . . Shmatovich." Hulteng added that negotiations with Respondent Serramonte Oldsmobile had "gotten a late start," that negotiations with Respondent Serramonte Service Plaza had been on-going for a year, "that the employer was unwilling to wait and that the Union was dragging its feet." Hulteng then warned "that we had to have a conclusion to negotiations prior to September 1st" or "the employer would be free to do whatever it had to do." During cross-examination, asked if he was aware that Respondent Serramonte Oldsmobile would propose basically the same things as proposed by Respondent Serramonte Service Plaza, Gandolfo stated that he was told this would occur but that he never actually examined Respondent Serramonte Service Plaza's proposals.²⁸ He added that he

²⁷ Notwithstanding that Hulteng and Rubenstein twice mailed him copies of the initial contract proposal, Gandolfo insisted that, at the bargaining session, was "the first time I saw it."

²⁸ Gandolfo said that he knew nothing of the status of or substance of the ongoing Respondent Serramonte Service Plaza bargaining. Asked if such was a strategic maneuver to insulate himself from knowledge of the Respondent Serramonte Service Plaza bargaining or proposals, Gandolfo conceded "maybe it was part of a strategy. I didn't think about it at that point. I really didn't know what was going on over there, and . . . I could care less. I had my hands full with . . . jumping back into this giant nightmare of which Serramonte Olds was a small problem." Asked by me why, if he

would not have discussed the specifics of Respondent Serramonte Service Plaza bargaining with Shmatovich, Barbe, or anyone else if such only pertained to that company, for "they might have done something different for the Plaza because that was a first-time contract . . . that was my philosophy from the beginning. . . . So I wouldn't inquire about something like that." As to union proposals, Gandolfo agreed that the Union's normal practice is to prepare proposals prior to the opening of bargaining, but such was not done for Respondent Serramonte Oldsmobile as "I didn't think the contract was opened in a timely fashion and, therefore, the old contract was in full force and effect," and "I was told that I was going to receive a copy of the proposal similar to the Service Plaza . . . so I assumed that we'd have a starting point for the first session." Gandolfo conceded that he requested copies of correspondence between Hulteng and Shmatovich and that Hulteng did this during a recess, including the Hulteng April 17 letter and the Shmatovich April 22 letter. Gandolfo admitted that the subject of arbitrating the Union's grievance, concerning the asserted rolling over of the expired contract, was discussed with Hulteng offering to have an expedited arbitration and that he said he wanted to refer the matter to the Union's attorney.²⁹ Asked by counsel for Respondents whether or not there was any explanation given of the meaning of the various contract provisions at this bargaining session, Gandolfo stated, "I wanted to walk through it, but we never did at that first session." Then, asked if he specifically requested to through Respondent Serramonte Oldsmobile's proposal section by section, Gandolfo conceded, "No, I did not ask to go over it section by section. We got the [proposal] . . . towards the end of the session . . . and I did not ask at that time."³⁰ Finally, Gandolfo conceded using profanity and making derogatory remarks about the "personalities" at the bargaining table" and making the statement that he was bargaining for a contract, which would become effective in 1993 "unless we lost the grievance. . . ."

The next bargaining session, between the parties, occurred on August 3 at the FMCS office. According to Gandolfo, the parties agreed to expedited arbitration of the Union's rollover

knew in May he would get the same proposal as that from Respondent Serramonte Service Plaza, he didn't want to know what was offered, Gandolfo replied, "Because they had explained that this was a whole rewrite . . . it would take a long time to go through it. . . . I didn't have the time." Asked why he just did not study the contract proposal at his leisure, Gandolfo averred that he was involved in other negotiations. "I had other things going on, too. I just had too many things going on. . . . [W]e're talking about a short time period of just a few months. . . . I was just backed up solid, swamped." Gandolfo conceded that he may have been at a meeting at which Mike Day discussed Respondent Serramonte Service Plaza bargaining, saying that he was trying to work something out.

²⁹ Gandolfo initially stated that he contacted the Union's attorney Rosenfeld immediately after the July 29 meeting but conceded that the Union's attorney did not respond to the Company's offer until September.

³⁰ In his pretrial affidavit, Gandolfo stated that, at each bargaining session, he asked Hulteng "three or four times" to go over the company proposal, and he refused. Gandolfo conceded this was incorrect as it pertained to July 29.

grievance.³¹ As to actual bargaining, Gandolfo testified that he requested that Hulteng go through the entire Respondent Serramonte Oldsmobile contract proposal “in detail,” and “his response was, ‘I’m not going to do that. We’ve been through this for the last 10 months [with Respondent Serramonte Service Plaza] . . . and if you want to find out what . . . we’ve discussed . . . [about] the interpretation of different sections . . . you should contact Shmatovich. . . .’” Hulteng then demanded counterproposals from the Union, and Gandolfo, who, as before, had no contract proposals, replied that he had to understand the company proposals in order to make counterproposals. Thereafter, Hulteng began explaining the initial sections of the company proposal in detail, and agreement was quickly reached on the preamble, recognition, and work jurisdiction clauses. Gandolfo added that Hulteng “was constantly requesting that the Union put forth its proposals . . . immediately” and that he responded, on August 3, “we had to go through his proposals so I could clearly understand them because I couldn’t counter-propose on something that I didn’t understand.” During cross-examination with regard to this bargaining session, while reiterating that Hulteng refused to go through Respondent Serramonte Oldsmobile’s contract proposal and, instead, insisted that Gandolfo look at Shmatovich’s notes of the Respondent Serramonte Service Plaza negotiations, Gandolfo conceded that, at one point, Hulteng did ask him to specify what contract sections he wanted Hulteng to review and that “we did start going through certain sections, and we did reach agreement . . . on . . . [some provisions].” Further, Gandolfo conceded that he then had the opportunity to ask about any provision of the Company’s offer and that Hulteng’s offer led to discussion of the health and welfare proposal, with Hulteng providing a “quick, general synopsis.” Thereupon, Gandolfo requested “more information,” including written information. The business representative testified that, at first, Hulteng said nothing would be provided and then said he should speak to Shmatovich. Finally, after stating that there was no obligation to provide anything, Hulteng said, “However, we will . . . be nice guys and give it to you, anyway.”³²

The next, and final, bargaining session, between the parties,³³ occurred on August 20 at the FMCS office, and, as

³¹ Gandolfo conceded that Hulteng and Rubenstein wanted the expedited arbitration procedure to be completed by August 15 but that he stated that such a date would be “a little soon” and not until September 1 did the Union’s attorney Rosenfeld write to Hulteng, confirming the agreement for arbitration. Further, while arbitration of the Union’s grievance did occur, it was eventually withdrawn by the Union as, according to Attorney Rosenfeld, “we decided that they would probably prevail” given that perhaps the Company wasn’t “wholly unjustified” in sending the April 17 letter to Shmatovich.

³² This information was provided to the Union at the next bargaining session.

³³ With regard to meeting availability, Gandolfo conceded, during cross-examination, that Hulteng said, on July 29, that he would be available any day between then and August 31 and that, on August 3, Hulteng pushed for another, early meeting date. To this, according to Gandolfo, he mentioned he expected to be available on August 7 because of the possibility of the cancellation of an NLRB hearing. He added that the hearing had been canceled but that he did not bother to arrange a bargaining session for that day as he became aware that a Respondent Serramonte Service Plaza bargaining session had been arranged.

Hulteng was unable to attend, another attorney, Elizabeth Franklin, was Respondent Serramonte Oldsmobile’s main spokesperson at this meeting. According to Gandolfo, Franklin announced that she was following Hulteng’s requests that the Union submit all bargaining proposals immediately and that, if the Union had any information requests, these must be made “prior to the end of the month.” To this, Gandolfo responded that he had already “reached areas of agreement” with Hulteng and that “for us to reach agreement on further sections . . . she had to go through their proposal. Thereupon, he complained about letters, which Hulteng had sent to him after each prior bargaining session, stating that they “were riddled with errors” and designed to paint “a picture the Union wasn’t being cooperative and bargaining in good faith.” Franklin admitted that there were some errors but defended other portions of the letters. Gandolfo testified that, as to his request that she continue to clarify Respondent Serramonte Oldsmobile’s proposal, Franklin repeated Hulteng’s mantra that he should speak to either Shmatovich or Barbe about the previous 10 months bargaining between the Union and Respondent Serramonte Service Plaza.³⁴ To this, Gandolfo replied that “she had the obligation to provide us with the information” and that he was “not privy” to either Shmatovich’s or Barbe’s bargaining notes. Gandolfo testified further that he made an information request at this bargaining session, requesting the names, classifications, wage rates, and wages of all bargaining unit employees.³⁵ Finally, during direct examination, Gandolfo stated that Franklin continually demanded that the Union submit contract proposals to Respondent Serramonte Oldsmobile and established a bargaining deadline of August 31. During cross-examination, Gandolfo conceded that, in the 2-week period between the penultimate and the final bargaining sessions, he failed to prepare any counterproposals because “for me to formulate a proposal, I had to understand where you were coming from.” According to Gandolfo, at the August 20 bargaining session, on this latter point in response to Franklin’s demand for proposals, he told her that the Union’s formulation of proposals was not yet completed as he “still needed clarification” on several of Respondent Serramonte Oldsmobile’s proposed contract sections, including health and welfare. Asked if, at the meeting, DeVincenzi mentioned that Respondent Serramonte Service Plaza had been negotiating with the Union about having the same contract terms as did Respondent Serramonte Oldsmobile, Gandolfo said that DeVincenzi had done so but that Gandolfo had not discussed this with either Shmatovich or Barbe because he had no reason to believe such would actually happen and he did not feel the necessity of verifying every assertion made at the bargaining table. Asked if he demanded to speak about any specific contract sections that day, Gandolfo said, “I had asked to go through the entire agreement,” including “the

³⁴ A review of Chuck Wetherby’s notes for the August 20 bargaining session does not corroborate Gandolfo that Franklin ever made such a statement.

³⁵ Asked why he needed this information, Gandolfo replied that Respondent Serramonte Oldsmobile had employees in numerous job classifications “and I needed to know where they were right now and what their wage rates were under the old agreement.” Gandolfo added that the information was subsequently provided by letter. He could not recall the date but stated that such was after the Company’s implementation of its final offer.

sections that we hadn't discussed yet" or upon which there was no agreement. Continuing, Gandolfo said that Franklin responded that "there was no way I'm going to walk through this agreement, section by section and talk about this. She was very explicit about that, and she said we're going to implement this offer on . . . September 1st, and that's it, do you have any proposals." Gandolfo replied that he'd been through this with Hulteng and demanded to begin dealing with the remaining contract sections on which there had been no agreement. Franklin then repeated Hulteng's demand that Gandolfo speak to Shmatovich, "refused" to discuss Respondent Serramonte Oldsmobile's contract proposal clause by clause, and said again that the Company was prepared to implement its offer. With regard to requested information, Gandolfo denied knowledge of the requested information prior to making his request and said what he ultimately received from Respondent Serramonte Oldsmobile was the classifications and wage rates under the implemented offer, which was not what had been requested.³⁶ Finally, Gandolfo admitted that the bargaining session ended with people "yelling and screaming," that he accused Franklin and Rubenstein of being "uninterested and unwilling" to negotiate, that he might have called Rubenstein some "vulgar names, and that "I got up from the table and concluded my statement and that was it. As far as I was concerned the bargaining was over . . . done."

Contrary to Glenn Gandolfo's depiction of the bargaining, the witnesses, who testified on behalf of Respondent Serramonte Oldsmobile portrayed the union business representative as engaging in tactics designed to forestall an inevitable impasse. Thus, Attorney Hulteng testified that, at the outset of the July 29 negotiating session, Gandolfo told him that Shmatovich was available for a meeting on August 7. Next, Gandolfo "took the position that the contract had been extended [because] . . . we had failed to timely reopen it." Hulteng replied that this position was "ridiculous," adding that Gandolfo could not "simultaneously tell me that he was certain that the contract had been extended and then . . . tell me he was there to negotiate" and that this was not good-faith bargaining. Gandolfo disputed Hulteng on this point, saying that the Union's counsel had advised him that he could simultaneously assert a legal position on contract roll-over and bargain. In this regard, according to Hulteng, the possibility of expedited arbitration was discussed. Denying that he had ever been provided with copies by mail, Gandolfo then asked for a copy of Respondent Serramonte Oldsmobile's initial contract proposal. Hulteng presented him with a copy and said that the proposal of Respondent Serramonte Oldsmobile was "virtually identical" to the current Respondent Serramonte Service Plaza proposal. Gandolfo replied that "he had no knowledge of the Serramonte Service Plaza negotiations." DeVincenzi, who was present at all the bargaining sessions, said he did not believe Gandolfo and mentioned a conversation with Mike Day during which the latter had mentioned that Gandolfo was present at a meeting regarding Respondent Serramonte Service Plaza.

³⁶ Apparently, the information was contained in a letter from Hulteng to Gandolfo dated September 2. Gandolfo testified that his request pertained to the expired agreement—he "didn't know where [Respondent Serramonte Oldsmobile was] going to place [the bargaining unit employees] in the new program" and "I had to have a starting point where they were under the old contract."

Gandolfo asked when such a meeting occurred. DeVincenzi said it was on July 17, and Gandolfo replied that it "did not happen." As to bargaining over the substance of the company proposal, Hulteng denied that Gandolfo ever asked to go through it or that he (Hulteng) ever refused to do so—"there were no questions that I did not answer." He added that the Union had no contract proposals to offer. With regard to any discussion of a deadline for agreement on a new contract, Hulteng said, "I said that the . . . employer was prepared to meet with the Union any day between July 29 and . . . August 31st, that we were frustrated by the position the Union was taking, that we were not going to allow the contract to be extended indefinitely by the Union's tactics, that we would have to make substantial progress by September 1st, and that, if that did not happen, we reserved the right to implement our proposal." Finally, as to this meeting, Hulteng characterized Gandolfo's demeanor as ranging from calm to a loud series of personal attacks with use of profanity.

With regard to the August 3 bargaining session, Hulteng testified that it began with a discussion of the Union's roll-over grievance, which he termed "foolish or frivolous." Hulteng further testified that he asked Gandolfo "more than once" for any counterproposals, and "Gandolfo said that he couldn't formulate proposals until he understood our proposals." According to Hulteng, he criticized Gandolfo on this point, saying he couldn't believe that Gandolfo was unable to formulate proposals as he had been aware "since June" of the "nature" of Respondent Serramonte Oldsmobile's proposals. Gandolfo responded that "he had never seen the employer's proposals before July 29th." Hulteng replied that the company proposals were not new and novel and were of the type the Union had previously seen. Gandolfo said he wanted to ask "questions" about the company proposal rather than make counterproposals. To this, Hulteng responded that Gandolfo could ask whatever questions he wanted but that he wanted to see counterproposals. Then, according to Hulteng, he "insisted" that the parties go through the company proposal "section by section," saying he wanted to learn Gandolfo's position on each section of Respondent Serramonte Oldsmobile's proposal.³⁷ Thereupon, the parties discussed the preamble and the first two sections of the Company's proposal, with the latter revising its language pursuant to comments by the Union. On this point, Hulteng specifically denied ever refusing to discuss Respondent Serramonte Oldsmobile's proposed contract language or telling Gandolfo to speak to Shmatovich or Barbe if he wanted to discover the Company's positions. He conceded, however, at one point, telling Gandolfo that Respondent Serramonte Oldsmobile's proposals were "the same proposals that were made at Serramonte Service Plaza" and saying, after Gandolfo said he knew nothing of those negotiations, that Gandolfo could "certainly familiarize [himself] with those negotiations because all the files are . . . in your office." Toward

³⁷ After refreshing his recollection with his own bargaining notes, Hulteng changed his testimony regarding what precipitated the parties' discussion of the preamble and the first two sections of the Company's proposed contract, stating that Gandolfo said he could agree to some of Respondent Serramonte Oldsmobile's proposals; that Gandolfo "said . . . we'll have to walk through the contract"; and that, thereupon, Hulteng invited Gandolfo to go through the contract proposal "section by section."

the end of the bargaining session, according to Hulteng, Chuck Netherby asked if Respondent Serramonte Oldsmobile was going to implement its final offer on August 31, "and I said we reserved the right to implement if no agreement was reached, and we felt that was a reasonable period of time" given that "we felt the negotiations had been delayed for far too long, and . . . the Union was solely responsible." According to Hulteng, exemplifying Respondent Serramonte Oldsmobile's contention that the Union was deliberately stalling in order to avoid an impasse, are the fact that, when asked if he had spoken to the bargaining unit employees and ascertained specifically what they desired in a new contract, Gandolfo said he had not yet done so; the fact that, at the conclusion of the meeting, he requested future bargaining dates but Gandolfo said he was "booked" for the remainder of that week and the next; and the fact that, when he offered to arrange a bargaining session with the insurance carrier so that the latter could explain the proposed health plan under the "cafeteria benefits" proposal to the Union, he received no response from Gandolfo.

During cross-examination, under questioning by counsel for the General Counsel, Hulteng testified that no more than 25 percent of the July 29 bargaining session was concerned with discussion of the Union's rollover grievance and that the subject consumed less time at the next bargaining session. Hulteng further testified that Respondent Serramonte Oldsmobile's contract proposal changed each section of the expired contract to some degree; that he never explained to Gandolfo which of the changes were of high priority to the Company; and that he did explain to Gandolfo "that we were seeking virtually the same contract as Serramonte Service Plaza," including health insurance and retirement. Responding to questions posed by the Union's counsel, Hulteng conceded that, during his two bargaining sessions with Gandolfo, he was "very firm" with the latter that Gandolfo should meet with Shmatovich and become aware of what had occurred during the Respondent Serramonte Service Plaza bargaining and "that [he] did not believe [Gandolfo] was unaware of what was going on in the Serramonte Service Plaza negotiations and pointed to Netherby's presence during some of the bargaining and the proximity of Gandolfo's office to those of Shmatovich and Barbe." Further, responding to a question, Hulteng was able to recall asking Gandolfo what the Union's counterproposals would entail and the latter replying that there were "a number of areas" in the Company's proposal with which the Union could agree and that the Union would not attack the overall proposal with counterproposals but "we want to ask questions about your proposals." Notwithstanding what Gandolfo said, Hulteng conceded that he responded by continuing to press Gandolfo for counterproposals because "I believed [Gandolfo] had proposals and was capable of making them." Moreover, according to Hulteng, after Gandolfo said he could agree on some terms, the former pressed him, and Gandolfo asked to begin going through the contract.

Elizabeth Franklin, who substituted for Hulteng as Respondent Serramonte Oldsmobile's main spokesperson at the August 20 bargaining session, testified that, during the meeting, Gandolfo asserted, "that the contract had not been appropriately reopened" and "that he was bargaining for the next year's contract." Franklin responded that "we thought the contract had been appropriately reopened and that's what

we were bargaining for" and, as had Hulteng, suggested expedited arbitration of Gandolfo's assertion regarding the rollover issue. Gandolfo said the Union's attorney would take care of it. With regard to any discussion of bargaining proposals, Gandolfo said "several times" that he had questions about the Company's contract proposal, and Franklin replied each time, asking what specific sections of Respondent Serramonte Oldsmobile's contract proposal the former did not understand. Gandolfo's reply was that "he didn't understand anything in our proposal. Likewise, Franklin asked "several times" whether Gandolfo had "any proposals, comments, questions about Section 3" of the company proposal, the point at which the parties had ceased bargaining on August 3, but Gandolfo never responded directly, and, in fact, had no proposals on any subject to offer. Eventually, discussion turned to the matter of future bargaining sessions, and, according to Franklin, "I indicated . . . that we were ready to meet at any time and suggested that [Gandolfo] not delay continuing negotiations." Franklin specifically asked if Gandolfo was willing to schedule additional dates, but, according to Franklin, Gandolfo refused and said he would respond in writing. With regard to the matter of implementation of Respondent Serramonte Oldsmobile's final offer, "I made the statement in response to . . . Gandolfo [asking] why we needed to expedite arbitration . . . that if we didn't get [responses to our questions regarding the contract reopener] . . . we would implement thereafter." Later, "I clarified our position . . . and indicated we were reserving the right to implement." At the hearing, she testified that her original statement was made in order "to alert [Gandolfo and Netherby] . . . that the employer took these negotiations very seriously" and reclarified its position "to be sure that they understood that we wanted to negotiate."³⁸ Finally, Franklin denied refusing to go through the Company's contract proposal with Gandolfo, saying she solicited questions from him and asked if he wanted to continue going through Respondent Serramonte Oldsmobile's contract proposal, starting with section 3. During cross-examination, Franklin conceded that, in response to her demand for proposals, on one occasion, Gandolfo said he did not know why he had to produce proposals because there was much he could accept in Respondent Serramonte Oldsmobile's proposal.³⁹

Karen Rubenstein was present at the three bargaining sessions, between Respondent Serramonte Oldsmobile and the Union, and testified that, prior to the start of negotiations,

³⁸ Franklin denied ever saying that, if the Union wanted to understand Respondent Serramonte Oldsmobile's proposal, Gandolfo should speak to Shmatovich but conceded that "at one point in the [session] I made the statement that I couldn't believe they didn't have any proposals considering that the Union [had our proposal] . . . for . . . three months and had been familiar with it for at least a year."

³⁹ There is no dispute that, either prior to or during the August 20 bargaining session, Respondent Serramonte Oldsmobile presented a second contract proposal to the Union, which, in accord with what had been presented to the Union earlier, is virtually identical to the final proposal from Respondent Serramonte Service Plaza to the Union. Thus, the Respondent Serramonte Oldsmobile proposal contains a flat-rate compensation plan, a cafeteria health insurance benefits plan, and a 401(k) retirement savings plan, which would be funded from each employee's cafeteria benefits fund. It is unclear which portions of the second contract proposal would have been acceptable to the Union.

she had provided copies of the Company's initial contract proposal to the Union. At the initial July 29 meeting, she further testified, Gandolfo termed the occasion a "first stage grievance" meeting; in response to Hulteng's demand for union proposals, Gandolfo replied, "that he wanted to go through our proposals and that he didn't have any proposals to give us"; and Gandolfo did not respond to Hulteng's question as to which contract sections he wished to discuss. According to Rubenstein, at the August 3 bargaining session, Gandolfo again, in response to Hulteng's demand for union proposals, "said he needed to go through our proposals"; she denied that Hulteng ever refused to go through Respondent Serramonte Oldsmobile's contract proposal or that Hulteng ever refused to answer questions, pointing out that Hulteng and Gandolfo engaged in a lengthy discussion regarding the preamble and the first two contract sections before "the Union had to leave." With regard to Gandolfo's assertion that Hulteng told him that, if he desired to learn about the contract proposal, he should ask Nick Shmatovich, Rubenstein said Gandolfo was not being "entirely accurate" in that, while Hulteng "did say" that the Union had all the information regarding the Respondent Serramonte Service Plaza negotiations, "he never said you have to go there to get it, I won't give it to you, ever." Also, Rubenstein recalled that Gandolfo did ask to see an insurance underwriter regarding the proposed health insurance plan and, while Hulteng did say the Union previously had the opportunity to do so, "if they wanted to we could surely make the person available again." Finally, with regard to August 3, Rubenstein stated that Gandolfo confirmed that he had not yet met with the bargaining unit employees in order to discuss what they wanted. As to what occurred on August 20, Rubenstein testified that, in response to Franklin's demand for proposals, Gandolfo insisted that Hulteng had agreed to work off of the Company's proposal, a position which Franklin rejected. Franklin continued to demand that the Union present some proposals, and Gandolfo replied that he did have some "but not until you explain your proposals." Gandolfo added that Hulteng had refused to do so, and Rubenstein responded that Gandolfo was being "ridiculous," making such assertions because they'd gone through the first two sections. Franklin then asked for the Union's position on section 3 of the Company's proposal; Gandolfo replied "we're out of time" and Netherby will respond but the latter never did. Asked if Franklin ever said that Respondent Serramonte Oldsmobile would implement its last offer after August 31, Rubenstein testified, "she made one comment earlier . . . that the employer would be implementing, and then she later clarified that . . . the employer reserves the right to implement." During cross-examination, Rubenstein recalled, at the August 3 bargaining session, Gandolfo "requesting to go through the proposal" and Hulteng stating "that he couldn't believe . . . Mr. Gandolfo had no knowledge about what was contained in our proposal, that it was . . . virtually the same proposal . . . on the table at Service Plaza [bargained for by Shmatovich], and that . . . [the latter] would have the notes regarding those." Later, after reiterating her testimony that, at the third bargaining session, Gandolfo said we're working off of the Company's proposal and that Franklin rejected the contention and demanded a counterproposal, Rubenstein conceded that, at the second bargaining session, the parties had, in fact, used the company

proposal for bargaining and that Hulteng had requested that such be done. Further, as to what was said regarding implementation at the third bargaining session, Rubenstein recalled that Gandolfo asked why all of the Union's questions had to be asked by August 31 and that Franklin replied, "because we're implementing after that." Finally, Rubenstein stated that not only had the Union never formally rejected the proposed health insurance or 401(K) retirement savings plans but also said subjects were never even discussed at the three bargaining sessions.

With bargaining in the above-described posture, the parties held no further meetings in August.⁴⁰ Barry DeVincenzi testified that, at the conclusion of the August 20 session, "I did not" feel there was any prospect of reaching agreement on a collective-bargaining agreement for the Respondent Serramonte Oldsmobile bargaining unit. Likewise, Attorney Hulteng, who was informed of what occurred at the August 20 bargaining session, testified that, by the end of August, he became convinced that impasse existed and that no agreement was possible. Accordingly, after discussions with his client, on September 1, Hulteng wrote to Gandolfo, stating that the parties had met and bargained three times and "I have consistently requested that the Union come forward with proposals to this Employer," and:

The record will reflect that the Union has failed and refused to make any proposals. Indeed, at our three meetings, the Union has elected to avoid bargaining over any subject. At the most recent meeting on August 20, you not only refused to make any proposals, but also cut off the meeting and refused to schedule another bargaining session.

For several months now, the Union has insisted that the former contract between the parties was not reopened on a timely basis, and thus was renewed for an additional year. I have pointed out to you that your position is totally unsupportable. . . . When the Employer offered [expedited arbitration] . . . you ignored us. . . . Regrettably, it appears that the Union has elected not to seriously negotiate with this Employer, based on your erroneous claim that the contract has been automatically renewed.

When we met on July 29, I clearly advised you that the Employer was very serious about its proposal, and was not willing to wait indefinitely for the Union to begin substantive negotiations. I noted that the Employer had already been forced to wait over three months after reopening the agreement before the Union would even schedule a meeting. . . . August 31 has now passed, and we have yet to receive any proposals on any subjects from the Union.

Under the circumstances, the Employer has concluded that the Union has never had any intention of bargaining for a new agreement. Based upon the Union's waiver of its right to bargain, the Employer has determined to implement certain portions of its contract proposal. Effective with the beginning of the work day on September 2, 1992, the Employer will implement all

⁴⁰ On August 28, Rubenstein wrote to Gandolfo, stating that the latter had not contacted any representative of Respondent Serramonte Oldsmobile in order to schedule another meeting and that Respondent Serramonte Oldsmobile was available to meet at any time.

sections of its [second proposal with specified exceptions, including health insurance and retirement]. . . .

It is undisputed that, notwithstanding the lack of any agreement with the Union, Respondent Serramonte Oldsmobile did, in fact, implement the aforementioned changes in its bargaining unit employees' terms and conditions of employment on September 2.⁴¹

Thereafter, on November 13, Attorney Hulteng submitted revised health insurance and retirement plans to the Union and stated that, if the Union so desired, Respondent Serramonte Oldsmobile would be willing to bargain over the proposed changes, and, eventually, the parties scheduled bargaining session for and, in fact, met on December 16 and 30 at the FMCS office. Hulteng and DeVincenzi represented Respondent Serramonte Oldsmobile at this meeting, and Gandolfo and David Rosenfeld represented the Union. Gandolfo testified that, during the meetings, the parties discussed the Company's proposals involving health insurance, long-term disability, and retirement savings; that no agreements were reached on the above issues or on Respondent Serramonte Oldsmobile ceasing its contributions to the existing health insurance and pension fringe benefits trust funds. During cross-examination, Gandolfo conceded that the December meetings were for the purpose of "negotiations" over revised company proposals and that, as to union proposals, "we had some ideas. They were more concepts. They weren't necessarily written proposals. . . . We talked about some different ideas."⁴² Testifying in greater detail, Hulteng stated that, at the December 16 meeting, he began by stating that Respondent Serramonte Oldsmobile desired to implement the proposed health insurance and retirement plans and did not want to "continue in limbo" for an indefinite period. According to Hulteng, he continually demanded proposals from the Union and that; at one point, David Rosenfeld, who represented the Union at the meeting, said "his position was the Company should provide the best benefits possible for dollars available," and he (Hulteng) said that was not specific enough. Then, Rosenfeld said he wanted to reach agreement on an entire contract. Hulteng replied that was "fine" and asked for all proposals; however, "the meeting ended without any proposals" from the Union. Discussions thereupon centered around the proposed fringe benefits plans with Hulteng pointing out that the Company was not willing to continue in the Union's trust funds." Rosenfeld said he wanted a summary description of the proposed long term disability plan, and Hulteng objected, saying that such had previously been provided to the Union. Rosenfeld said that Gandolfo did not have it, and Hulteng replied that a description of the plan had been provided to Don Barbe in September.

⁴¹ On September 17, Rubenstein wrote to Gandolfo, informing him that bargaining unit employees' rates of pay would be increased on September 28 unless the Union objected. Presumably the increases were implemented, for Gandolfo did not write to Hulteng, objecting to the increase in wage rates, until October 12. Hulteng wrote to Gandolfo 10 days later, that his objections were deemed untimely but that Respondent Serramonte Oldsmobile would be willing to meet and bargain with the Union if the latter so desired.

⁴² Gandolfo believed that, rather than the AI health insurance and pension trust funds, the Union proposed usage of other Taft-Hartley trust funds, known as the P.A.D.I.T. funds. Such were rejected by Respondent Serramonte Oldsmobile as being too costly.

Rosenfeld then asked for a summary description of the proposed 401(k) retirement savings plan, and Hulteng responded that this document had been provided to the Union during the Respondent Serramonte Service Plaza bargaining. Gandolfo said that the document had never been given to him, and Hulteng again said it had been given to Barbe. Rosenfeld then said that neither summary description document had been given to the Union "in these negotiations," and Hulteng replied that Rosenfeld's claim was "frivolous."⁴³ Regarding a deadline for the conclusion of bargaining, Hulteng testified that "we told the Union that we really wanted to get this issue resolved by January 1." Rosenfeld asked why there was such urgency, and Hulteng replied that it was "not unreasonable" to expect the Union to have a position by that date and that all the other Tom Price dealerships were going to implement by that date. Rosenfeld asked if the implementation deadline was irrevocable; Hulteng said it was unless the Union presented a "strong reason" for delay and reiterated that the Company would bargain about anything if the Union presented some proposals.⁴⁴

The parties again met for bargaining over Respondent Serramonte Oldsmobile's proposed changes in its fringe benefits plan proposals on December 30. As was his practice, Hulteng began by requesting the Union's proposals, and Rosenfeld replied by asking questions regarding Respondent Serramonte Oldsmobile's proposed shop steward contractual provision. After a lengthy discussion of that subject, Rosenfeld said that the Union proposed continuing the existing health and pension trust funds with yearly caps on increases. Hulteng replied that Respondent Serramonte Oldsmobile had evaluated the fringe benefit trust fund plans, found them "too costly," and rejected them. Near the end of the meeting, Rosenfeld asked whether, if the Union found a plan that met Respondent Serramonte Oldsmobile's criteria, such would be considered. Hulteng replied that such a plan would be evaluated but cautioned that such would have to be "almost an exact match" for the proposed plans. Rosenfeld then said the Union had such a plan and Gandolfo would mail it to the Company the next morning. Asked what it was, Rosenfeld mentioned the P.A.D.I.T. trust fund, an alternative Taft-Hartley-style trust fund to the AI plans. Hulteng asked if Rosenfeld was being sincere as he knew that plan, and believed it to be almost as costly as the AI trust funds. He asked if the P.A.D.I.T. plans had different

⁴³ In this regard, I note that a summary plan of the proposed 401(k) retirement savings plan had been given to the Union in connection with the Respondent Serramonte Service Plaza negotiations and that Rosenfeld himself acknowledged receipt of the document on October 16, 1992.

⁴⁴ On December 18, 2 days later, Rosenfeld wrote to Hulteng that the Union wanted to reach an agreement on "all subjects" and that "although we have serious doubts about the health and welfare and 401(k) proposals, we are prepared to consider them carefully and reach agreement on them or other alternative proposals in the context of an entire agreement. We do not believe that it is appropriate to reach piecemeal agreements."

On the same day, Hulteng wrote back to Rosenfeld that Respondent Serramonte Oldsmobile "is firmly committed to its proposals on health and welfare and 401(k)" but remains "willing to consider" alternative proposals.

On December 22, Hulteng mailed to Rosenfeld a copy of the summary description of the 401(k) plan and a copy of summary description of the long-term disability plan.

contribution levels for individuals and for families, and Gandolfo said everything would be in writing.⁴⁵ At the conclusion of the meeting, according to counsel for Respondents, based upon the costly nature of the only two union proposals and the bargaining over the shop steward provision, which was not an impediment to agreement, he believed “that there was no prospect here of actually making progress toward an agreement.” After receipt of letters dated January 6 and 11, however, in which Rosenfeld stated that the Union wished to continue the negotiations, Hulteng, by letter dated January 14, extended the deadline for the submission of “concrete proposals” to January 23.⁴⁶ Thereafter, inasmuch as the Union failed to provide any counterproposals, as there was no “flexibility” in Respondent Serramonte Oldsmobile’s position, and as Hulteng saw “no prospect” for agreement,⁴⁷ in February and March 1993, respectively, Respondent Serramonte Oldsmobile ceased making payments to the AI pension and health insurance plans and implemented its proposed 401(k) retirement savings and health insurance plans for the bargaining unit employees.

4. Alleged direct dealing and additional unilateral changes by Respondent Serramonte Oldsmobile

There is no dispute that, on or about September 2, 1992, Respondent Serramonte Oldsmobile implemented most portions of its last offer to the Union, including the proposed flat-rate compensation system. Daniel Ghiorso, an automotive technician for Respondent Serramonte Oldsmobile and the Union’s shop steward at that time, testified that the bargaining unit employees were informed of the changes in the morning and that, in the afternoon, he spoke to the service manager and asked if service technicians would be compensated for time spent performing safety inspections.⁴⁸ The latter said employees would be compensated for a half an hour of work; however, later in the day, the service manager

⁴⁵As promised, on December 31, Gandolfo submitted the P.A.D.I.T. trust fund proposal to Respondent Serramonte Oldsmobile along with cost information. On January 6, Hulteng rejected the proposal based upon “the costs” of the plan.

⁴⁶On January 11, Hulteng wrote to Rosenfeld that, effective February 1, 1993, the then administrator of the 401(k) retirement savings plan would be replaced by Barclay West. On January 21, Rosenfeld wrote to Hulteng, demanding information with regard to the change of administrators, and stating that the change necessitated bargaining. At the hearing, Hulteng rejected Rosenfeld’s assertion, stating that the change “didn’t [alter] the substance of the . . . proposal at all.”

⁴⁷Between January 21 and February 5, Hulteng and Rosenfeld exchanged a series of letters, with Hulteng accusing Rosenfeld of a lack of sincerity in claiming that the Union wanted to negotiate Respondent Serramonte Oldsmobile’s health insurance and pension proposals and Rosenfeld assuring Hulteng that the Union was desirous of continued bargaining and would make counterproposals and each accusing the other of not being available for meetings.

Eventually, a third bargaining session was scheduled for February 5; however, Gandolfo became ill and the meeting was canceled.

⁴⁸Barry DeVincenzi testified that a safety inspection is “a curtesy we provide to our customers . . . to make sure that . . . the blinkers work, the horn works, headlights, taillights. . . . There’s nothing mechanical about it. It takes a total of probably five minutes.” He added that there is no customer charge, that, under an hourly compensation system, the safety check time was not segregated from an employee’s worktime, but that the original choice was not to pay for this time under flat rate.

said Barry DeVincenzi had decided that there would be no compensation for the work.⁴⁹ Ghiorso asked for an explanation and was told that none of the other Tom Price dealerships were paying employees for time spent performing safety inspections “and we weren’t going to be any different.” The next morning, Ghiorso refused to perform safety inspections and was ordered to report to the service manager’s office. The latter said that DeVincenzi would be upset by Ghiorso’s misconduct, and the latter said that DeVincenzi could not expect the bargaining unit employees to be performing work for free. Shortly thereafter, Ghiorso was again instructed to report to the service manager’s office and found DeVincenzi waiting for him. DeVincenzi asked what the problem was, and Ghiorso said he wouldn’t do the work for free. DeVincenzi said Ghiorso was required to perform the work and instructed the service manager to draft a written reprimand. An hour later, the service manager gave Ghiorso the reprimand but told him that DeVincenzi had decided to pay the employees a 10th of an hour thereafter for safety inspections.⁵⁰ Another shop steward, Harlan Silva, testified that it was common for him to seek out DeVincenzi to discuss shop-related issues and that they resolved “most of them” without a meeting with union representatives. Silva added that the Union did not object to such meetings. Glenn Gandolfo testified that shop stewards are authorized to try to resolve “a problem” with management and that the Union becomes involved only when there is a “blatant” contract violation or where the matter involves a subject of contract bargaining. Without disputing what happened, DeVincenzi testified that the foregoing was not the first time he had adjusted a pay issue with a shop steward—“it’s happened all the time.”

The record establishes that, on or about January 1, 1993, the franchise to sell General Motors cars and trucks was transferred from Respondent Serramonte Oldsmobile to Transcar Leasing, d/b/a Serramonte Auto Plaza; that, thereafter, Respondent Serramonte Oldsmobile was dissolved as a corporate entity and its assets were assumed by Transcar Leasing, Inc.; but that, notwithstanding the foregoing, the bargaining unit employees continued to perform their regular job duties at Respondent Serramonte Oldsmobile’s facility.⁵¹

⁴⁹Ghiorso telephoned Gandolfo to report on what occurred. The latter had no instructions and told Ghiorso that a grievance would be filed.

⁵⁰Subsequently, Gandolfo met with Respondent Serramonte Oldsmobile’s service technicians and a decision was reached to file a grievance over what occurred. Ghiorso did not know if such a grievance had ever been filed.

⁵¹According to Barry DeVincenzi, as of September 1992, there were 12 bargaining unit employees working for Respondent Serramonte Oldsmobile at its facility, which was located approximately 200 yards from Respondent Serramonte Service Plaza’s facility. He testified that the bargaining unit employees worked with the equipment (hoists, wheel balances, alignment racks, and any other generic and specialized tools and equipment), which was provided by Respondent Serramonte Oldsmobile, and with “whatever tools that they had within their tool boxes”; that, while the bargaining unit employees performed some work on other types of vehicles, 99 percent of their work was on General Motors vehicles; that the employees were never performed work for other dealerships; that, at least through September 1, 1992, the bargaining unit employees’ terms and conditions of employment were established by collective-

Continued

Then, on March 6 and 7, shortly after the implementation of new health care and retirement savings plans for the employees, changes which made their fringe benefits virtually identical to those of Respondent Serramonte Service Plaza's bargaining unit employees,⁵² Respondent Serramonte Service Plaza assumed responsibility for Respondent Serramonte Oldsmobile's vehicle servicing operations, and all of the Respondent Serramonte Oldsmobile's bargaining unit employees, along with 75 percent of its automotive service equipment, and its entire automotive service operations were relocated to the vacant service area in Respondent Serramonte Service Plaza's facility. DeVincenzi testified that, having been relocated, Respondent Serramonte Oldsmobile's bargaining unit employees utilized the same parts department as the Nissan-Isuzu service technicians; shared a common parking area with Respondent Serramonte Service Plaza's bargaining unit employees; as did all employees in the facility, had access to all employee break areas; had virtually the identical terms and conditions of employment, including compensation and fringe benefits, as other employees in the facility; and had the same overall supervisor—DeVincenzi. During cross-examination, however, the latter added that, after the relocation, Respondent Serramonte Oldsmobile's bargaining unit employees continued to work virtually exclusively on General Motors vehicles, on which they used their own and factory service equipment, and under the same service manager, Jim White.

A month after the relocation, in April, according to Harlan Silva, the current shop steward for the Union, Respondents implemented "modified" 7500, 15,000, and 30,000 mile service menus for General Motors vehicles and also unilaterally reduced the flat-rate time allocations for particular job tasks, thereby reducing the incomes of the Respondent Serramonte Oldsmobile bargaining unit employees.⁵³ The record reveals that a service menu is a factory-recommended and area experience-generated listing of "service options" for work done at particular mileage intervals; that Respondent Serramonte Oldsmobile changed these every 6 months; and that, upon the advent of flat-rate compensation in September 1992, completion times were unilaterally assigned to the particular tasks. In this regard, Silva testified that the April 1993 service menus increased the amounts of required work⁵⁴ and that Barry DeVincenzi concurrently published time allocations for the required jobs, reducing some as much as "a few tenths" of an hour. After receiving complaints from some bargaining unit employees, Silva met with DeVincenzi and informed him of the complaints. As a result, according to Silva, allocation times for compensation were changed in June—"They were . . . increased about three-tenths on the [7,500 mile service] and two-tenths on the 15,000 mile service, and were increased by one hour on the

bargaining agreement; and that they were issued paychecks from Respondent Serramonte Oldsmobile.

⁵² Respondents had previously implemented the identical flat-rate compensation systems for their respective service technicians.

⁵³ or to the implementation of flat-rate compensation, menu changes made no difference to bargaining unit employees as they were being hourly compensated for whatever work they performed.

⁵⁴ On direct examination, Silva stated that the menu changes represented a consolidation of services. During cross-examination, he stated that there were some additions to the menu and some work was removed.

30,000 mile service." Denying that Respondent Serramonte Oldsmobile had ever bargained about these in the past or that such necessitated mechanics to do more work for less pay, DeVincenzi confirmed that, after extensive analysis of what the factory recommended and what its competition was doing, service menu changes were implemented in April 1993 and that, after Silva complained the time allocations were not sufficient for what was being done, they were subsequently revised. Further, according to DeVincenzi, Silva never requested the involvement of the Union in the matter.

On September 14, 1993, Respondents' counsel Hulteng wrote to the Union's counsel Rosenfeld that Respondents desired "to utilize a new provider for portions of the comprehensive health insurance benefits provided to bargaining unit employees; that, as a result, there would be "certain enhancements" to the benefit package; and that Respondents desired to implement the proposed changes on October 1. Hulteng also stated Respondents' willingness to bargain over the matter and proposed several dates later that month. A week later, on September 21, Rosenfeld wrote to Hulteng, stating that he needed the following information in order to evaluate the proposed change—"a list of all of the employees, their addresses, work classifications, rates of pay, and the number of dependents including ages and sex of each dependent" and "the amount currently being contributed by each employer." On September 24, 3 days later, Hulteng wrote to Rosenfeld, reiterating Respondents' desire to implement the proposed changes on or about October 1 and its availability for bargaining, and, on September 29, Rosenfeld wrote to Hulteng, demanding to know why there was such urgency to implement. In these circumstances, with no bargaining between the parties and without the agreement of the Union, Respondents implemented the above-described health plan changes on October 1. Asked about the urgency for the changes, Hulteng stated that "the entire Tom Price Dealership Group was going to make some modifications to the health plan on that date" and, as of October 1, "the old plan essentially was not going to be in existence anymore." Finally, there is no dispute that, by letter dated October 22, 1993, Respondents provided the above-requested information to the Union. Although it is alleged that Respondents failed to provide such in a timely manner, DeVincenzi testified that the delay in doing so was necessary—"it was tough to get the coordinated material" as different people were responsible for the requested information.

B. Legal Analysis

Initially, turning to Respondent Serramonte Service Plaza and its October 1992 implementation of various terms of its final contract offer to the Union, there is no dispute that such was done unilaterally, without the agreement of the Union. In this regard, the law is clear that, during collective bargaining, an employer violates Section 8(a)(1) and (5) of the Act by unilaterally changing the terms and conditions of employment of bargaining unit employees. *NLRB v. Katz*, 369 U.S. 736, 739 (1962). Moreover, in said circumstances, the employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached in the bargaining. *Katz*, supra; *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991); *Winn-Dixie Stores*, 243

NLRB 972 (1979); *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967). Thus, the principal issue, involving Respondent Serramonte Service Plaza's aforementioned implementation of changes in the bargaining unit employees' terms and conditions of employment, is whether the parties had reached an impasse in their contract negotiations so as to have permitted the aforementioned implementation. On this point, "a genuine impasse in negotiations is synonymous with a deadlock; the parties have discussed a subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position." *Hi-Way Billboards, Inc.*, 206 NLRB 22, 23 (1973). Further, "whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining exist[s]." *Taft Broadcasting*, supra. Finally, "impasse is a defense to the charge of unilateral change," and "it must be proved by the party asserting impasse—in this case . . . Respondent." *North Star Steel Co.*, 305 U.S. 45 (1991).

In his posthearing brief, Respondents' counsel Hulteng points to, at least, 12 factors, which assertedly establish the existence of an impasse in the negotiations between Respondent Serramonte Service Plaza and the Union prior to the former's implementation of most of its final contract proposal to the Union, and, indeed, there is ample record evidence warranting a conclusion that the parties' negotiations had reached a point of deadlock immediately upon the conclusion of the private conversation between DeVincenzi and Barbe on September 14. Thus, based upon the uncontested testimony of Respondents' witnesses, the record establishes that, encompassing no less than 27 formal negotiating sessions and several off-the-record meetings, the parties had been engaged in bargaining for over a year, and, while, apparently, no agreement had been reached on over 60 of Respondent Serramonte Service Plaza's proposed contract provisions with several never having been discussed, bargaining concentrated on what Hulteng continually termed the most critical issues—Respondent Serramonte Service Plaza's proposed flat-rate compensation system or the Union's traditional hourly compensation proposal and the former's proposed cafeteria benefits plan, including a 401(k) retirement savings plan, or the Union's proposed Taft-Hartley fringe benefits trust funds. Further, for the 6 months preceding September 14, the parties had engaged in serious efforts to compromise their differences, with the Union seeking to condition acceptance of flat-rate compensation to Respondent Serramonte Service Plaza's acceptance of the AI health insurance and pension plans and the latter proposing to accept either AI health insurance and either the AI pension plan or its proposed 401(k) retirement savings plan but at its proposed cost levels. Finally, on September 14, during their private meeting prior to formal bargaining, DeVincenzi and Don Barbe discussed the parties "key areas" of disagreement, with each restating his party's positions, and that, after an unsuccessful exploration of "some middle ground," the two "looked at each other and said, look, we gave it our best shot. Shook hands."

Respondent Serramonte Service Plaza asserts that its perception was that the foregoing bilaterally declared state of impasse persisted through its October implementation of the terms of its final contract proposal; however, counsel for the General Counsel and counsel for the Union contend that what was said during the formal across-the-table bargaining on September 14 by Attorney Rosenfeld and what he subsequently stated in letters to Hulteng vitiated any state of impasse between the parties. Initially, in this regard, I note that, during the formal across-the-table bargaining session on September 14 and in subsequent letters, while Hulteng continually reiterated his client's position that it was at "final position" on all contract proposals and did not foresee any possibility of further movement, notwithstanding whatever Barbe said to DeVincenzi on September 14, Rosenfeld continually denied that the parties were at impasse and expressed the Union's willingness to continue bargaining with Respondent Serramonte Service Plaza. Specifically, with regard to the crucial issue of flat-rate compensation, in the his posthearing brief, Rosenfeld states that, at the across-the-table bargaining session on September 14, "the union [made] it clear that it was backing off its position that flat rate was conditioned upon acceptance of the [AI] plans." Although, concededly, what Rosenfeld said on September 14 and wrote in subsequent letters was hardly free from ambiguity,⁵⁵ I believe that Rosenfeld's request for bargaining over employee placement on the flat-rate schedule and what he said, regarding Respondent Serramonte Service Plaza's proposed 401(k) retirement savings plan, should have caused the latter to contemplate whether the Union was reconsidering linking acceptance of flat-rate compensation to the Company's acceptance of the AI health and pension plans. Thus, there is no dispute that, on September 14, Rosenfeld spent considerable time questioning DeVincenzi about Respondent Serramonte Service Plaza's criteria for placing bargaining unit employees on the flat-rate schedule, with such leading to DeVincenzi listing the factors that would be considered and a discussion of the placement of particular individuals. Moreover, with regard to the proposed 401(k) plan, Karen Rubenstein admitted that Rosenfeld said that the Union wanted to take a closer look at the plan because it did not appear that the AI pension plan would be acceptable to Respondent Serramonte Service Plaza and then requested copies of the 401(k) plan and accompanying financial statements in order to determine if such would be acceptable to the Union. While counsel for Respondent Serramonte Service Plaza argues that Rosenfeld was engaged in mere "legal posturing" and only had a "feigned interest" in the placement of employees in a flat-rate system,⁵⁶ during the following month, the former did little to test Rosenfeld's sincerity. In this regard, rather than probing Rosenfeld's frankness, Hulteng merely repeated his demands for counterproposals, and 10 days elapsed before

⁵⁵ Both in his testimony as to what he said to Hulteng on September 14 and in his letters to Hulteng dated September 18 and 30, Rosenfeld's words were that the Union had "indicated its willingness" to accept flat rate.

⁵⁶ In this regard, inasmuch as Respondents chose to offer no surrebuttal, I credit Glenn Gandolfo's rebuttal testimony that the Union had accepted Respondent Serramonte Oldsmobile's IRA retirement savings plan in the parties' 1983 through 1986 collective-bargaining agreement. In these circumstances, similar acquiescence by the Union was not an unforeseeable prospect.

Respondent Serramonte Service Plaza responded to Rosenfeld's request for a copy of the proposed 401(k) plan and, even then, rather than mailing the copy directly to Rosenfeld, the Company circuitously gave it to an employee, who, then, was supposed to give it to Barbe, who, in turn, was to transmit the document to Rosenfeld. As a consequence, the latter did not receive the copy of the 401(k) plan until sometime after September 30 and did not acknowledge receipt until October 16—4 days after Hulteng announced Respondent Serramonte Service Plaza's pending implementation of its final offer. Finally, while one aspect of the parties' asserted bargaining impasse was the Union's insistence that Respondent Serramonte Service Plaza accede to the existing Serramonte Oldsmobile contract language, both Rubenstein and DeVincenzi admitted that, on September 14, Rosenfeld said that the Union would accept many of Respondent Serramonte Service Plaza's proposed contractual provisions, even those considered to be harmful to the employees, and Rubenstein considered such to be a concession from the Union. Surely, this movement from the Union might have engendered inquiries from Respondent Serramonte Service Plaza but none were forthcoming.

There can be no doubt that all the elements of a genuine impasse in bargaining were in place after the private conversation between DeVincenzi and Barbe on September 14; nevertheless, and contrary to counsel for Respondents, based upon the foregoing, I am convinced that what occurred during the formal across-the-table bargaining session on September 14, rather than being dismissible as utter posturing or feigned interest, ostensibly represented serious movement by the Union—a substantial effort by Attorney Rosenfeld to bridge the gap in the parties' bargaining positions. Further, I believe that, had Respondent Serramonte Service Plaza's mindset been to objectively consider what Rosenfeld said rather than to view his words as meaningless in the context of earlier events, what should have been evident to Attorneys Hulteng and Rubenstein and to DeVincenzi was that, as Rosenfeld sought to explore the criteria for employee placement under the proposed flat-rate system and stated that his client wished to consider the proffered 401(k) retirement savings plan and could accept other "harmful" provisions, the Union was signaling its apparent willingness to accept flat rate unconditionally and, further, to accept significant portions of Respondent Serramonte Service Plaza's proffered contract language. At the least, Rosenfeld's statements demanded testing; however, as set forth above, Respondent Serramonte Service Plaza virtually ignored and failed to probe the Union's announced changes of position and, then, unaccountably delayed in providing the requested 401(k) information to the Union's attorney, thereby affording him scant time in which to examine the material and formulate a response prior to Respondent Serramonte Service Plaza's implementation of its final offer.⁵⁷ In finding that what Rosenfeld said, during the bargaining, seemingly negated the existence of impasse between the parties, I do not mean to

⁵⁷ As to the tentatively scheduled September 21 bargaining session, it appears to have been rather disingenuous of counsel for Respondent Serramonte Service Plaza to have demanded new contract proposals from the Union, prior to the meeting, in order to consider whether or not to attend when it knew that the information would be utilized for possible new proposals but had not yet provided the requested 401(k) material to Rosenfeld.

suggest either that Rosenfeld was being entirely candid or that, ultimately, the Union would have acceded to many, or all, of Respondent Serramonte Service Plaza's contract demands. Rather, as Rosenfeld did not have the requested 401(k) plan information for a sufficient period of time prior to implementation by Respondent Serramonte Service Plaza, it is impossible to determine if Rosenfeld's and the Union's analysis of the information, in fact, would have resulted in the Union changing its position on the proffered retirement savings plan, and this uncertainty must be resolved against Respondent Serramonte Service Plaza. *Dependable Building Maintenance Co.*, 274 NLRB 216 (1985). In short, as I do not believe that, on October 12, negotiations had reached a definitive point where there was no realistic possibility that continued discussion would have been fruitful, Respondent Serramonte Service Plaza's claim of impasse on that date was premature, and its implementation thereafter of various terms of its final offer that day, without the agreement of the Union, was violative of Section 8(a)(1) and (5) of the Act. *WPIX, Inc.*, 293 NLRB 10 fn. 1 (1989), enf. 906 F.2d 898 (2d Cir. 1990); *Sacramento Union*, 291 NLRB 552, 557 (1988); *Dependable Building Maintenance Co.*, supra.

As to Respondent Serramonte Service Plaza's withdrawal of recognition from the Union as the bargaining representative of its service technicians on December 23, 1992, which conduct, counsel for the General Counsel argues, was violative of Section 8(a)(1) and (5) of the Act, counsel for Respondents argues that Respondent Serramonte Service Plaza lawfully relied upon the petition, distributed by Earl Taylor and executed by 19 individuals, and that the petition gave the Company "objective evidence that a majority of the employees in the bargaining unit no longer wished to be represented by [the Union]." Board law is well settled that, absent unusual circumstances, a labor organization is irrebuttably presumed to enjoy majority support during the first year following certification; however, on expiration of the certification year, the presumption of majority status becomes rebuttable. An employer, which wishes to withdraw recognition from a certified labor organization after 1 year, may rebut the presumption of majority support by showing that, on the day recognition was withdrawn, the labor organization did not, in fact, enjoy majority support or by presenting evidence of a sufficient objective basis for a reasonable doubt of the labor organization's majority status. *Davies Medical Center*, 303 NLRB 195 (1991); *Mental Health Services, Northwest*, 300 NLRB 926 (1990); *Master Slack Corp.*, 271 NLRB 78 (1984). It is equally well settled that an employer may not withdraw recognition from a labor organization by relying upon a loss of majority status attributable to its own unfair labor practices. *Davies Medical Center*, supra; *Master Slack Corp.*, supra; *Celanese Corp. of America*, 95 NLRB 664, 673 (1951). Herein, I have previously concluded that, as its assertion of a bargaining impasse was premature, Respondent Serramonte Service Plaza's implementation of its final contract offer to the Union on or about October 12 was violative of Section 8(a)(1) and (5) of the Act. The Board has held that, by implementing unlawful unilateral changes prior to employee distribution of and execution of a petition, an employer engages in conduct designed to undermine employee support for, and cause their dissatisfaction with, a union and, therefore, will be precluded from relying upon the petition as a basis for questioning the union's majority status. *Powell*

Electrical Mfg. Co., 287 NLRB 969, 969–970 (1987); *Hearst Corp.*, 281 NLRB 764 (1986). Accordingly, I find that Respondent Serramonte Service Plaza was precluded from utilizing the Taylor petition as a basis for questioning the Union's continuing majority status⁵⁸ and that, by withdrawing recognition from the Union on December 23, Respondent Serramonte Service Plaza engaged in additional conduct violative of Section 8(a)(1) and (5) of the Act. *Powell Electrical*, supra.⁵⁹

Finally, with regard to Respondent *Serramonte Service Plaza*, it is alleged, and there is no dispute, that, in February or March 1993, said Respondent implemented changes in the bargaining unit employees' health insurance and retirement plans, with the changes corresponding to that which was proposed to the Union in Respondent Serramonte Service Plaza's final contract offer and the minor changes announced in Hulteng's November 13 letter to Rosenfeld, and that the implementation was done without the consent of the Union. I have previously concluded that the parties had not reached a genuine impasse in their bargaining prior to Respondent Serramonte Service Plaza's implementation of most of its final contract offer in October. Furthermore, between that conduct and Hulteng's November 13 letter, despite several requests from the Union, no further bargaining sessions were held. Slightly over a month later, Respondent Serramonte Service Plaza unlawfully withdrew recognition from the Union as the bargaining representative of the bargaining unit employees, and, of course, no further bargaining between the parties occurred after that date. In these circumstances, Re-

⁵⁸ In his posthearing brief, counsel argues that the Taylor petition also served as the basis for a good-faith doubt of the Union's continued majority status; however, in light of its unremedied unfair labor practices, Respondent Serramonte Service Plaza likewise is precluded from using the petition as the basis for such an assertion.

⁵⁹ Even assuming that a genuine bargaining impasse existed and that Respondent Serramonte Service Plaza lawfully implemented its final offer to the Union in October 1992, I do not believe that the former could lawfully rely upon the Taylor petition as a basis for concluding that the Union had lost its majority standing. Thus, the certified bargaining unit included Respondent Serramonte Service Plaza's Nissan-Isuzu service technicians, Lincoln-Mercury service technicians, and Chrysler-Plymouth service technicians, and there is no record evidence that the Union ever agreed to changing its scope. Moreover, counsel for Respondents attached the Regional Director's Decision and Direction of Election to his posthearing brief. The document is, of course, a public document, and I note that, therein, he wrote that the parties had stipulated that the employees of Serramonte Mitsubishi were specifically excluded from the bargaining unit. Furthermore, it appears that Serramonte Mitsubishi is a separate and distinct corporation from Respondent Serramonte Service Plaza, and there is no record evidence that, when the service employees of the former were moved into the latter's facility, they became Respondent Serramonte Service Plaza's employees. Also, the record establishes that, although they were moved to a facility a quarter of a mile from Respondent Serramonte Service Plaza's facility, the Lincoln-Mercury employees continued to have the same terms and conditions of employment as the other bargaining unit employees. In these circumstances, noting that six Mitsubishi service technicians, who had not voted in the NLRB election and were never represented by the Union, executed the Taylor petition, I do not believe that Respondent Serramonte Service Plaza was privileged to unilaterally change the certified bargaining unit by including the Mitsubishi employees and excluding the Lincoln-Mercury employees and to utilize the Taylor petition as justifying an assertion that the Union had, in fact, lost its majority status.

spondent Serramonte Service Plaza's implementation of its proposed health insurance and retirement plans clearly was violative of Section 8(a)(1) and (5) of the Act, and I so find. *Powell Electrical*, supra.

With regard to Respondent Serramonte Oldsmobile, I turn initially to consideration of whether the alleged unilateral changes in its bargaining unit employees' terms and conditions of employment, implemented on or about September 2, 1992, were violative of Section 8(a)(1) and (5) of the Act. There is, of course, no dispute that, on that date, asserting that the Union had waived its right to bargain for a successor collective-bargaining agreement, Respondent Serramonte Oldsmobile implemented most of the terms of its final contract proposal to the Union without the assent of the Union. In urging that the said unilateral act was justified, counsel for Respondents initially contends that Respondent Serramonte Oldsmobile's above-described negotiations with the Union had reached the point of impasse, and, on this point, argues that the bargaining must not be considered in isolation from the negotiations between Respondent Serramonte Service Plaza and the Union as the same parties and same issues were involved; that the Union's bargaining strategy of having no proposals to present was adopted because the parties were nearing impasse in the Respondent Serramonte Service Plaza negotiations; and that, despite being given ample warning that the Company was prepared to implement on or after August 31, the Union refused to meet more frequently and, by the end of August, had no future meeting dates for the continuation of bargaining. Even conceding the likelihood that the Union's spokesperson in the Respondent Serramonte Oldsmobile negotiations, Glenn Gandolfo,⁶⁰ was well aware of what Respondent Serramonte Service Plaza was offering to the Union and the probability that the Union had devised some sort of strategy in light of what had occurred in the Respondent Serramonte Service Plaza bargaining,⁶¹ the facts remain that a separate employer and a separate bargaining unit were involved in the Respondent Serramonte Oldsmobile negotiations and that, given the longstanding collective-bargaining relationship, what may well have been acceptable to the Union in a mature bargaining relationship, such as with Respondent Serramonte Oldsmobile, may not have been acceptable during Respondent Serramonte Service Plaza's initial contract bargaining. Moreover, although not free from doubt, the Union may simply have not believed Hulteng's

⁶⁰ Gandolfo's testimonial demeanor was that of a most untrustworthy witness. Significant portions of his sworn trial testimony was contradicted by his sworn pretrial affidavit testimony and major portions of his testimony were rather incredible. Accordingly, except when corroborated by others, I place no reliance upon his testimony herein.

⁶¹ In this regard, there is record evidence that Gandolfo participated in, at least, two staff meetings during which the Respondent Serramonte Service Plaza negotiations were discussed. Gandolfo conceded that he was informed that Respondent Serramonte Oldsmobile would offer the Union a proposal similar to that which was offered by Respondent Serramonte Service Plaza, and I do not believe his incredible testimony that he neither was interested in nor inquired about the specifics of the latter's contract proposals. I believe the state of the record warrants the conclusion that a strategy was discussed for the Union to frustrate the bargaining with Respondent Serramonte Oldsmobile in order to forestall any assertion of impasse by the latter so as to justify implementation of what were, to the Union, odious contract terms.

warnings that Respondent Serramonte Oldsmobile would implement any contract terms after just a month of bargaining. In short, I see no reason why the Board's traditional criteria for determining the existence of an impasse in bargaining, as set forth in *Taft Broadcasting Co.*, supra, should not be utilized for determining the existence of impasse herein prior to September 2. Accordingly, I note that, while the General Counsel has not questioned the good faith of Respondent Serramonte Oldsmobile, the Company's imposition of what, in effect, became a one month deadline for the conclusion of bargaining seems antithetical to said bargaining obligation; that the parties had been engaged in collective bargaining for only a month and had held just three negotiating sessions during said period of time; that the parties had held substantive discussions over only three provisions of Respondent Serramonte Oldsmobile's proposed agreement; that there is no record evidence that the parties had as yet identified the divisive issues between them; and that, while Attorney Hulteng asserted the existence of impasse, such certainly was not a mutually held position. Rather than impasse, I believe that, when Respondent Serramonte Oldsmobile implemented its last offer, the parties' negotiators were continuing to posture and had not yet commenced the hard bargaining necessary for agreement and that, therefore, Hulteng's assertion of impasse was woefully premature.

Respondent Serramonte Oldsmobile's next defense to the allegation that, on September 2, it acted unlawfully by implementing its final contract offer to the Union, is legally more compelling and is grounded in one of two limited exceptions to the general rule that, when, as here, parties are engaged in negotiations, the employer's obligation is to refrain from implementation of contract terms unless and until an overall impasse has been reached in bargaining for the agreement as a whole. These so-called "limited" exceptions, as recognized by the Board, may be found when, in response to an employer's "diligent and earnest efforts" to engage in bargaining, a union insists on continually avoiding or delaying bargaining or when "economical exigencies" compel an employer's prompt action. *Fire Fighters*, 304 NLRB 401, 402 (1991); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991); *M & M Contractors*, 262 NLRB 1472 (1982). Unlike the requirement for an impasse defense that both parties perceive their bargaining to be at a point of deadlock, in analyzing the validity of a dilatory bargaining defense, "a single party's perception of the other party's tactics is a relevant consideration in determining whether unilateral implementation is a lawful act." *Southwestern Portland Cement Co.*, 289 NLRB 1264, 1272 fn. 9 (1988). Herein, counsel for Respondents argues that the Union's entire course and conduct, prior to the start of collective bargaining and during the instant negotiations, evidenced "a legal strategy to obstruct negotiations," one grounded in the tactics of avoidance and delay, and I find merit in these contentions.

Initially, in agreement with counsel for Respondents, I find that, in April 1992, as its negotiations with Respondent Serramonte Service Plaza seemed to be relentlessly moving toward impasse, as the latter had proposed, in the negotiations, terms and conditions of employment, including a flat-rate compensation system and health insurance and retirement savings plans, which differed from the existing Respondent Serramonte Oldsmobile bargaining unit employees' terms and conditions of employment, as negotiations for a

successor agreement with Respondent Serramonte Oldsmobile were about to commence, and as Respondents' counsel had informed Nick Shmatovich that the same unacceptable contract terms, as offered to Respondent Serramonte Service Plaza, would be offered to Respondent Serramonte Oldsmobile, the Union's leadership adopted a strategy designed to frustrate the latter negotiations and impede any possibility of impasse and eventual implementation of these unacceptable terms and conditions of employment. In this regard, I believe that the Union's claim, that Respondent Serramonte Oldsmobile had failed to serve timely notice of its desire to open the existing collective-bargaining agreement for negotiations, thereby causing the rolling over of the agreement for another year, which was assiduously asserted by Glenn Gandolfo for, at least, 2 months prior to the start of negotiations as justification for not complying with Respondent Serramonte Oldsmobile's request for bargaining to commence, was spurious and a sham. Thus, Attorney Hulteng's contract reopening letter was mailed to the individual, whom he reasonably believed would represent the Union in negotiations—Nick Shmatovich. On this point, not only must I place no reliance upon Gandolfo's uncorroborated hearsay testimony that J. B. Martin, the Union's area director, informed him that he (Martin) had informed Hulteng of Gandolfo's appointment as the chief spokesman for the Union in dealing with Respondent Serramonte Oldsmobile but also I specifically credit Attorney Hulteng's denial that such a conversation with Martin occurred and his testimony that, in March, Nick Shmatovich told him he (Shmatovich) would be the Union's chief spokesperson in the Respondent Serramonte Oldsmobile negotiations. That Hulteng could reasonably rely upon what Shmatovich said may be seen from the latter's April 22 reply to Hulteng's April 17 letter, wherein he stated that Hulteng should communicate with him to arrange dates and times for bargaining, and, as a copy of the letter was sent to him, I also do not credit Gandolfo's denial of having seen Shmatovich's letter to Hulteng prior to the start of bargaining. Further, after contract negotiations commenced, rather than readily accepting Hulteng's offer of expedited arbitration of the Union's contract rollover grievance, Gandolfo, at first, rejected the offer and the Union's attorney did not confirm acceptance of the offer until after Respondent Serramonte Oldsmobile implemented its final offer. Finally, clearly revealing the Union's canard, after the commencement of the arbitration proceeding in July 1993 but prior to the issuance of a decision, based upon its conclusion that Respondent Serramonte Oldsmobile would prevail, the Union abruptly withdrew the rollover grievance.

Once bargaining commenced on July 29, 3-1/2 months after Respondent Serramonte Oldsmobile's request for such, the Union engaged in further dilatory tactics, designed, I believe, to forestall a possible deadlock in the negotiations. Thus, relying upon the credible testimony of Attorneys Hulteng and Elizabeth Franklin, with both corroborated by Karen Rubenstein, over the comparatively incredible testimony of Gandolfo, I find that, during each bargaining session, significant portions of time were wasted by Gandolfo's baseless insistence that the expired collective-bargaining agreement had rolled over for another year and that he was bargaining for the next contract. Next, and of the utmost most significance to my belief that his aim was to frustrate the bargaining between the parties, was Gandolfo's continued

insistence, throughout the course of the bargaining, in the face of repeated demands from Respondent Serramonte Oldsmobile's attorneys, that he could not prepare any contract proposals inasmuch as he had not seen the Company's initial proposal prior to July 29, as he did not understand the company proposals, and as he had no knowledge of what was transpiring in the Respondent Serramonte Service Plaza negotiations. On this point, it is extremely difficult to believe, and I do not, that an experienced negotiator, such as Gandolfo, was unable to prepare some sort of counterproposals for consideration by Hulteng. Further, given the fact that Hulteng and Rubenstein had twice mailed copies of Respondent Serramonte Oldsmobile's initial proposal to Gandolfo prior to the start of bargaining, I cannot accept the latter's denial of having seen the proposal prior to July 29. With regard to Gandolfo's asserted lack of knowledge of the contract bargaining between the Union and Respondent Serramonte Service Plaza, I found his testimony ludicrous that, having attended strategy sessions, at which said bargaining was discussed and with knowledge that Respondent Serramonte Oldsmobile's contract proposals would be virtually identical, he neither ever inquired into the substance of the proposals nor ever heard such discussed and that he did not care about what occurred and had no time to study what Respondent Serramonte Service Plaza was offering. Rather, I believe Gandolfo was well versed in what to expect from Respondent Serramonte Oldsmobile and, as part of the Union's stratagem, feigned ignorance. Additional indicia of the Union's avoidance of its bargaining obligation are that, notwithstanding the commencement of bargaining, Gandolfo had not yet communicated with the bargaining unit employees in order to ascertain what they desired from the bargaining and that, despite Hulteng's threat of implementation if contract negotiations were not concluded by the end of August, other than August 3 and 20, the union negotiators would not commit to other meeting dates in August. Given the stated threat of implementation after August 31, Gandolfo's failure to respond to Franklin's request for bargaining dates after August 20 is an especially egregious example of the Union's dilatory approach to bargaining.

Analyzing the foregoing from Respondent Serramonte Oldsmobile's perspective, the Union's avoidance and delaying tactics appear even more odious. Thus, notwithstanding that, on April 17, in excess of 60 days prior to the expiration of the existing collective-bargaining agreement, Hulteng sent Respondent Serramonte Oldsmobile's notice of contract termination and reopening letter to Nick Shmatovich, whom Hulteng reasonably believed would represent the Union in bargaining with Respondent Serramonte Oldsmobile, and that Hulteng repeatedly demanded that the Union commence bargaining, three and one half months passed by before negotiations on a successor agreement commenced. Moreover, as Respondents' counsel well knew, Gandolfo's rationale for delaying the start of bargaining, that Respondent Serramonte Oldsmobile had failed to reopen the contract for negotiations in a timely manner, was an utter sham. Further, after bargaining finally commenced, notwithstanding Hulteng's warning, that, if bargaining was not concluded by September 1, Respondent Serramonte Oldsmobile reserved the right to implement its final offer, the Union's negotiators procrastinated in accepting expedited arbitration of Gandolfo's claim that the Company had failed to timely reopen the expired con-

tract, had no prior communication with the bargaining unit employees in order to ascertain what they desired from the bargaining, failed to prepare any bargaining proposals, conceded having attended strategy sessions but claimed ignorance of the virtually identical Respondent Serramonte Service Plaza bargaining positions and proposals, and, despite Hulteng's aforementioned warning, would not agree to bargaining dates late in August. Clearly, in view of the foregoing, Attorney Hulteng and his client reasonably concluded that, well aware of the nature of Respondent Serramonte Oldsmobile's bargaining proposals and of the intolerable changes in the bargaining unit employees' terms and conditions of employment if such became effective and, in order to deny the Company the opportunity to assert impasse and unilaterally implement its proposals, the Union's strategy and conduct was to intentionally avoid and delay bargaining herein. In these circumstances, especially noting that Respondent Serramonte Oldsmobile made repeated demands for the Union to bargain, that the latter avoided bargaining for in excess of 3 months, that, despite undoubtedly having been aware, at all times, of the contents of Respondent Serramonte Oldsmobile's contract proposals, the Union made no counterproposals, and that, during the month of actual negotiations, the latter evidenced no real effort to engage in sustained bargaining, I find that this labor organization engaged in a strategy of continually avoiding or delaying bargaining with Respondent Serramonte Oldsmobile and that, therefore, on September 2, the latter was justified in implementing portions of its last contract offer to the Union. *Southwestern Portland Cement Co.*, supra at 1273; *R. A. Hatch Co.*, 263 NLRB 1221, 1223 (1982); *M & M Building Contractors*, supra. Accordingly, I shall recommend dismissal of paragraph 8 of the complaint in Case 20-CA-24875.

It is next alleged that Respondent Serramonte Oldsmobile violated Section 8(a)(1) and (5) of the Act by, during the three bargaining sessions, failing to inform the Union of the meaning of its contract proposals and by failing to provide requested wage information to the Union in a timely manner. As support for the former allegation, counsel for the General Counsel relies upon Gandolfo's testimony that, at the August 3 bargaining session, he asked Hulteng and, at the August 20 bargaining session, he asked Franklin to go through and explain Respondent Serramonte Oldsmobile's entire contract proposal and that both attorneys refused, saying that Respondent Serramonte Service Plaza had been engaged in bargaining over the identical contract proposals for 10 months and that, if Gandolfo wanted to learn about the meaning and interpretations of said proposals, he should speak to Nick Shmatovich. Based upon my resolutions of the comparative credibility of the witnesses, however, I credit the denials of Hulteng and Franklin that either ever refused to discuss Respondent Serramonte Oldsmobile's contract offer in detail or that either told Gandolfo to speak to Shmatovich in order to discover the Company's positions and note, in this regard, that, at the second bargaining session, when Gandolfo requested to discuss Respondent Serramonte Oldsmobile's proposal section by section, Hulteng agreed, and the parties began detailed bargaining over the initial sections of the proposed contract. In these circumstances, I find no merit to the initial failure to provide information allegation and shall recommend dismissal of paragraph 7(a) of the complaint in Case 20-CA-24875. As to Respondent Serramonte Olds-

mobile's failure to provide financial information to the Union in a timely manner, the record is uncontroverted that, at the third bargaining session on August 20, Gandolfo requested information concerning the classifications, wage rates, and wages of all bargaining unit employees under the recently expired collective-bargaining agreement and that, in a letter dated September 2, information regarding the bargaining unit employees' classifications and wage rates under the newly implemented flat-rated compensation system was provided to the Union. I note that, while the provided information does not directly correspond to what was requested by Gandolfo, the complaint allegation only asserts that such was not provided in a timely manner and that, despite being aware of the nature of Gandolfo's testimony, counsel for the General Counsel never sought to amend the applicable complaint paragraph. In support of the allegation, counsel asserts that the information "could have been more quickly provided;" however, the Board requires only that an employer make a diligent effort to promptly provide requested information and short delays have been held to be reasonable. *General Electric Co.*, 290 NLRB 1138 (1988); *United Engines, Inc.*, 222 NLRB 50 (1976). Herein, the delay was only for 12 days, and, as the Union evidenced no desire to hurriedly resume bargaining in the interim in order to meet Respondent Serramonte Oldsmobile's August 31 deadline, it can not be said that the delay had any deleterious effect. Accordingly, I find no merit to the allegation and shall recommend dismissal of paragraph 7(b) of the complaint in Case 20-CA-24875.

Turning to the complaint allegations, pertaining to Respondents' implementation of new health insurance and retirement savings plans for the Respondent Serramonte Oldsmobile bargaining unit employees in February or March 1993, counsel for the General Counsel argues that, in the absence of impasse, the conduct was violative of Section 8(a)(1) and (5) of the Act. In this regard, I note, at the outset, that Respondent Serramonte Oldsmobile's final contract offer's health and retirement savings provisions were not implemented by the Company in October 1992; that what the Respondents implemented corresponds to the plans contained in said final offer to the Union as modified in November 1992; and that the Union never agreed to implementation of either the health insurance or retirement savings plans. In defense to the alleged unlawful implementation, counsel for Respondents argues that such was justified as the parties had reached a bargaining impasse and, alternatively, that, despite warnings of implementation, the Union refused to come to the bargaining table after December, thereby waiving its right to bargain. Concerning the matter of impasse, I have previously concluded that no impasse existed in October 1992. Subsequently, after Hulteng wrote to Gandolfo on November 13 that Respondent Serramonte Oldsmobile desired to change its health insurance and 401(k) plan proposals and then implement said benefits, two December bargaining sessions were held at which the parties held lengthy discussions on the benefits plans. No agreements were reached, and the Union later submitted counterproposals, which Respondent Serramonte Oldsmobile rejected. Thereafter, while asserting deadlock, the latter announced that the administrator of its 401(k) plan would be changed. The Union denied the existence of impasse and demanded additional bargaining over this and other matters pertaining to the proposals; however,

due to scheduling conflicts and illness, no further bargaining occurred and, with matters in said posture, Respondent Serramonte Oldsmobile implemented its proposed benefits plans. Without regard to other factors, the law is clear that, in order to find impasse, both parties must believe that they are at the end of their bargaining rope. *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1177 (5th Cir. 1982). Herein, the parties' correspondence demonstrates that, while Respondent Serramonte Oldsmobile's attorney Hulteng repeatedly asserted impasse, the Union's attorney Rosenfeld repeatedly denied that a deadlock existed and insisted that continued bargaining was required. Given that Respondents announced a change of administrators for its 401(k) plan in January, a matter which, in my view, clearly represented a significant change of circumstances and warranted further bargaining, Rosenfeld's denials of deadlock may not be blithely dismissed as being insincere, and I find the defense of impasse to be without merit. Regarding the waiver defense, the law is longstanding and clear that, in order to constitute a waiver of its statutory right to bargain over changes in terms and conditions of employment, a labor organization's conduct must be "clear and unmistakable." *Metropolitan Edison v. NLRB*, 460 U.S. 693 (1983); *Mount Hope Trucking Co.*, 313 NLRB 262 (1993). Herein, counsel for Respondents argues that, by refusing to come to the bargaining table after December 1992 and evidencing an "avoidance of bargaining," the Union waived its right to do so. Contrary to counsel, rather than being unmistakable, what occurred in January is, at best, clouded in ambiguity. Thus, the only record evidence is contained in the correspondence between attorneys Hulteng and Rosenfeld, with each accusing the other of being unavailable to meet; there is no basis for finding fault, and I shall not speculate. Further, notwithstanding counsel's assertion that the Union representatives refused to make themselves available after December, the record merely establishes that a bargaining session was scheduled for February 5 and that Gandolfo became ill and canceled the meeting. In these circumstances, waiver has not been established, and I find that Respondents' unilateral implementation of changes in the Respondent Serramonte Oldsmobile bargaining unit employees' health insurance and retirement plans in February and March 1993 constituted conduct violative of Section 8(a)(1) and (5) of the Act. *Mount Hope Trucking*, supra; *Bottom Line Enterprises*, supra.

Turning next to the complaint allegation that Respondent Serramonte Oldsmobile unlawfully dealt directly with bargaining unit employees in derogation of its obligation to bargain with the Union, there is no dispute that, on September 2, 1992, at the same time it implemented portions of its final contract offer to the Union, including the flat-rate compensation system, Respondent Serramonte Oldsmobile announced that it would not compensate the its bargaining unit employees for the time required for performing safety inspections; that Shop Steward Ghiorso protested to the service manager; that, after Respondents refused to reconsider this decision, Ghiorso refused to perform the disputed work; that, subsequently, Ghiorso met with Barry DeVincenzi, who said Ghiorso was required to do safety inspections and ordered the service manager to issue a written reprimand to the shop steward; and that, the next day, the service manager gave Ghiorso the reprimand and, at the same time, said DeVincenzi had decided to compensate bargaining unit em-

ployees for one-tenth of an hour for performing safety inspections. Further, not only did DeVincenzi testify, without contradiction, that Respondent Serramonte Oldsmobile's past practice was to adjust pay disputes with shop stewards but also another shop steward, Harlan Silva, admitted that it was common for the shop stewards to meet with DeVincenzi regarding shop related controversies and that most were resolved without intervention by a union official or objections by the Union. Contrary to counsel for the General Counsel, I fail to see how the foregoing establishes direct dealing. Thus, the essence of such an unfair labor practice is that, in derogation of its obligation to bargain with the bargaining unit employees' recognized bargaining representative, an employer meets directly with employees in order to resolve a matter concerning their terms and conditions of employment. Herein, rather than bargaining with or even discussing payment for safety inspections, DeVincenzi met with the shop steward over the latter's refusal to perform the foregoing work, ordered discipline for him and later, without consulting with the shop steward, decided to compensate employees for a tenth of an hour of work for safety inspections. Moreover, if, arguably, the facts do establish direct dealing over compensation, inasmuch as the parties' past practice was to permit DeVincenzi and the shop steward to resolve similar compensation problems without the intervention of the Union, Respondent Serramonte Oldsmobile's conduct herein was not unlawful. Accordingly, what occurred does not establish direct dealing so as to be violative of the Act, and, in said circumstances, I shall recommend dismissal of paragraph 9 of the complaint in Case 20-CA-24875.⁶²

Regarding the complaint allegation that Respondents acted in violation of Section 8(a)(1) and (5) of the Act by unilaterally, without giving the Union an opportunity to bargain, changing the job allocation times for purposes of compensation, there is no dispute as to what occurred. Thus, I find that, in April, after the relocation of the bargaining unit employees to the Respondent Serramonte Service Plaza facility, Respondents modified the 7500-, 15,000-, and 30,000-mile service menus for General Motors vehicles and, in the process, unilaterally, without notice to or offering to bargain with the Union, reduced the flat-rate time allocations for particular job tasks, thereby reducing the incomes of the former Respondent Serramonte Oldsmobile bargaining unit employees, and that, in June, after complaints from the employees, again without notice to or affording the Union an opportunity to bargain, Respondents again adjusted the contested flat-rate time allocations. Although not denying the foregoing facts, Barry DeVincenzi denied that the Union had ever previously demanded bargaining on the implementation of service menu changes. Counsel for the General Counsel argues that, by engaging in the foregoing conduct, Respondents engaged in acts violative of the Act, and I agree. Thus, there can be no doubt that, under a flat-rate system, what employees may earn for a particular job is directly related to the specified time allocations for that job and that, by adjusting the time

⁶² Although it might be argued that, if not direct dealing, Respondent Serramonte Oldsmobile engaged in an unlawful unilateral change when DeVincenzi changed the compensation rate for safety inspections, such was not alleged in the applicable complaint paragraph, and, notwithstanding being aware of the facts, counsel for the General Counsel did not move to amend the complaint to allege an unlawful unilateral change. Therefore, no such violation will be found.

upward or downward, an employer affects the earning ability of its employees. Further, whether considered as a separate bargaining unit or as part of the Respondent Serramonte Service Plaza bargaining unit, the former Respondent Serramonte Oldsmobile bargaining unit employees continued to be represented by the Union for purposes of collective bargaining;⁶³ therefore, it was incumbent upon Respondents to have given notice to and offered to bargain with the Union prior to implementing the above-described changes in the employees' terms and conditions of employment. Such was not done,⁶⁴ and, therefore, I find that Respondents engaged in conduct violative of Section 8(a)(1) and (5) of the Act.

Next, it is alleged that Respondents violated Section 8(a)(1) and (5) of the Act in October 1993 by, unilaterally, without notice to or affording the Union the opportunity to bargain, implementing changes in the Respondent Serramonte Service Plaza's and the former Respondent Serramonte Oldsmobile's bargaining unit employees' terms and conditions of employment and by failing to provide information, necessary for purposes of collective bargaining, to the Union in a timely manner. In this regard, there is no dispute that, on September 14, Attorney Hulteng wrote to Attorney Rosenfeld, announcing Respondents' intent to utilize a new provider for portions of the comprehensive health insurance plan and to add "certain enhancements" to the benefits package on October 1 and stating Respondents' willingness to bargain over said changes prior to implementation; that, a week later, Rosenfeld wrote to Hulteng, requesting certain information necessary for evaluating the effect of the proposed changes, including the names of bargaining unit employees, their job classifications, rates of pay, and dependents, the ages and sex of the latter, and Respondents' current contribution amounts for each employee. On September 24, Hulteng wrote again to Rosenfeld, stating Respondents' desire to implement by October 1 and suggesting immediate bargaining dates, and, 5 days later, Rosenfeld wrote Hulteng, asking why there was such urgency to implement. There is no dispute that the announced changes were implemented by Respondents on October 1, and, on October 22, Respondents provided the requested information to the Union. On the latter point, Barry DeVincenzi attributed the delay in transmitting the material to the Union to difficulties in collating the material. There can be no doubt that Respondents' unilateral implementation of changes in the bargaining unit employees' health insurance plans constituted a violation of Section 8(a)(1) and (5) of the Act. Thus, there can be no valid assertion of a bargaining impasse; indeed, no bargaining had occurred and Respondents had not yet complied with an information request. Moreover, implementation occurred subsequent to earlier, unremedied unfair labor practices including an unlawful withdrawal of recognition from the Union as the bargaining representative for the Respondent Serramonte Service Plaza

⁶³ Of course, I have previously concluded that Respondent Serramonte Service Plaza's withdrawal of recognition from the Union was unlawful.

⁶⁴ Contrary to the testimony of Barry DeVincenzi, it is irrelevant that the Union had never previously sought to bargain over service menus. On this point, I do not mean to suggest that service menus are a subject for bargaining. Rather, my only finding herein is that Respondents have a legal obligation to refrain from unilaterally changing the time allocations for particular jobs under the flat-rate system without permitting the Union an opportunity to bargain.

bargaining unit employees and unlawful unilateral changes in the terms and conditions of employment for those employees and for the former Respondent Serramonte Oldsmobile bargaining unit employees, with said changes ironically including implementation of the health plan for which Respondents implemented changes on October 1. As to the alleged failure to provide the requested information in a timely manner, while normally a short delay in order to collate material would not be unlawful, in the above circumstances, to fail to find an unfair labor practice would be specious. Thus, Rosenfeld informed Hulteng that the requested information was necessary for bargaining; nevertheless, Respondents implemented the above-described changes prior to transmitting the requested information to the Union, thereby rendering the information useless for its intended purpose. Accordingly, I find that Respondents failed to provide the requested information to the Union in a timely manner and that, therefore, it engaged in conduct violative of Section 8(a)(1) and (5) of the Act.

Finally, I turn to the effect, upon Respondents' continuing bargaining obligations, of Respondent Serramonte Service Plaza's assumption of Respondent Serramonte Oldsmobile's vehicle servicing operations in March 1993 and of the subsequent relocation of the latter's bargaining unit employees to the Respondent Serramonte Service Plaza facility. At the outset, counsel for Respondents contends that, after the relocation, as Respondent Serramonte Oldsmobile's former bargaining unit employees did not have a sufficiently distinct community of interests separating them from the other service technicians, who worked at Respondent Serramonte Service Plaza's facility and who were unrepresented for bargaining purposes, Respondents' duty to bargain with the Union over the former Respondent Serramonte Oldsmobile bargaining unit employees was abrogated. Counsel for the General Counsel argues, to the contrary, that, as what occurred was a mere relocation of the bargaining unit employees, along with the same operations and equipment, a bargaining unit limited to the former Respondent Serramonte Oldsmobile employees remained appropriate. At the outset, contrary to counsel for Respondents, inasmuch as I have previously concluded that Respondent Serramonte Service Plaza unlawfully withdrew recognition from the Union as the majority representative for its bargaining unit employees, said employees continued to be represented by the Union for purposes of collective bargaining, and, therefore, notwithstanding whether the former Respondent Serramonte Oldsmobile bargaining unit employees are considered to have become accreted to the larger unit or to constitute a separate appropriate unit, Respondent Serramonte Service Plaza, which, in the circumstances herein, appears to have been a successor to Respondent Serramonte Oldsmobile,⁶⁵ is obligated to continue to recognize and bargain with the Union as the bargaining representative of the employees. Accordingly, the real issue herein, raised by Respondents' contention that the former Respondent Serramonte Oldsmobile bargaining unit employees did not have a community of interests distinct from Respond-

⁶⁵ Thus, although everything was relocated to its own facility, Respondent Serramonte Service Plaza assumed Respondent Serramonte Oldsmobile's entire automotive service operations without a hiatus in business operations, utilized 75 percent of Respondent Serramonte Oldsmobile's equipment, and continued to employ all of the latter's service technicians in the same job classifications.

ent Serramonte Service Plaza's bargaining unit employees, concerns the existence of any prospective bargaining obligation for Respondents for a bargaining unit limited to the former employees of Respondent Serramonte Oldsmobile.⁶⁶

In support of his position that relocation has no real effect upon the continued appropriateness of a unit, counsel for the General Counsel argues that, as all of the employees, operations, and equipment remained essentially the same, the effect on the bargaining relationship was not substantial and the former Respondent Serramonte Oldsmobile employees bargaining unit remains an appropriate one. The cited cases, however, *Westwood Import Co.*, 251 NLRB 1213 (1980), and *Mass Machine & Stamping*, 231 NLRB 801 (1977), are in apposite inasmuch as both involve the movement of the same employer's employees, jobs, equipment, and operations from one location to another and do not involve the question of the appropriateness of a unit limited to only the former bargaining unit employees at the second location; while, in contrast, the instant matter involves a successorship situation and, as Respondent Serramonte Service Plaza employs employees working in the same job classifications, with similar terms and conditions of employment, but on different products, an issue as to whether a bargaining unit limited to the predecessor's employees may be found "independently appropriate by application of any traditional tests." *Kelly Business Furniture*, 288 NLRB 474, 478 (1988). Thus, utilizing traditional community-of-interests criteria,⁶⁷ while the former Respondent Serramonte Oldsmobile bargaining unit employees use the same tool room as the Nissan-Isuzu service technicians, share a parking area with the other facility employees, and are all under the ultimate supervision of DeVincenzi, unlike the Respondent Serramonte Service Plaza bargaining unit employees, they must be compensated under a flat rate rather than hourly system, they are covered under the AI health insurance and retirement savings plans as set forth in the most recent collective-bargaining agreement between Respondent Serramonte Oldsmobile and the Union, their remaining terms and conditions of employment are those lawfully implemented by Respondent Serramonte Oldsmobile on September 2, 1992, and, while not controlling by itself, they work in a separate area of the Respondent Serramonte Service Plaza facility almost exclusively on General Motors vehicles with GM factory equipment. In these circumstances, especially when viewed from the perspective reflecting the existence of the extensive unfair labor practices found herein, I believe that the former Respondent Serramonte Oldsmobile bargaining unit employees do possess a sufficient community of interests distinct from those of the Respondent Serramonte Service Plaza bargaining unit em-

⁶⁶ Inasmuch as I have not found any unfair labor practices to have been committed by Respondent Serramonte Oldsmobile as a separate corporate entity, there is, of course, no issue of past liability. Thus, any unfair labor practices, affecting the former Respondent Serramonte Oldsmobile bargaining unit employees, appear to have been committed subsequent to the dissolution of the latter as a corporate entity and at approximately the time that its assets were assumed by Transcar Leasing, Inc.

⁶⁷ In discussing any differences or similarities in terms and conditions of employment, rather than utilizing what was in effect under the legal fiction of Respondents' unfair labor practices, I have been guided by what should have been in effect had no unfair labor practices been committed.

ployees to constitute a separate appropriate unit. Therefore, I believe that Respondents continue to have an obligation to bargain with the Union for a unit of employees, limited to the former Respondent Serramonte Oldsmobile bargaining unit employees.

CONCLUSIONS OF LAW

1. Respondent Serramonte Service Plaza is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. At all times material, until, at least, February 1, 1993, Respondent Serramonte Oldsmobile was an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

4. (a) At all times material, the Union was, and is, the exclusive bargaining representative of Respondent Serramonte Service Plaza's employees in the following appropriate unit: All full-time and regular part-time service technicians, including Chrysler-Plymouth/Lincoln Mercury service technicians, Nissan-Isuzu service technicians, PDI technicians, apprentices, utility mechanics, trainee mechanics, and working technicians; excluding all other employees, PDI detailing employees, body shop employees, sales employees, lot attendants, warranty administrators, service advisors, filing clerks, cashiers, the Chrysler-Plymouth dispatcher, shuttle drivers, maintenance person, parts department employees, office clerical employees, guards, and supervisors as defined by the Act.

(b) At all times material, the Union was, and is, the exclusive bargaining representative in the following appropriate unit: All employees performing work covered by the 1989-1992 collective-bargaining agreement between Respondent Serramonte Oldsmobile and the Union.

5. By unilaterally, in the absence of a genuine impasse in bargaining with the Union as the exclusive representative for purposes of collective bargaining of the appropriate unit of employees described in paragraph 4(a) above, implementing changes in the terms and conditions of employment of the bargaining unit employees in October 1992, Respondent Serramonte Service Plaza engaged in conduct violative of Section 8(a)(1) and (5) of the Act.

6. By withdrawing recognition from the Union as the exclusive representative for purposes of collective bargaining of the appropriate unit of employees described in paragraph 4(a) above, Respondent Serramonte Service Plaza engaged in conduct violative of Section 8(a)(1) and (5) of the Act.

7. By unilaterally, without bargaining with or the consent of the Union as the exclusive representative for purposes of collective bargaining of the appropriate unit of employees described in paragraph 4(a) above, implementing changes in the employees' health insurance and retirement savings plans in or about February and March 1993, Respondent Serramonte Service Plaza engaged in conduct violative of Section 8(a)(1) and (5) of the Act.

8. By unilaterally, without the existence of a genuine impasse in bargaining with the Union as the representative for purposes of collective bargaining of the appropriate unit of employees described in paragraph 4(b) above, implementing changes in the employees' health insurance and retirement savings plans in or about February and March 1993, Re-

spondents engaged in conduct violative of Section 8(a)(1) and (5) of the Act.

9. By unilaterally, without notice to or bargaining with the Union as the representative for purposes of collective bargaining of the appropriate unit of employees described in paragraph 4(b) above, implementing changes in job allocation times under the flat-rate compensation system in April and June 1993, Respondents engaged in conduct violative of Section 8(a)(1) and (5) of the Act.

10. By unilaterally, without bargaining with or the consent of the Union as the representative for purposes of collective bargaining of the appropriate units of employees described in paragraphs 4(a) and (b) above, implementing changes in the employees' health insurance plan in October 1993, Respondents engaged in conduct violative of Section 8(a)(1) and (5) of the Act.

11. By failing and refusing to provide information, necessary for collective bargaining, to the Union in a timely manner in October 1993, Respondents engaged in conduct violative of Section 8(a)(1) and (5) of the Act.

12. The above-described unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

13. Unless specified above, Respondents engaged in no other unfair labor practices.

THE REMEDY

I have found that Respondents have engaged in serious unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act and shall require them to cease and desist therefrom and to take certain affirmative acts designed to effectuate the policies and purposes of the Act. Prior to delineating the specifics of the remedy, I note, initially, that, with regard to the former Respondent Serramonte Oldsmobile bargaining unit employees, the only unfair labor practices, which directly affected their terms and conditions of employment, were committed subsequent to the dissolution of their former employer and to the assumption of the latter's automotive service operations by Respondent Serramonte Service Plaza. In these circumstances, I believe that the latter, as the successor employer, must be responsible for future bargaining with the Union and for remedying the three unilateral change unfair labor practices and the failure to provide timely information unfair labor practice affecting the employees. Accordingly, I shall recommend, first, that Respondent Serramonte Service Plaza be ordered to bargain with the Union, upon request, as the representative for purposes of collective bargaining of the former Respondent Serramonte Oldsmobile bargaining unit employees. With regard to the unlawful unilateral changes in the former Respondent Serramonte Oldsmobile bargaining unit employees' health insurance and retirement plans, implemented by Respondents in February, March, and October 1993 in the absence of genuine bargaining impasses with the Union, and to Respondents' unlawful failure to continue to make monthly contributions to the AI health and pension benefits funds on behalf of each of the employees since February and March 1993, I shall recommend that Respondent Serramonte Service Plaza, upon the request of the Union, be ordered to resume making monthly payments to the AI health insurance and pension benefits funds in accordance with the former Respondent Serramonte Oldsmobile bargaining unit employees'

terms and conditions of employment extant on or about February 1, 1993; to reimburse the AI health insurance and pension benefits funds for all amounts owed on behalf of the employees from on or about February 1993 until the date on which it commences making monthly payments on behalf of the employees to the respective trust funds;⁶⁸ and to reimburse the former Respondent Serramonte Oldsmobile bargaining unit employees for any medical expenses or other losses attributable to Respondents' failure to make the required payments to the AI health insurance and pension trust funds as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Further, as to Respondents' unlawful unilateral implementation of changes in the time allocations for the flat-rate compensation system for the former Respondent Serramonte Oldsmobile bargaining unit employees in April and June 1993, without affording the Union opportunities to bargain, I shall recommend that, upon the request of the Union, Respondent Serramonte Service Plaza reinstate the time allocations, which existed before the unlawful unilateral changes, and to make whole unit employees for any losses suffered as a result of Respondents' unlawful unilateral changes in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as prescribed in *New Horizons for the Retarded*, supra.

Turning to those unfair labor practices affecting the Respondent Serramonte Service Plaza bargaining unit employees and directly attributable to Respondent Serramonte Service Plaza, I shall recommend, at the outset, that, as such was unlawfully withdrawn, the latter be ordered to continue to recognize the Union as the majority representative of its certified bargaining unit employees. Next, specifically having found that Respondent Serramonte Service Plaza unilaterally implemented its final contract offer to the Union, in October 1992, at a time when no impasse had occurred, I shall recommend that Respondent Serramonte Service Plaza be ordered, upon request, to bargain collectively with the Union on the terms and conditions of employment of the former's bargaining unit employees and, if an agreement is reached, to embody the understanding in a signed agreement. Further, I shall recommend that, upon request of the Union, Respondent Serramonte Service Plaza be ordered to reinstate the wages and terms and conditions of employment which existed prior to October 1992 and to make whole unit employees for any losses suffered as a result of its unlawful action in the manner prescribed in *Ogle Protection Services*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra.⁶⁹ Likewise, with regard to the health insurance plan

⁶⁸ Because the provisions of employee benefits funds are variable and complex, I leave to the compliance stage the question whether Respondent Serramonte Service Plaza must pay additional amounts into any benefit funds to satisfy my "make whole" remedy. *Merryweather Optical Co.*, 240 NLRB 1213 (1979). In addition, pursuant to *Merryweather*, I shall not order the payment of interest on whatever sums are owed to the trust funds.

⁶⁹ Counsel for Respondents argues that, even if Respondent Serramonte Service Plaza prematurely implemented its final contract offer, events subsequent to implementation establish that the Union conceded that there was no prospect of reaching agreement. Accordingly, citing *Dependable Building Maintenance Co.*, supra, counsel argues that this subsequent impasse ended his client's liability for

and retirement savings plan changes, which were unlawfully implemented by Respondent Serramonte Service Plaza on or about February 1 and October 1, 1993, without affording the Union an opportunity to bargain, I shall recommend that, upon the request of the Union, the former be ordered to reinstate whatever health insurance plan and retirement savings plan existed for the bargaining unit employees prior to Respondent Serramonte Service Plaza's unlawful implementation of changes and reimburse bargaining unit employees for any medical expenses or other losses directly attributable to the unlawful unilateral changes, with interest, as provided in *Ogle Protection Service*, supra; *New Horizons for the Retarded*, supra. Finally, I shall require Respondent Serramonte Service Plaza to post a notice, setting forth its obligations.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷⁰

ORDER

A. The Respondents, Serramonte Oldsmobile, Inc., d/b/a Serramonte Oldsmobile, Serramonte Pontiac, Serramonte G.M.C. Trucks and Transcar Leasing, Inc., d/b/a Serramonte Service Plaza, Colma, California, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively in good faith with the Union as the exclusive bargaining representative of the employees in the following appropriate unit by, in the absence of a genuine bargaining impasse, unilaterally implementing changes in the employees' health insurance and pension plans and their flat-rate compensation system work allocation times

All employees performing work covered by the 1989-1992 collective-bargaining agreement between Respondent Serramonte Oldsmobile and the Union.

(b) Failing and refusing to provide information, which is necessary for purposes of collective bargaining, in a timely manner to the Union as the exclusive representative of the aforementioned employees.

(c) In any like or related manner interfering with, restraining, or coercing the aforementioned employees in the exercise of their rights under the Act.

said unlawful implementation. Although counsel's citation is correct, his view of the record evidence is mistaken. Thus, rather than evidencing impasse, what the record establishes is that, between implementation and Respondent Serramonte Service Plaza's unlawful withdrawal of recognition from the Union, counsel for the Union continually insisted that the implementation was unlawful and demanded that Respondent Serramonte Service Plaza engage in further bargaining; that counsel for Respondents stated that he would agree to such only if the Federal Mediator determined that further bargaining would be "fruitful;" and that, with matters in this posture, Respondent Serramonte Service Plaza withdrew recognition. In these circumstances, the record evidence does not establish the existence of a bargaining impasse subsequent to implementation.

⁷⁰ 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.

B. The Respondent, Transcar Leasing, Inc., d/b/a Serramonte Service Plaza, Colma, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition from the Union as the exclusive representative for purposes of collective bargaining of the Respondent's employees in the following appropriate unit:

All full-time and regular part-time service technicians, including Chrysler-Plymouth/Lincoln-Mercury service technicians, Nissan-Isuzu service technicians, PDI technicians, apprentices, utility mechanics, trainee mechanics, and working technicians; excluding all other employees, PDI detailing employees, body shop employees, sales employees, lot attendants, warranty administrators, service advisors, filing clerks, cashiers, the Chrysler-Plymouth dispatcher, shuttle drivers, maintenance person, parts department employees, office clerical employees, guards, and supervisors as defined in the Act.

(b) Failing and refusing to bargain with the Union as the exclusive representative for purposes of collective bargaining of the employees in the above appropriate unit by, in the absence of a genuine bargaining impasse, unilaterally changing said employees' compensation system and other terms and conditions of employment.

(c) Failing and refusing to bargain with the Union as the exclusive representative for purposes of collective bargaining of the employees in the above appropriate unit by, without affording the Union an opportunity to bargain, unilaterally changing the employees' health insurance and retirement savings plans.

(d) Failing and refusing to provide information, which is necessary for purposes of collective bargaining, in a timely manner to the Union as the exclusive representative of the aforementioned employees.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under 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 representative for purposes of collective bargaining of the employees in the following appropriate unit:

All employees performing work covered by the 1989-1992 collective-bargaining agreement between Respondent Serramonte Oldsmobile and the Union.

(b) On the request of the Union, commence making monthly payments to the AI health insurance and pension benefits funds on behalf of the employees in the appropriate unit in paragraph 2(a) above; reimburse the benefits funds, on behalf of the bargaining unit employees, in the manner set forth in the above remedy section; and reimburse the bargaining unit employees, described in paragraph 2(a) above for any medical expenses or other losses, with interest, in the manner set forth in the above remedy section.

(c) On the request of the Union, reinstate the worktime allocations, which existed prior to April 1993, and make the

bargaining unit employees, described in paragraph 2(a) above, whole, with interest, for any losses in the manner set forth in the above remedy section.

(d) Continue to recognize the Union as the exclusive representative for purposes of collective bargaining of Respondent Serramonte Service Plaza's employees in the following appropriate unit:

All full-time and regular part-time service technicians, including Chrysler-Plymouth/Lincoln-Mercury service technicians, Nissan-Isuzu service technicians, PDI technicians, apprentices, utility mechanics, trainee mechanics, and working technicians; excluding all other employees, PDI detailing employees, body shop employees, sales employees, lot attendants, warranty administrators, service advisors, filing clerks, cashiers, the Chrysler-Plymouth dispatcher, shuttle drivers, maintenance person, parts department employees, office clerical employees, guards, and supervisors as defined in the Act.

(e) On request, bargain collectively, in good faith, with the Union as the collective-bargaining representative of the employees in the appropriate bargaining unit, described in paragraph 2(d) above, and, if an agreement is reached, embody the understanding in a signed agreement.

(f) On request, reinstate the wages, compensation system, and other terms and conditions of employment of the employees in the appropriate unit, described in paragraph 2(d) above, which were in effect prior to October 1, 1992, and make the employees whole, with interest, for any losses suffered in the manner set forth in the above remedy section.

(g) On request, reinstate whatever health insurance and pension plans, which had been established for the employees in the appropriate unit, described in paragraph 2(d) above, prior to February 1, 1993, and make the employees whole, with interest, for any losses suffered in the manner set forth in the above remedy section.

(h) Place at its office and place of business in Colma, California, copies of the attached notice marked "Appendix."⁷¹ Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by Respondents' authorized representative, shall be posted by Respondent Serramonte Service Plaza 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 Respondent Serramonte Service Plaza to ensure that such notices are not altered, defaced, or covered by any other material.

(i) Notify the Regional Director within 20 days from the date of this Order what steps Respondent Serramonte Service Plaza has taken to comply.

IT IS FURTHER ORDERED that the complaint in Case 20-CA-24875 be, and the same is, dismissed.

⁷¹ 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 fail and refuse to bargain collectively, in good faith, on request, with International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 190, Local Lodge No. 1414, as the representative for purposes of collective bargaining of the following appropriate unit of former Serramonte Oldsmobile, Inc. employees:

All employees performing work covered by the 1989-1992 collective-bargaining agreement between Serramonte Oldsmobile, Inc. and the Union

WE WILL NOT, in the absence of a genuine impasse in bargaining with the Union, unilaterally implement changes in the above employees' health insurance and pension plans and their flat-rate compensation system work allocation times.

WE WILL NOT fail and refuse to provide information, which is necessary for collective bargaining, to the Union in a timely manner.

WE WILL NOT fail and refuse to continue to recognize and, on request, to bargain in good faith with the Union as the majority bargaining representative of the following appropriate unit of Serramonte Service Plaza's employees:

All full-time and regular part-time service technicians, including Chrysler-Plymouth/Lincoln-Mercury service technicians, Nissan-Isuzu service technicians, PDI technicians, apprentices, utility mechanics, trainee mechanics, and working technicians; excluding all other employees, PDI detailing employees, body shop employees, sales employees, lot attendants, warranty administrators, service advisors, filing clerks, cashiers, the Chrysler-Plymouth dispatcher, shuttle drivers, maintenance person, parts department employees, office clerical employees, guards, and supervisors as defined in the Act.

WE WILL NOT, in the absence of a genuine bargaining impasse with the Union, implement our final contract offer to the Union, thereby changing the employees' system of compensation and other terms and conditions of employment.

WE WILL NOT, without offering the Union an opportunity to bargain, unilaterally change the employees' health insurance and retirement savings plans.

WE WILL NOT fail and refuse to provide information, which is necessary for collective bargaining, to the Union in a timely manner.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the rights guaranteed to them in the National Labor Relations Act.

WE WILL, on the request of the Union, commence making monthly payments, on behalf of the above appropriate unit of former Serramonte Oldsmobile, Inc. employees, to the Automotive Industries Health Insurance and Pension benefits plans; reimburse the Automotive Industries Health Insurance and Pension benefits plans for all amounts owed on behalf of the employees; and reimburse, with interest, the employees for any medical expenses or other losses attributable to our unlawful failure to make required payments to the Automotive Industries Health Insurance and Pension benefits funds.

WE WILL, on request of the Union, reinstate the worktime allocations, which had been in existence for the above appropriate unit of former Serramonte Oldsmobile, Inc. employees prior to April 1993, and WE WILL make whole, with interest, the former Serramonte Oldsmobile, Inc. employees for any lost wages incurred as a result of our unlawful unilateral change.

WE WILL, on request of the Union, reinstate the wage compensation system and other terms and conditions of employment of the above appropriate unit of Serramonte Service Plaza employees, which had been in effect prior to October 1, 1992, and make the employees whole, with interest, for any lost wages and other losses incurred as a result of our unlawful implementation of our final contract offer to the Union.

WE WILL, on request of the Union, reinstate the health insurance and retirement savings plans, which had been in effect for the appropriate unit of Serramonte Service Plaza employees, and make whole, with interest, the employees for whatever losses they may have suffered as a result of our unlawful unilateral changes.

SERRAMONTE OLDSMOBILE, INC., D/B/A
SERRAMONTE OLDSMOBILE, SERRAMONTE
PONTIAC, SERRAMONTE G.M.C. TRUCKS;
TRANSCAR LEASING, INC., D/B/A SERRA-
MONTE SERVICE PLAZA