

Golden Eagle Spotting Co., Inc. and Brewery Drivers and Helpers, Local Union 133, affiliated with International Brotherhood of Teamsters, AFL-CIO. Case 14-CA-23333

September 27, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND TRUESDALE

On June 6, 1995, Administrative Law Judge Frank H. Itkin issued the attached decision. The Respondent filed exceptions¹ and the Charging Party filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and brief and has decided 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 Respondent, Golden Eagle Spotting Co., Inc., Hannibal, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ The Respondent's exceptions are limited to the judge's findings that it violated Sec. 8(a)(1) and (a)(3) of the National Labor Relations Act by engaging in regressive bargaining with respect to union security.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Drywall Products*, 91 NLRB 544 (1985), *encl.* 188 F.2d 362 (1951) *cert. denied*, 353 U.S. 911 (1957). We find no basis for reversing the findings.

Lynette K. Zuch, Esq., for the General Counsel.
Timothy L. Stalnaker, Esq., for the Respondent Employer.
Jan Bond, Esq., for the Charging Party Union.

DECISION

FRANK H. ITKIN, Administrative Law Judge. Unfair labor practice charges and amended charges were filed in the above case on November 15 and December 30, 1994, and on January 26, 1995. An amended complaint issued on February 9, 1995, and was later further amended on March 3 and at the hearing on March 6, 1995. The General Counsel alleged that Respondent Employer has interfered with, restrained, and coerced its employees in the exercise of their Section 7 rights, in violation of Section 8(a)(1) and (a)(3) of the National Labor Relations Act, by informing employees that the Employer would not bargain in good faith with the Union, the duly certified collective-bargaining agent of an appropriate unit of its

employees, and that the Union's bargaining with the Employer would be futile; by informing employees that the Employer would not bargain in good faith with the Union concerning employee wages; by threatening to discharge employees if they went on strike; by telling employees that supporting the Union was disloyal to the Employer; by promising to grant employees wage raises even if they were not represented by the Union; and by threatening an employee with physical harm or other reprisals because of the employee's union activities.

The General Counsel further alleged that Respondent Employer has failed and refused to bargain in good faith with the Union as the exclusive collective-bargaining representative of an appropriate unit of its employees, in violation of Section 8(a)(5) of the National Labor Relations Act, by promoting shift leaders to newly created supervisory positions excluded from the unit and, further, by implementing a safety and attendance bonus program for the unit employees, without prior notice to the Union and affording the Union an opportunity to bargain with respect to this conduct or the effects of this conduct; by failing to meet with the Union at reasonable times and, further, by arriving late and leaving earlier than the agreed-on times at scheduled negotiation sessions; by engaging in regressive bargaining withdrawing prior agreements with respect to union security and drug-testing proposals; by making proposals regarding the grievance procedure and changes in employee wages which grant the Employer the exclusive right to determine the outcome of grievances and wage changes; by its overall conduct during collective bargaining; and, finally, by implementing its final offer which made changes in employment conditions including but not limited to wages, the grievance procedure, layoff and recall, and a mandatory alcohol and drug testing policy for all unit employees without reaching impasse on these issues, without the Union's consent and without affording the Union an adequate opportunity to bargain with the Employer with respect to this conduct.

Respondent Employer denies, inter alia, violating the Act as alleged. Accordingly, hearings were held on the issues thus raised in St. Louis, Missouri, on March 6 and 7, 1995, and on the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

Respondent Employer is engaged in the spotting and supervision of the loading of beer products on distributor and common carrier trailers and is admittedly engaged in commerce as alleged. Charging Party Union is admittedly a labor organization as alleged. On December 20, 1993, the Union, following a Board-conducted representation election, was certified as the exclusive collective-bargaining representative for the following appropriate unit of the Employer's employees:

All full time and regular part time spotting/drivers and loading employees employed by Respondent Employer at its St. Louis, Missouri facility, excluding office clerical and professional employees, guards and supervisors as defined in the Act.

Sec. 5, I don't have a response . . . but on Sec. 6 [vacation schedule] they did not like that . . . they were going to rewrite Sec. 6 in its entirety. Sec. 7 was okay with him. Sec. 8 was not okay with him.

On holidays [art. 8], the Company rejected . . . they said that [they] currently only provided for eight holidays They told me that they would consider the Friday after a Thanksgiving . . . but for now it was rejected.

On Art. 9, limitations of production, . . . after having discussion on that, the Union deleted it from its proposals.

On Art. 10, Union made materials and supplies, [Riesenbeck] said that was all right.

[On art. 11, business agents and union officials,] [Riesenbeck] said that was all right.

Under Art. 12, the grievance and arbitration procedure, [Riesenbeck] said that he would have to check with his consultant, that he didn't know how that situation worked. But what he did know about it he did not like.

Under Art. 13, supervisory employees, [Riesenbeck] agreed that was all right. On Art. 14, the military clause, he said . . . okay On Art. 15, on jury duty, . . . he said it was all right and agreed to that.

Then we went into hours [art. 16]. . . . [Riesenbeck] said that the language [in sec. 1] was fine but he needed a broader period between the fourth and fifth hour [for meal time]. Sec. 2 he had a question Sec. 3 the Company would offer me a counter. On Sec. 4 the Company didn't understand what the odd hour was [and] I explained it to them and put a question mark [on G.C. Exh. 6]. On Sec. 5 [and sec. 6] the Company told me that they would counter On Sec. 7 [and sec. 8] . . . after discussing that . . . I agreed to delete that from my proposal. And under Sec. 9 . . . [Riesenbeck] won't agree to that.

Scott explained that "that's where we left off at that bargaining session"; the meeting had lasted about 3 hours; and the parties agreed to meet again at 6 p.m. on April 21. Scott noted that at no time during this session did Riesenbeck claim "that he was without authority to enter into any agreement for the Company" and, "other than with respect to the grievance and arbitration procedure, did he say that he needed to speak with his advisor." Further, Riesenbeck never claimed that "only his consultant could bind the Company."

Jerome Diekemper, attorney for the Union, also attended this and later bargaining sessions between the parties. (fIMDBUfl*ERR17*fIMDNMfl See Tr. 303-308.)fIMDBUfl*ERR17*fIMDNMfl Diekemper's testimony corroborates in significant part the testimony of Scott. (fIMDBUfl*ERR17*fIMDNMfl See Tr. 303-308.)fIMDBUfl*ERR17*fIMDNMfl Company President Riesenbeck generally testified:

Q. . . . Did you ever agree to the Union's proposal on Union security?

A. In my mind, I never agreed to anything at that meeting in that I had previously told Gary [Scott] that without having Kenny [Smelcer] there, my labor negotiator, I didn't want to get in a position where I was negotiating on something.

Kenneth Smelcer testified that he was to serve as Riesenbeck's labor consultant during the 1994 negotiations. He was uncertain "what was the first meeting [he] attended." He generally claimed:

There was one [meeting] I was going to attend and then it ended up getting moved and I was out west at the time. I guess that might have been the first one when he [Riesenbeck] went ahead. . . . And [as for] the second [meeting], I had refinanced a house And I said [to Riesenbeck] . . . just listen and discuss with them what the clauses mean.

IV. THE APRIL 21 MEETING

Union Representative Scott wrote Company President Riesenbeck on April 16 enclosing some "additional proposals" pertaining to "supervisory employees," "job security" and the "successor clause" so that the Employer "can have them in advance of" the scheduled April 21 meeting. (fIMDBUfl*ERR17*fIMDNMfl See Tr. 303-308.)fIMDBUfl*ERR17*fIMDNMfl

This meeting, as noted, was scheduled to start at 6 p.m. on April 21. The company representatives arrived at 6:30 p.m. Attending for the Union were Scott and Alsop and the Union's attorney, Diekemper. Attending for the Company were Riesenbeck and Summers and the Company's consultant, Smelcer. Scott recalled:

We started off on Art. 17 [premium days] where we had left off at the previous meeting of the 15th of April. [See G.C. Exh. 6.] . . . I [Scott] asked if the Company worked on Sunday. And they explained that they only worked a couple of hours on Sunday, which was the beginning of their workweek [and] it was considered Monday's work. . . . [T]he Company handed me . . . a letter that stated that they were going to make all of their current . . . part time employees, which were employees with more than six months of service, to full time employment. This would entitle them to health and welfare benefits [T]hen the Company advised us that they had problems with premium days.

And then we moved on to Art. 18 [uniforms]. Riesenbeck said that the Company didn't care if the employees wore uniforms as long as they were presentable

On Art. 19 on wages, it was agreed at the . . . beginning of the session, it was Smelcer's request, that we discuss non-economic issues first and put these to bed before we went on to economic issues.

And we then went to Art. 20 on picketing and struck employees. The Company asked about the proposal. I explained that that gave the employees the right to honor picket lines without being subject to disciplinary action. Smelcer said he understood the proposal.

We then went on to Art. 21, Union stewards. . . . Diekemper asked if the Company had any problem with the language and Smelcer said he understood the proposal as put forth.

And we went on to Art. 22, the welfare plan I at that time asked for a copy . . . of all their current benefits for health and welfare [T]he Union was proposing that the Company could continue the same

health and welfare program that it had in effect at that particular time [with Alliance]. Riesenbeck explained that he didn't want to be tied down to [his] Alliance program. I told him that was fine . . . my proposal said the Alliance program or the equivalent . . . [and he] would have to go out and negotiate with substitute providers if he in fact saw fit.

[Under art. 23, pensions,] Riesenbeck stated that there was no way that he was going to agree to [the] Central States pension, that they currently had a 401K in the Company plan in effect, however, they did not provide any match by the Company.

[Under art. 24, unauthorized activity] . . . after I read the proposal, Diekemper asked if Section 1 gave anyone a problem from the Company. We got no response.¹

We then went on and read our Art. 25 on management rights. . . . The Company said they would respond later to our proposal.

We then moved on to Art. 26, the successor clause. . . . [Cf. G.C. Exhs. 6, 9, and 10.] They [the Company] didn't want to be hindered from selling their business . . . the Company did not agree to that proposal And then we went on to the job security [and the supervisory employees] provision Riesenbeck said that he wanted general manager Summers to perform bargaining unit work as the needs of the business warranted. . . . [W]e were willing to insert that the Employer shall not direct [or] require any of its employees, other than the general manager, who are not included within the bargaining unit covered by this agreement, to do or perform any work [W]e told them that they had leadmen [or shift leaders] for spotters and leadmen for loaders on the different shifts, and we would allow those people to work . . . they were . . . bargaining unit members and not supervisors. . . . [On independent contractors and subcontracting out work,] Riesenbeck brought up that there was a dispute on the bulk heads . . . between [another union and our Union] as to this work. It was currently being done off site. So what we did is we said that we would agree, except for bulk heads, and that if [work] other than spotting and loading becomes available then the parties would discuss alternatives On the job security proposal, the Company said they understood our proposal but did not agree.

We then went on to funeral leave, Art. 27 Riesenbeck said that he could not agree to in-laws . . . and I told him that was . . . already agreed to in his employee manual. [Cf. G.C. Exh. 7.] Riesenbeck said that they would give us a corrected copy [of the employee manual] at the next meeting.

¹ The notation "OK" appearing on G.C. Exh. 6 for this union proposal was, as Scott explained, placed on G.C. Exh. 6 at a later time.

² Scott initially recalled that G.C. Exh. 9 contains the Union's April 16 "additional" proposals to the Employer pertaining to "supervisory employees," "job security" and "successor clause," and G.C. Exh. 10 shows his handwritten notes made on the "proposals" during the April 21 negotiation session. Later, however, Scott corrected his testimony to explain that "after reviewing my notes, what I testified to on G.C. Exh. 10, was truly done at [the next] meeting of May 12." (fiMDBUfl*ERR17*fiMDNMflSee Tr. 109-111.)fiMDBUfl*ERR17*fiMDNMfl

. . . We then went on to the proposal on substance abuse [art. 28]. The Company said that because of its length they would need time to review this.

We then went to termination [art. 29]. Smelcer questioned Diekemper on the 60 day notice [and] with that the meeting ended.

(fiMDBUfl*ERR17*fiMDNMflSee also the testimony of Diekemper (fiMDBUfl* Kenneth Smelcer, the Employer's labor consultant, generally recalled attending this session, and this "might have been [his] first session." (fiMDBUfl*ERR17*fiMDNMflSee Tr. 508.)fiMDBUfl*

V. THE MAY 12 MEETING

Union Representative Scott testified that the parties had agreed to meet next at 6 p.m. on May 12 and during the "afternoon" of May 13. Scott, Alsop, Diekemper, and Union Vice President Tim Leonard appeared for the Union as scheduled on May 12. However, Riesenbeck and Summers "showed up" on May 12 at 6:30 p.m., and Smelcer, their consultant, did not "arrive" until 9:30 p.m. Scott recalled:

[T]he meeting started by Riesenbeck wanting to address the [Union's] April 16 letter [see G.C. Exhs. 9 and 10, and fn. 2, supra]. And again he stated that he needed more flexibility in his operations. He didn't see that in our letter. With regards to not letting Mike [Summers] occasionally drive a truck when someone doesn't show up, that's when the discussions arose regarding the handwritten language on Secs. 2 and 3 of job security [as shown in longhand on G.C. Exh. 10]. After we did those handwritten notes [or modifications of the Union's initial proposal to reflect the Employer's concerns], Riesenbeck agreed to Secs. 2 and 3 [as reflected in G.C. Exh. 10].

See also General Counsel's Exhibit 8, page 10 and General Counsel's Exhibit 27, page 13.

Scott again noted that Riesenbeck had not claimed that "he was without authority to enter into an agreement for the Employer" or that "he could not make an agreement without Smelcer." Scott further noted that Riesenbeck had "advised us at that particular time that he would not agree to a successor clause." In addition, Scott also recalled:

At that particular time, . . . I had previously requested that the Company provide the employees with a time clock . . . and I asked if . . . if the time clock had been put in place I was advised that it had not . . . but Riesenbeck assured me that it would be shortly.

Discussion also ensued over, inter alia, "how many employees worked on each particular shift," and "we agreed to Sec. 6 of Art. 16" pertaining to hours. (fiMDBUfl*ERR17*fiMDNMflSee G.C. Exh. 6. And, the Employer presented the Union with a "corrected copy" of its "Employee Handbook" or "Manual." (fiMDBUfl*ERR17*fiMDNMfl G.C. Exhs. 11 and 7.)fiMDBUfl*ERR17*fiMDNMfl

As Scott further testified and his bargaining notes show (fiMDBUfl*ERR17*fiMDNMflG.C. Exh. 8)fiMDBUfl*ERR17*fiMDNMfl, Smel

[Smelcer's] words upon arrival [were], "Nothing has been agreed to yet." Diekemper [said], "I beg your pardon. There's been several things agreed to . . ." and

he [Diekemper] started reading from his proposals going back to the first meeting that Diekemper was involved . . . on April 15 [Following a caucus] Smelcer [came] back into the room and [said], "They have a problem . . . if the Union thinks that Riesenbeck has agreed to certain items already." He [Smelcer] wanted to stop there until we could resolve that issue. . . . Diekemper . . . explained to Smelcer that we felt misled . . . and the Union believed at that time that the Company was doing nothing but stalling . . . knowing we were under a one year certification rule. Riesenbeck stated he wanted to adjourn for the day . . . [and] they were going to cancel [the next day's session]. I [Scott] told him [Riesenbeck] . . . it's getting late . . . we're going into June . . . you are only allowing me to negotiate with you four hours a month . . . I need a proposal from the Company . . . I need to set some dates Riesenbeck told me that he would have Smelcer draw up a counterproposal or some Company counterproposals and get them to the Union prior to our next meeting.

Company President Riesenbeck claimed that, following a "conflict between Diekemper and myself" over "what I had agreed to" or "didn't agree to . . . previously," it "was my understanding that we are going to negotiate this thing . . . we were now negotiating from a new position as far as what had happened when [Smelcer] was not with me." According to Riesenbeck, "it was the Company's position at that time that any of the discussions or agreements during the March 25th, April 15th or April [21st] negotiating sessions were no longer binding."

Smelcer generally recalled attending this session, as follows:

I [Smelcer] think May 12 was the second session I was late because . . . I had attempted to bring a classic car down for a car rally . . . in St. Louis and I proceeded to blow three tires by the time I got to Quincy

[T]here definitely was an episode of where we threatened to leave because there was no sense in continuing negotiations where we were having a conflict whether there was an agreement or there wasn't an agreement on these things, and we would just end up here [before the NLRB]

[W]e sat down basically then and agreed on the ones we had agreed on . . . although we didn't sign a master copy.

Elsewhere, Smelcer generally claimed that this dispute or "heated discussion" over what had or had not been agreed to arose both at this session and the prior meeting.

VI. THE EMPLOYER PROMOTES THREE UNIT SHIFT LEADERS TO SUPERVISORS ON MAY 25

The next meeting between the parties was, as discussed below, on June 3. However, on May 25, Company President Riesenbeck sent a memorandum to Manager Summers, with

copies purportedly sent to Smelcer and Scott, stating in part (fiMDBUfl*ERR17*fiMDNMflG.C. Exh. 12)fiMDBUfl*ERR17*fiMDNMfl:

Per our discussion the other day, please be advised that effective June 1, 1994, we will be promoting the three shift leaders, David Hagler, David Kapper and Mike Elliot. As you know, for quite some time they have been functioning as leadmen and I feel because of the growth we have experienced over the past eight months, as well as Anheuser-Busch, Inc.'s intent to continue higher than normal shipment quantities throughout the summer, we will need this extra line of management to continue to offer our customers and Anheuser-Busch our efficient, effective performance.

Please advise David Hagler that because of his high salary level . . . we will be holding his salary at this amount. . . . We will be raising [David Kapper's] salary We will raise [Mike Elliot's] salary

Please keep in mind that these gentlemen, like yourself, will continue to drive and work in the same capacity they have been in the past, but we are formalizing the fact that drivers and loaders as well as secretaries report to the shift leader on each of their respective shifts. They will have management responsibilities in selecting overtime situations and have input to you in regard to promotions, disciplinary action, vacations and all other management situations.

Scott was first given a copy of this document by a unit employee on June 1, shortly prior to the next meeting between the parties. Scott explained that the parties had never discussed "promoting shift leaders to supervisory positions" and the Union had never "agreed" to these "promotions." Further, there are no longer, as a consequence of this change, any unit "shift leaders," an elimination of three of some 27 unit positions.

David McGlynn, formerly employed by the Company as a driver, testified that Kapper was his "shift leader" in 1994 and was "promoted to a shift supervisor" during the summer of 1994.³ Kapper "reported to general manager Summers" and his "job duties" did not "change" "when he was promoted." Further, according to McGlynn, Kapper did not exercise the various cited indicia of supervisory authority. (fiMDBUfl*ERR17*fiMDNMflTr. 353-354.)fiMDBUfl*ERR17*fiMDNMfl⁴

VII. THE JUNE 3 MEETING

Union Representative Scott recalled that this bargaining session was scheduled to start at 4 p.m. on June 3. However, the Employer's representatives arrived 20 minutes late. Scott,

³It was stipulated that "the three shift leaders . . . were promoted outside the bargaining unit" on June 1, 1994. (fiMDBUfl*ERR17*fiMDNMflSee Tr. 350-351.)

⁴See also the testimony of employee Todd O'Laughlin describing the duties of both Elliot and Kapper (fiMDBUfl*ERR17*fiMDNMflTr. 362-367)fiMDBUfl*ERR17*fiMDNMfl

Michael Elliot, called as a witness for Respondent, acknowledged that his "duties" have not "changed as a result of the promotion from shift leader to supervisor." Elsewhere, he claimed that he has "more control of what happens on [his] shift." Cf. G.C. Exh. 28, where Riesenbeck wrote the unit shift leaders,

During this period of time it is an unfair labor practice if we raise anyone's salary other than Management. Therefore I am recommending that the first of June we promote you three leadmen to shift supervisors.

Alsop, Diekemper, and Leonard attended for the Union. Riesenbeck, Summers, and Smelcer attended for the Employer. The Employer had sent the Union its proposed "agreement." (fiMDBUfl*ERR17*fiMDNMF) See G.C. Exh. 13.) (fiMDBUfl*ERR17*fiMDNMF) Scott testified that the Employer's representatives, "when they arrived at 4:20, immediately took a 20 minute caucus," and corrected "typos in their proposal." Smelcer then "took us through his proposal." Scott testified:

On the preamble, we okayed it except for the dates that are left blank. [See G.C. Exh. 13.] . . . The next article [art. 1 recognition and unit] there was some discussion on the word "loaders" . . . [and] "loader observers" at the end of that paragraph . . . [W]e had agreed to replace the word "loaders" with the words "loader observers," and we okayed and agreed to that

The next article [art. 2] was freedom of choice. Riesenbeck told me [Scott] that there had been persons who had indicated to him their desires not to belong or be required to join the Union. Diekemper said that he wanted to make it understood that at a prior meeting [Riesenbeck] had indicated the only problem with Union security was a probationary period. . . . [Diekemper] also indicated that there was no provision in there to offer to provide for checkoff. Smelcer then stated that if the employees wanted to join the Union that they should be willing to write a check. Riesenbeck said the same exact thing. . . .

We went on to Art. 3 Sec. 1 . . . disability, illness and leaves of absence. . . . I had explained to the Company that under our proposal we wanted the Company to provide for health and welfare benefits during the four weeks of military training. We left that [Sec. 1] open. Under Sec. 2, we agreed to scratch out the words "employees may elect which sick days will be paid." We agreed to insert . . . the words "consecutive" and I dated that [on G.C. Exh. 13]. And we agreed to put in "unused sick days will be paid to the employees on the last paycheck of the year." We didn't, however, agree to the total section . . . we only agreed to those particular items.

The Company caucused When they came back to the room, Smelcer advised me that he didn't want to make or agree to any changes at that particular time, and he also advised me that he had to leave . . . 7:30 p.m.

Riesenbeck at the time told me that the Company would grant leaves of absence for persons whose spouse was dying of cancer, but not for someone who wanted to go sailing around the world with his brother.

We then went into their Art. 4, discharge. The Union section had a request for just cause. Diekemper asked why would the Company have an objection to just cause. Smelcer said, "because they would have to prove it." They wanted to write the discharge without proving it. We then went to the Company's Sec. 1; . . . I had asked . . . how I could expect anybody to be off for committee work if . . . he has to obtain a supervisor's permission

Scott noted that, under article 4, section 2 of the Employer's proposal, he "questioned . . . how that could be that the Employer could make work rules and regulations that could . . . you're telling me then you could make the rule that your employees can't attend Union meetings," and Riesenbeck said: "Yeah, I think my proposal has got a little bull shit in it." The Union then agreed to section 3 and marked "okay" on General Counsel's Exhibit 13.

Under section 1 of article 5, seniority, the Union said it "would counter with bargaining unit" instead of "Company seniority." The Union would also "counter" on other proposals in this article, but section 4 "A, B, C and E were okay."⁵ Under article 6, health and safety, the Union had "no problems with Secs. 1 through 5," and "agreed." Under article 7, vacations, "it was exactly the language" the Union had "proposed," and the Union "agreed to it" except for section 1 on "length of vacation" which "remained open." Under article 8, holidays, the Union "agreed" to "everything but Sec. 1." Under articles 9 and 10, union-made materials and supplies and business agents and union officials, the Union "agreed."

Under article 11, the grievance procedure, Scott testified:

I [Scott] told them that it was not acceptable. I have to be honest. I did laugh and so did my committee when they found out that the president of the Company [Riesenbeck] wanted to be the final and binding arbitrator and that the Union was going to agree to and live by his decisions. . . . [Riesenbeck] told me to be assured that he was a fair guy [See G.C. Exh. 13.]

And, under article 12, supervisory employees, the Company was now proposing that "supervisors may perform any bargaining unit work at any time needed to further the interests of the business." Scott, referring to the Employer's May 25 memorandum, General Counsel's Exhibit 12, stated:

When we started out these negotiations we had one supervisor. Today we have four. Next week [we] might have 12. And by the time I get a contract I won't have any [unit employees]. . . . I told them I could not accept that I said that if they are supervisors they are not going to be in the unit, and if they are going to be supervisors they are not going to be performing bargaining unit work. . . . I had previously agreed to allow [manager] Summers to do what Riesenbeck had said and that was to fill in for absentee problems. But now, seeing where he was going with this, I told him, absolutely not.

Under article 13, jury duty, Scott could not agree to section 1 "because they limited it to two weeks a year." Under article 14, hours, as Scott testified:

We scratched out the words "try to" [in sec. 1] and we added the words "for lunch" [on G.C. Exh. 13] after "minutes." We agreed to that and dated it. I also agreed to the Company's proposal on Sec. 2 after changing the word "driver" to "employees." I coun-

⁵ Scott later explained that the Union "wanted to put in there [art. 5, sec. 4 (fiMDBUfl*ERR17*fiMDNMF)c)fiMDBUfl*ERR17*fiMDNMF] the words, with G.C. Exh. 13.)fiMDBUfl*ERR17*fiMDNMF)

tered Sec. 3 with adding the words "except in the case of emergency," but that hadn't been agreed to.

In addition, as Scott further testified, "[W]e then went into the Union proposals on premium days because the Company had left that out of their proposal." Riesenbeck

responded that there would be no double time while I'm in charge . . . the work week is 40 hours . . . I pay time and a half after 40 hours . . . I start the work week at my time.

Scott then "agreed to the Company's proposal on Art. 15, attire, but . . . I [Scott] am not agreeing to delete those other [proposed] sections where the Company needed to provide the uniforms."

Under article 16, wages, the Employer proposed in General Counsel's Exhibit 13:

Sec. 1. Wages shall be determined by management for each employee within the indicated ranges . . . :

All regular full time employees classified as drivers . . . \$6.50-\$10.00 per hr.

All regular full time employees classified as loaders . . . \$6.50-\$9.00 per hr.

All part time employees classified as drivers or loaders . . . \$5.50-\$9.00 per hr., without fringe benefits.

Sec. 2. All overtime shall be paid at the rate of time and one half.

Scott testified:

I [Scott] told him [Riesenbeck] that it was totally unacceptable . . . nowhere in my life have I ever seen a range where the Employer would say certain people can make this and certain people can make that. I want one established wage rate.

The parties ended here and "set the next tentative session for June 21 . . . at 3:00 p.m." See also the testimony of Diekemper (fiMDBUfi*ERR17*fiMDNMfiTr. 313-321.)fiMDBUfi*ERR17*fiMDNMfi

VIII. THE JUNE 21 MEETING

This meeting was scheduled to begin at 3 p.m., however, as Scott recalled, the Employer's representatives arrived at 3:30 p.m. During preliminary discussions, Scott testified:

I [Scott] had asked . . . if the Company . . . had approached the bargaining unit employees requesting their opinions as to whether or not they would cross a [Union] picket line . . . Riesenbeck indicated that he did not . . . but doesn't know if Mike [Summers] has or not . . . Also . . . asked Riesenbeck if he had made the comment that he wasn't going to [meet] with those son of a bitches until after the 4th of July. Riesenbeck responded that he had made the comment, but that he did not refer to us as son of a bitches. [Cf. Tr. 151-152; G.C. Exh. 8 at 18.]

The parties then resumed discussing the Employer's proposals set forth in General Counsel's Exhibit 13. Scott testified:

[Under art. 17, Union stewards,] I [Scott] told him [Riesenbeck] I would agree to everything because it was the same as the Union had proposed . . . except for the last sentence . . . [requiring all business to be performed off the clock.]

I then identified that they [the Employer] made no reference to the Union's proposal of picketing and struck goods in their proposal

Under article 18, welfare, the Employer proposed:

The Company will continue to cover its regular full time employees under the same plan it maintains for its non-bargaining unit employees on the same terms so long as that plan is in effect.

Scott asked Riesenbeck: "[A]re you telling me that if you decided to discontinue health and welfare coverage for non-bargaining unit employees it would be discontinued for all employees," and Riesenbeck responded: "[C]orrect." Further, as Scott recalled, the Employer "made no reference to a pension plan, [although] the Company told me in previous negotiations that they would consider a pension plan."

Article 19, pertaining to unauthorized activity, was agreed on and "okayed." Under management rights in article 20, Scott questioned:

[W]hy they had in their management right's the part that says they could discharge for just cause, but would not allow that to be inserted at the Union's request in the discharge article. Riesenbeck and Smelcer both indicated that they have the exclusive right to terminate an employee . . . the ultimate, final and binding decision was going to be Riesenbeck's.

Then, the Company said "no" on the Union's proposed "successor clause," and the Union "agreed" to the Employer's article 21 funeral leave proposal.

Article 22 of General Counsel's Exhibit 13 contains the Employer's counterproposed substance abuse policy. A discussion ensued. Finally, as Scott testified, "Riesenbeck then [said] that he didn't care to have a policy on substance abuse. I said that would be fine, and I would so note it."

Article 23 pertains to termination. Scott "agreed" "except for the term of the contract and dates." Scott recalled that "the Company wanted a one year contract" and "the Union wanted a three year contract."

Further negotiations were scheduled for July 14 and 15. The Employer later "canceled." The parties thereafter met, as discussed below, on July 20 and 21.

IX. THE JULY 20 MEETING

Scott generally recalled that the Employer's representatives "could have" "arrived about an hour late" for this July 20 meeting. Scott then gave to the Company "a counterproposal from the Union for a complete labor agreement" which "incorporated some of the previously agreed items." (fiMDBUfi*ERR17*fiMDNMfi Exh. 14.)fiMDBUfi*ERR17*fiMDNMfi Scott noted a number of "changes Union's original position" as well as "deletions." (fiMDBUfi*ERR17*fiMDNMfi 161-170 and G.C. Exh. 8, 21-24.)fiMDBUfi*ERR17*fiMDNMfi Thus, for ex Union's proposed vacations were reduced to a maximum of 5 weeks; two proposed holidays were deleted; proposals per-

taining to supervisory employees were “changed . . . to allow that supervisors may perform the bargaining unit work” under certain circumstances; union premium pay proposals were deleted; specific union wage counterproposals were made; and reference to a proposed substance abuse proposal was deleted “because at the previous meeting the Company indicated that it didn’t want it and I [Scott] agreed to that.”

Riesenbeck stated, “[J]ust looking at our proposal, it is not acceptable.” Scott’s bargaining notes for this session reflect the positions of the parties with respect to the Union’s various counterproposals. (fiMDBUfi*ERR17*fiMDNMF See G.C. Exh. 8, 21-24) fiMDBUfi*ERR17*fiMDNMF Scott called, inter alia, that the “Company . . . said no to . . .” the Union’s “unauthorized activity” and “funeral leave” proposals which the “parties had previously agreed to” “and signed off on” at the June 21 meeting. Scott further recalled that Smelcer then said that “they needed substance abuse” provisions, and Scott responded:

[T]ell me if you want one or tell me if you don’t want one . . . I don’t know what you want . . . you change every time I meet with you . . . we agree to something and the next meeting we don’t agree.

This session then ended. See also the testimony of Diekemper (fiMDBUfi*ERR17*fiMDNMF Tr. 321-323) fiMDBUfi*ERR17*fiMDNMF.

X. THE JULY 21 MEETING

This session was supposed to start, as agreed, at 4 p.m. on July 21. The Employer’s representatives arrived 30-minutes late. At the beginning of this meeting, the Employer furnished to the Union for the first time the following document pertaining to a “safety and attendance incentive pool” proposal, dated July 20, 1994, signed by Company President Riesenbeck, and addressed to unit personnel (fiMDBUfi*ERR17*fiMDNMF G.C. Exh. 15) fiMDBUfi*ERR17*fiMDNMF.

Please be advised that effective July 1, 1994, and each month thereafter, \$200 will be put in a pool for a three month period, totaling \$600. At the end of each quarter . . . all the names of full time employees in the above classifications will be placed in a hat for two separate drawings if they haven’t had any lost time injuries or unexcused absences.

Drivers only—if no accidents have occurred during the quarter, the driver’s name drawn will receive \$300.

All employees—if no lost time injuries or unexcused absences have occurred, the employee whose name is drawn will receive \$300.

Scott explained that this was “the first time” that he had “learned that the safety and attendance incentive pool would be effective July 1,” and he had never “agreed to this plan.”

Smelcer then handed Scott General Counsel’s Exhibit 16, a copy of the Employer’s July 21 counterproposals. The Employer reviewed its counterproposals. (fiMDBUfi*ERR17*fiMDNMF See G.C. Exh. 8, 25-31; and Tr. 183-193.) fiMDBUfi*ERR17*fiMDNMF As the Union’s testimony show, “the only discussion” on the Union’s proposed union-security clause was simply a rejection. On leave of absence, “the Union countered with language [which] the Company agreed to.” On discharge, “Diekemper again asked about just cause for discharge” and “Smelcer again said it was associated with arbitration” and

“the Company doesn’t want any part of arbitration.” On supervisors, the Company “wants their supervisors to perform bargaining unit work.” On seniority, the Union agreed to “company seniority.” On wages, the Company rejected the union counterproposal and “proposed [the Company’s] language as it was before” “within a range”; however, the parties did agree on overtime at time and a half. On stewards, the Company “changed its mind” on matters “previously agreed to.” On welfare, the Company made no further counterproposals and the Company “was looking into its own” pension program. On substance abuse, the Company “wanted [the Union] to agree to a plan and the Union stated that it would “counterpropose at a later date.”

The Union then announced that it “wanted to request the assistance of the FMCS,” and the Employer stated that it only wanted to meet for “one day” and not for “two days in a row.” See also the testimony of Diekemper (fiMDBUfi*ERR17*fiMDNMF 329) fiMDBUfi*ERR17*fiMDNMF.

Company President Riesenbeck generally claimed that the Union “consented” to his “retroactive proposal” pertaining to a “safety and attendance incentive pool.” (fiMDBUfi*ERR17*fiMDNMF G.C. Exh. 17) Riesenbeck added:

This is certainly the impression I got from the conversation we had across the table . . . if he [Scott] had said no I wouldn’t have implemented it. [See Tr. 478-479.]

XI. THE UNION’S AUGUST 8 LETTER WITH COUNTERPROPOSALS

On August 8 Scott mailed to Riesenbeck a copy of the Union’s new counterproposals (fiMDBUfi*ERR17*fiMDNMF G.C. Exh. 17) fiMDBUfi*ERR17*fiMDNMF. Scott expedite the bargaining process” “scheduled at Federal Mediation. August 18 from 1 p.m. to 4 p.m.”⁶ Scott also apprised the Employer:

This is also to express my concern with the inordinate delays in the bargaining process necessitated by the lack of availability by your bargaining committee. Over the past seven months we have only been able to schedule nine bargaining sessions and some of them for only short periods of time. The Union has repeatedly indicated that its schedule was open for entire week blocks of time, yet our sessions were relegated to once or twice a month because of the Company’s commitments. We need to begin serious negotiations towards reaching an agreement.

XII. THE AUGUST 18 MEETING

This meeting was scheduled to begin a 1 p.m. on August 18 “at the Federal Mediation office.” The Employer arrived about 2 p.m. According to Scott and his bargaining notes (fiMDBUfi*ERR17*fiMDNMF Tr. 193-217; and G.C. Exh. 8 at 32-35) fiMDBUfi*ERR17*fiMDNMF. The Union presented its counterproposals, and the Union presented its counterproposals.⁷ The Union, as Scott noted, also made additional proposed changes in its positions at this meeting.

⁶ G.C. Exh. 17 underlines the Union’s proposed changes in its past bargaining positions or proposals.

⁷ See G.C. Exh. 18, a copy of G.C. Exh. 17 containing Scott’s additional August 18 bargaining notes. G.C. Exh. 18 shows previous

Continued

the wage range He said the only agreement on wages was going to be . . . on his terms . . . and that there was no way that he was going to agree to the Union's proposals

See also General Counsel's Exhibit 20, Scott's notes of this meeting; the testimony of former employee David McGlynn (fiMDBUfi*ERR17*fiMDNMfiTr. 354-356)fiMDBUfi*ERR17*fiMDNMfi and the testimony of employee John Link (fiMDBUfi*ERR17*fiMDNMfiTr. 399-401)fiMDBUfi*ERR17*fiMDNMfi.

Company President Riesenbeck generally denied, inter alia, various coercive statements attributed to him during the August 28 employee meeting, and on other occasions, as summarized herein.

XV. THE OCTOBER 21 MEETING

Scott testified that he never heard from the Company on August 24, as promised, and consequently no meeting could be set for August 25. The next bargaining meeting "was scheduled" at Scott's request at the Federal Mediation office for October 21. Scott and the Union's bargaining team showed up at the Federal Mediation office on October 21. The union representatives and the mediator waited for about an hour. The mediator "finally track[ed] down Riesenbeck who return[ed] his call." Riesenbeck then told

[the mediator] that he is not going to be there at any time during that day, and that he previously told his [the mediator's] secretary that he was not going to be there.

The mediator, in relaying Riesenbeck's message to the Union representatives, explained: "[T]hat can't be . . . I have no secretary . . . mediators have answering machines . . . he had heard nothing [previously] from the Company."

The mediator, at Scott's request, then arranged for another meeting at 5 p.m. on November 17 in the Federal Mediation office. See also the testimony of Diekemper (fiMDBUfi*ERR17*fiMDNMfiTr. 334-335)fiMDBUfi*ERR17*fiMDNMfi.

Company President Riesenbeck claimed:

[M]y secretary told me . . . that she called and canceled the [October 21] meeting . . . [and] if we want her to come down and get on the witness stand . . . she will attest to that . . . but we didn't do it on purpose

XVI. THE NOVEMBER 17 MEETING

The Employer arrived at this November 17 meeting about 45 minutes late. The Employer's attorney, Timothy Stalnaker, also attended this session. Scott recalled Riesenbeck telling the mediator that "we [the Employer] have been sitting across the street at the bar . . . we just didn't want to come over here." Riesenbeck then restated the Employer's positions on various items and accused the Union "of want[ing] [bargaining unit employees] to lose their jobs" by requesting "industry seniority." Scott responded disputing Riesenbeck's assertion. Scott urged Riesenbeck to "get down to the issues" and "let's get moving." The Employer announced:

The Company was going to present the Union with a final offer . . . [and] they planned on implementing it on December 17 . . . and the wages on December 15

This document . . . [G.C. Exh. 21] was distributed . . . [and the Employer stated] this was the Company's final offer.

Scott then observed that "previous negotiations had resulted in numerous agreements between the parties that have been

left out of the Company's final proposal" (fiMDBUfi*ERR17*fiMDNMfiTr. 243-250.)fiMDBUfi*ERR17*fiMDNMfi and the testimony of employee John Link (fiMDBUfi*ERR17*fiMDNMfiTr. 399-401)fiMDBUfi*ERR17*fiMDNMfi.

Scott recalled that counsel for the Employer replied:

Look, because of so many [omitted agreements], he wanted an opportunity to go back and prepare . . . another complete final offer with all the agreed upon changes, and get it to [Scott's] office the following day.

Scott again noted that no "impasse" had been declared by the Employer. The meeting ended.

Scott did not receive this "complete final offer" the "following day" as promised. Instead, on November 20, the Employer distributed to its employees separate memoranda pertaining to "a reserved gate" in the event of "picketing"; a purported statement of employee "rights as strikers" and attempted disavowal of an alleged "threat" by the Employer "to fire employees who strike"; and a statement of the Employer's "offers." (fiMDBUfi*ERR17*fiMDNMfiTr. 253-256.)fiMDBUfi*ERR17*fiMDNMfi See also the testimony of Diekemper (fiMDBUfi*ERR17*fiMDNMfiTr. 337)fiMDBUfi*ERR17*fiMDNMfi.

In addition to the above testimony and documentary evidence, former employee David McGlynn testified that Company President Riesenbeck had admonished him and his coworkers during the evening of November 17: "Guys, don't let them talk you out of your jobs. Anybody that goes on strike will be fired and not rehired."

Later, as McGlynn further recalled, General Manager Summers had similarly admonished him and a coworker: "I am sure going to hate to lose you."

On November 17, 1993, (fiMDBUfi*ERR17*fiMDNMfiTr. 334-335)fiMDBUfi*ERR17*fiMDNMfi, during the evening of November 17, Company President Riesenbeck told him and another coworker that the Company had given the Union "a final proposal"; that "included in this final proposal would be [wages of] \$9 an hour for the loaders and \$9.50 an hour for the drivers"; that "we were going to get that [wage increase]⁸ with or without the Union [on] December 15"; that "we would not get our jobs back if he won the strike"; and that, before the 1993 Board-conducted representation election, "he [Riesenbeck] had asked for a year . . . we had f_ked him by voting the Union in . . . we really stabbed him in the back by doing that."

Riesenbeck, as noted below, in fact implemented a pay raise on December 15, as promised. See also the testimony of employee Ken Torti (fiMDBUfi*ERR17*fiMDNMfiTr. 380-385.)fiMDBUfi*ERR17*fiMDNMfi.

Employee Larry Riddle recalled that during the evening of November 17, Company President Riesenbeck told him and his coworkers:

He [Riesenbeck] had just come from the contract meetings . . . he didn't see any resolution . . . he wasn't wasting his time anymore with contract meetings . . . they had come to an impasse

⁸As the record shows (fiMDBUfi*ERR17*fiMDNMfiTr. 370-373, 380-385)fiMDBUfi*ERR17*fiMDNMfi would thus receive under the Employer's proposal a \$1.50-an-hour wage increase.

He [Riesenbeck] said to me [Riddle] that he had heard that I was intimidating people for the Union, and I told him that was not the case. . . . Riesenbeck said, if I hear one more word from you, you and I will be taking a walk and you will not be coming back [See Tr. 391-395.]

See also the testimony of employee John Link (fiMDBUfi*ERR17*fiMDNMfiTr. 401-404)fiMDBUfi*ERR17*fiMDNMfi. Company President Riesenbeck claimed, inter alia, that during the evening of November 17, he had made the following statements to employees:

I [Riesenbeck] just want you to be aware that if we do have a strike, if you cross the picket line, we will be operating. If you don't cross the picket line, there is a possibility that you will be permanently replaced.

Riesenbeck insisted: "At no time did I make the comment that anybody would be fired" Elsewhere, Riesenbeck acknowledged that the word "fired" was used during his conversations with employees that evening. Further, Riesenbeck admittedly had

asked [Supervisor] Mike Elliot if this is the guy [employee Larry Riddle] that was mouthing off as far as causing the problems . . . , [and then stated to Riddle that] I [Riesenbeck] just talked to two young men that you have been intimidating . . . you have threatened them and I want that to cease immediately . . . if that kind of situation occurs you are going to have severe problems with me, something to that effect.⁹

XVII. THE EMPLOYER'S DECEMBER 8 "LAST OFFER"

On December 8, counsel for the Employer mailed to Union Representative Scott the "Company's last offer." Counsel stated that he "was sorry for the delay." (fiMDBUfi*ERR17*fiMDNMfiTr. 257-266.)fiMDBUfi*ERR17*fiMDNMfi This "last offer" was agreed upon changes, prior agreements, . . . along with the Company's position on unresolved items." However, as Scott explained, "this document does not reflect the agreed upon" items; "inserted things that were agreed to be deleted"; and included language "never . . . discussed" or "agreed to." (fiMDBUfi*ERR17*fiMDNMfiTr. 257-266.)fiMDBUfi*ERR17*fiMDNMfi the Company "had always taken the position of a one year contract" and the Union "had always taken the position of a three year agreement"; however, "this [last offer] provides for a two year contract" despite the absence "of any discussion of a two year contract." Scott also again noted that the Employer had not "claimed that the parties were at impasse" and there were a number of "outstanding articles" at the time, including union security, discharge, vacations, holidays, grievance procedures, supervisory employees, hours, wages, picketing and struck goods, health and welfare and pensions, management rights, successor, job security, and substance abuse. The Union "was . . . willing to make proposals and movement on these articles."

Shortly thereafter, about December 15, Scott was notified by the unit employees that the Employer had "implemented its final proposal." Indeed, on February 15, 1995, a unit em-

⁹Michael Elliot, called as a witness for Respondent, generally denied, inter alia, witnessing Riesenbeck make various coercive statements attributed to him.

ployee was disciplined pursuant to the Employer's implemented substance abuse policy. (fiMDBUfi*ERR17*fiMDNMfiTr. 358-359)fiMDBUfi*ERR17*fiMDNMfi See G.C. Exh. 271. See also the testimony of former employee David McGlynn (fiMDBUfi*ERR17*fiMDNMfiTr. 371-372)fiMDBUfi*ERR17*fiMDNMfi; employee Larry Riddle (fiMDBUfi*ERR17*fiMDNMfiTr. 404-405)fiMDBUfi*ERR17*fiMDNMfi; employee John Link (fiMDBUfi*ERR17*fiMDNMfiTr. 401-404)fiMDBUfi*ERR17*fiMDNMfi. testified, was drug tested under this implemented policy and suspended during February 1995.

I credit the testimony of Gary Scott, Jerome Diekemper, David McGlynn, Todd O'Laughlin, Ken Torti, Larry Riddle, and John Link as detailed and cited above. Their testimony, as demonstrated, was in significant part mutually corroborative; was substantiated by uncontroverted documentary evidence; and was substantiated by admissions of Respondent Employer's witnesses. And, relying also upon demeanor, they impressed me as reliable and trustworthy witnesses. On the other hand, I was not impressed with the testimony of Richard Riesenbeck, Kenneth Smelcer, and Michael Elliot. Their testimony, as demonstrated, was often vague, general, unsubstantiated, incomplete, contradictory, and unclear. Thus, for example, I find totally incredible Riesenbeck's vague and general assertions that "[i]n my mind I never agreed to anything" at the April 15 "meeting"; that the Union later "consented" to his "retroactive" proposal pertaining to a "safety and attendance pool"; that he in fact did not make various of the alleged coercive statements attributed to him; or that his secretary, who did not testify here, had telephoned the mediator in advance to cancel the scheduled October 21 "meeting."

In sum, on this full record, I am persuaded that the above-quoted and cited testimony of Gary Scott, Jerome Diekemper, David McGlynn, Todd O'Laughlin, Ken Torti, Larry Riddle, and John Link represents a complete and trustworthy account of the pertinent sequence of events. And, insofar as the testimony of Richard Riesenbeck, Kenneth Smelcer, and Michael Elliot conflicts with the above testimony of Gary Scott, Jerome Diekemper, David McGlynn, Todd O'Laughlin, Ken Torti, Larry Riddle, and John Link, I find the testimony of the latter witnesses to be more trustworthy and reliable.

Discussion

Section 7 of the National Labor Relations Act guarantees employees the "right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right "to refrain from any or all such activities." Section 8(fiMDBUfi*ERR17*fiMDNMfi)fiMDBUfi*ERR17*fiMDNMfi the Act makes it an unfair labor practice for an employer "to interfere with, restrain or coerce employees in the exercise of" their Section 7 rights. The "test" of "interference, restraint and coercion under Section 8(fiMDBUfi*ERR17*fiMDNMfi)fiMDBUfi*ERR17*fiMDNMfi turn on the employer's motive or on whether the coercion succeeded or failed . . . [t]he test is whether the employer engaged in conduct, which it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." See *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (fiMDBUfi*ERR17*fiMDNMfi7th Cir. 1946)fiMDBUfi*ERR17*fiMDNMfi of Section 8(fiMDBUfi*ERR17*fiMDNMfi)fiMDBUfi*ERR17*fiMDNMfi engaging in union activity they have stabbed . . . management in the back" (fiMDBUfi*ERR17*fiMDNMfi*Belding Hausman Fabrics*,

Scott recalled, inter alia, that the “preamble” “language was agreed to” by Riesenbeck except for “the insertion of dates” and marked “okay.” The “recognition and bargaining unit” language “was marked as okay . . . after getting told by Riesenbeck that that was okay with him.” Other proposals were discussed and “marked as okay.” Specifically,

Under Art. 2, . . . Union security, . . . the Company said the language was fine except . . . they had a problem with the 31st day because their current procedure was to have a probationary period of six months. And, the dues check off, he [Riesenbeck] didn’t really want to get into that . . . he was a small Company and he only had one secretary in St. Louis and . . . Hannibal And so, I [Scott] put a question mark by that because he [Riesenbeck] needed to talk to his payroll people

Under Art. 12, the grievance and arbitration procedure, [Riesenbeck] said that he would have to check with his consultant, that he didn’t know how that situation worked. But what he did know about it he did not like.

As Scott credibly noted, at no time during this session did Riesenbeck claim “that he was without authority to enter into any agreement for the Company” and, “other than with respect to the grievance and arbitration procedure, did he say that he needed to speak with his advisor.” Further, Riesenbeck had never claimed that “only his consultant could bind the Company.”

The company representatives, including Smelcer, arrived at the next session on April 21 about 30 minutes late. The parties continued discussing the Union’s “proposals” from where they “had left off at the previous meeting of April 15.” Union Representative Scott recalled, inter alia,

[W]e went on to the job security [and the supervisory employees] provision Riesenbeck said that he wanted general manager Summers to perform bargaining unit work as the needs of the business warranted. . . . [W]e were willing to insert that the Employer shall not direct [or] require any of its employees, other than the general manager, who are not included within the bargaining unit covered by this agreement, to do or perform any work [W]e told them that they had leadmen [or shift leaders] for spotters and leadmen for loaders on the different shifts, and we would allow those people to work . . . they were . . . bargaining unit members and not supervisors.

The next meeting was scheduled for 6 p.m. on May 12. The company representatives, again without Smelcer, arrived about 30 minutes late. Union Representative Scott testified:

With regards to not letting [General Manager] Mike [Summers] occasionally drive a truck when someone doesn’t show up, that’s when the discussions arose regarding the handwritten language on Secs. 2 and 3 of job security [as shown in longhand on G.C. Exh. 10]. After we did those handwritten notes [or modifications of the Union’s initial proposal to reflect the Employer’s concerns], [Company President] Riesenbeck agreed to Secs. 2 and 3 [as reflected in G.C. Exh. 10].

Scott again credibly noted that Company President Riesenbeck had not claimed that “he was without authority to enter into an agreement for the Employer” or that “he could not make an agreement without Smelcer.”

Smelcer showed up at this May 12 meeting about 3-1/2 hours late, and, as Scott recalled,

[Smelcer’s] words upon arrival [were], “Nothing has been agreed to yet.” [Union attorney] Diekemper [said], “I beg your pardon there’s been several things agreed to . . .” and he [Diekemper] started reading from his proposals going back to the first meeting that Diekemper was involved . . . on April 15 [Following a caucus] Smelcer [came] back into the room and [said], “They have a problem . . . if the Union thinks that Riesenbeck has agreed to certain items already.” He [Smelcer] wanted to stop there until we could resolve that issue. . . . Diekemper . . . explained to Smelcer that we felt misled . . . and the Union believed at that time that the Company was doing nothing but stalling . . . knowing we were under a one year certification rule. Riesenbeck stated he wanted to adjourn for the day . . . [and] they were going to cancel [the next day’s session]. I [Scott] told him [Riesenbeck] . . . it’s getting late . . . we’re going into June . . . you are only allowing me to negotiate with you four hours a month . . . I need a proposal from the Company . . . I need to set some dates Riesenbeck told me that he would have Smelcer draw up a counterproposal or some Company counterproposals and get them to the Union prior to our next meeting.

According to Company President Riesenbeck, “it was the Company’s position at that time that any of the discussions or agreements during the March 25th, April 15th or April [21st] negotiating sessions were no longer binding.”

The next meeting was scheduled for June 3; however, on May 25, Company President Riesenbeck notified the Company’s three unit leadmen that they were being promoted out of the unit into newly created supervisory positions. The credited evidence of record makes it clear that these three former unit employees thereafter continued to perform their same “duties”; did not exercise any indicia of supervisory status; and were in fact told by Riesenbeck:

During this period of time it is an unfair labor practice if we raise anyone’s salary other than Management. Therefore I am recommending that the first of June we promote you three leadmen to shift supervisors.

Scott was first given a copy of the company document promoting the three unit leadmen by a unit employee on June 1, shortly prior to the next meeting between the parties. Scott credibly explained that the parties had never discussed “promoting [unit] shift leaders to supervisory positions” and the Union had never “agreed to these “promotions.” Further, there are no longer, as a consequence of this unilateral change, any unit “shift leaders,” thereby eliminating 3 of some 27 unit positions.

The parties met for the sixth time on June 3. The Employer first presented its proposed “agreement” at this session, over 5 months after the commencement of bargaining.

Again, the Employer also arrived late for this meeting and took additional time to correct "typos" in its proposed "agreement." Later, Company Consultant Smelcer announced that he "had to leave [early at] . . . 7:30 p.m." Union Representative Scott, referring to the Employer's proposed "agreement," recalled:

[Under art. 11, the grievance procedure] . . . [Riesenbeck] wanted to be the final and binding arbitrator and that the Union was going to agree to and live by his decisions. . . . [Riesenbeck] told me to be assured that he was a fair guy.

Under article 12, supervisory employees, the Company was now proposing that "supervisors may perform any bargaining unit work at any time needed to further the interests of the business." Scott protested:

When we started out these negotiations we had one supervisor. Today we have four. Next week [we] might have 12. And by the time I get a contract I won't have any [unit employees]. . . . I told them I could not accept that I said that if they are supervisors they are not going to be in the unit, and if they are going to be supervisors they are not going to be performing bargaining unit work. . . . I had previously agreed to allow [general manager] Summers to do what Riesenbeck had said and that was to fill in for absentee problems. But now, seeing where he was going with this, I told him, absolutely not.

And, under article 16, wages, the Employer proposed:

Sec. 1. Wages shall be determined by management for each employee within the indicated ranges . . . :

All regular full time employees classified as drivers . . . \$6.50-\$10.00 per hr.

All regular full time employees classified as loaders . . . \$6.50-\$9.00 per hr.

All part time employees classified as drivers or loaders . . . \$5.50-\$9.00 per hr., without fringe benefits.

Scott testified:

I [Scott] told him [Riesenbeck] that it was totally unacceptable . . . nowhere in my life have I ever seen a range where the Employer would say certain people can make this and certain people can make that.

The seventh meeting of the parties was on June 21. Again, the company representatives arrived late for this meeting. In discussing the Employer's proposed "agreement," Scott noted, *inter alia*, that under article 18, welfare, he asked Riesenbeck: "are you telling me that if you decided to discontinue health and welfare coverage for non-bargaining unit employees it would be discontinued for all employees," and Riesenbeck responded: "correct." Further, as Scott recalled, the Employer "made no reference to a pension plan, [although] the Company told me in previous negotiations that they would consider a pension plan." Further, article 22 of the Employer's proposed "agreement" contains the Employer's counter-proposed substance abuse policy. A discussion ensued. Finally, as Scott testified, "Riesenbeck then told me

[Scott] that he didn't care to have a policy on substance abuse. I said fine and I would so note it."

Additional negotiation sessions were scheduled for July 14 and 15, however, later, the Company again "canceled."

The Employer's representatives arrived about an hour late for the eighth scheduled meeting on July 20. Scott then gave to the Company "a counterproposal from the Union for a complete labor agreement" which "incorporated some of the previously agreed items." Scott noted a number of "changes from the Union's original position" as well as "deletions." Thus, for example, the Union's proposed vacations were reduced to a maximum of 5 weeks; two proposed holidays were deleted; proposals pertaining to supervisory employees were "changed . . . to allow that supervisors may perform the bargaining unit work" under certain circumstances; union premium pay proposals were deleted; specific union wage counterproposals were made; and reference to a proposed substance abuse proposal was deleted "because at the previous meeting the Company indicated that it didn't want it and I [Scott] agreed to that."

Riesenbeck "stated, just looking at our proposal, it is not acceptable." Scott recalled, *inter alia*, that the "Company . . . said no to . . ." the Union's "unauthorized activity" and "funeral leave" proposals which the "parties had previously agreed to" "and signed off on" at the June 21 meeting. Scott further recalled that Smelcer then said that "they needed substance abuse" provisions, and Scott responded:

[T]ell me if you want one or tell me if you don't want one . . . I don't know what you want . . . you change every time I meet with you . . . we agree to something and the next meeting we don't agree.

The ninth meeting of the parties was on July 21. Again, the Employer's representatives arrived late. At the beginning of this meeting, the Employer furnished to the Union for the first time a document pertaining to a "safety and attendance incentive pool" proposal, dated July 20, 1994, signed by Company President Riesenbeck, addressed to union personnel, and by its terms "effective July 1." Scott credibly explained that this was "the first time" that he had "learned that the safety and attendance incentive pool would be effective July 1," and he had never "agreed to this plan." In addition, as the credited evidence of record shows, Company Consultant Smelcer then handed Union Representative Scott a copy of the Employer's July 21 counterproposals. The Employer reviewed its counterproposals. "[T]he only discussion" on the Union's proposed union security clause was simply a rejection. On leave of absence, "the Union countered with language [which] the Company agreed to." On discharge, "[Union Attorney] Diekemper again asked about just cause for discharge" and "Smelcer again said it was associated with arbitration" and "the Company doesn't want any part of arbitration." On supervisors, the Company "wants their supervisors to perform bargaining unit work." On seniority, the Union agreed to "company seniority." On wages, the Company rejected the union counterproposal and "proposed [the Company's] language as it was before" "within a range"; however, the parties did agree on overtime at time and a half. On stewards, the Company "changed its mind" on matters "previously agreed to." On welfare, the Company made no further counterproposals and the Company

“was looking into its own” pension program. On substance abuse, the Company “wanted [its] substance abuse” plan and the Union stated that it would “counterpropose at a later date.”

The Union then announced that it “wanted to request the assistance of the FMCS.” The Employer, in turn, insisted that it only wanted to meet for “one day” and not for “two days in a row.” As a consequence, the Union wrote the Employer on August 8:

This is . . . to express [the Union’s] concern with the inordinate delays in the bargaining process necessitated by the lack of availability by your bargaining committee. Over the past seven months we have only been able to schedule nine bargaining sessions and some of them for only short periods of time. The Union has repeatedly indicated that its schedule was open for entire week blocks of time, yet our sessions were relegated to once or twice a month because of the Company’s commitments. We need to begin serious negotiations towards reaching an agreement.

The tenth meeting of the parties was scheduled to begin 1 p.m. on August 18 “at the Federal Mediation office.” The Employer arrived late about 2 p.m. Union Representative Scott explained that, after going through his “proposal,” which “reflected past agreements as closed,” “areas where there had been no agreements as open,” and “underlined areas as changes from the Union’s position from the July 20 session,” the “parties caucused.” The parties then presented further counterproposals. Scott credibly recalled:

The Company came back [from caucus] and Smelcer stated they were very disappointed in the way the counterproposals were presented by the Union. They were not here to horse trade and they believed that is what I [Scott] was doing. I [Scott] said that that is no different than your proposal telling me that you would accept my discharge [proposal] for [their] just cause [proposal] if I accepted [their] grievance and arbitration [proposal]. And they said, irregardless, we’re adjourning for today. . . . I got upset because it was only 6:15 p.m. I said that this was just another blatant attempt of not wanting to continue to meet as previously promised. . . . Riesenbeck then said . . . we’ll call you on the 24th . . . we’ll provide you with answers to your counterproposals and we’ll meet on August 25.

The Employer did not “call” the Union on August 24, or “provide . . . answers to . . . counterproposals and . . . meet on August 25,” as promised. Instead, Company President Riesenbeck, on August 24, issued a letter to the unit employees asserting, inter alia, that “we are basically at an impasse”; “I have agreed to about all of the Union’s demands that I can and they don’t seem to want to give in to us on anything more”; and “I just can’t agree to anymore of the things they want.” Riesenbeck, in this same letter, invited the unit employees to meet with him on August 28. There, Riesenbeck

told the employees that the Union wanted a third person to come in and be the person that decides disputes when the Union and the Company have a dispute, . . .

and there was no way that he was going to allow that to happen . . . if they didn’t like it . . . to just go ahead and strike . . . the only way he was going to sign a contract was under his terms and his terms only . . . the only agreement on wages was going to be . . . on his terms . . . and that there was no way that he was going to agree to the Union’s proposals.

As Union Representative Scott credibly explained, however, the Employer had not “told the Union that it thought they were at impasse,” and the Union was “still proposing items that represented movement on the Union’s position.” Scott also had not “received a response” to his August 18 “counterproposals.” Indeed, counsel for Respondent Employer, during colloquy, when asked whether or not he was claiming “impasse at this point,” responded: “On the 24th there was basically an impasse. But we made some pretty substantial changes after that.”

The next bargaining meeting “was scheduled” at Scott’s request at the Federal Mediation office for October 21. Scott and the Union’s bargaining team showed up at the Federal Mediation office on October 21. The union representatives and the mediator waited for about an hour. The company representatives never appeared. The mediator, at Scott’s request, then arranged for another meeting at 5 p.m. on November 17 in the Federal Mediation office. The Employer arrived at this November 17 meeting about 45 minutes late. Scott recalled Riesenbeck telling the mediator that “we [the Employer] have been sitting across the street at the bar . . . we just didn’t want to come over here.” Riesenbeck then restated the Employer’s positions on various items and accused the Union “of want[ing] [bargaining unit employees] to lose their jobs” by requesting “industry seniority.” Scott responded disputing Riesenbeck’s assertion. Scott urged Riesenbeck to “get down to the issues” and “let’s get moving.” The Employer instead announced:

The Company was going to present the Union with a final offer . . . [and] they planned on implementing it on December 17 . . . and the wages on December 15

This document . . . was distributed . . . [and the Employer stated] this was the Company’s final offer.

Scott then observed that “previous negotiations had resulted in numerous agreements between the parties that have been . . . left out of the Company’s final proposal.” Counsel for the Employer replied:

Look, because of so many [omitted agreements], he wanted an opportunity to go back and prepare . . . another complete final offer with all the agreed upon changes, and get it to [Scott’s] office the following day.

Again, as Scott credibly noted, no “impasse” had been declared by the Employer. The November 17 meeting ended.

Commencing on the evening of November 17, as the credited evidence of record shows, Company President Riesenbeck apprised unit employees: “Guys, don’t let them talk you out of your jobs. Anybody that goes on strike will be fired and not rehired.”

Employees were also told by Riesenbeck that the Company had given the Union “a final proposal”; that “included

in this final proposal would be [wages of] \$9 an hour for the loaders and \$9.50 an hour for the drivers"; that "we were going to get that [wage increase] with or without the Union [on] December 15"; that "we would not get our jobs back if he won the strike"; and that, before the 1993 Board-conducted representation election, "he [Riesenbeck] had asked for a year . . . we had fcked him by voting the Union in . . . we really stabbed him in the back by doing that."

In addition, an employee was openly threatened with physical violence by Riesenbeck because of the employee's protected union activities.

Finally, on December 8, almost 3 weeks late, counsel for the Employer mailed to Union Representative Scott the "Company's last offer." Counsel stated that he "was sorry for the delay." This "last offer" was "supposed to reflect all the agreed upon changes, prior agreements, . . . along with the Company's position on unresolved items." However, as Scott credibly explained, "this document does not reflect the agreed upon" items; "inserted things that were agreed to be deleted"; and included language "never . . . discussed" or "agreed to." Scott noted, inter alia, that the Company "had always taken the position of a one year contract" and the Union "had always taken the position of a three year agreement"; however, "this [last offer] provides for a two year contract" despite the absence "of any discussion of a two year contract." Scott again credibly noted that the Employer had not "claimed that the parties were at impasse" and there were a number of "outstanding articles" at the time, including union security, discharge, vacations, holidays, grievance procedures, supervisory employees, hours, wages, picketing and struck goods, health and welfare and pensions, management rights, successor, job security, and substance abuse. The Union "was . . . willing to make proposals and movement on these articles." The Employer thereafter "implemented its final proposal." Indeed, on February 15, 1995, a unit employee, Link, was disciplined pursuant to the Employer's implemented substance abuse policy.

This record makes it clear that Respondent Employer was unwilling to make "a serious attempt to resolve differences and reach a common ground" with the Union. See cases cited supra. The Employer, as demonstrated above, repeatedly failed and refused to meet with the Union at reasonable times, repeatedly canceled scheduled meetings, and repeatedly arrived late and left early from meetings. At their fifth May 12 meeting, Union Attorney

Diekemper . . . explained to [Company Consultant] Smelcer that we felt misled . . . and the Union believed at that time that the Company was doing nothing but stalling . . . knowing we were under a one year certification rule. [Company President] Riesenbeck stated he wanted to adjourn for the day . . . [and] they were going to cancel [the next day's session]. I [Scott] told him [Riesenbeck] . . . it's getting late . . . we're going into June . . . you are only allowing me to negotiate with you four hours a month . . . I need a proposal from the Company . . . I need to set some dates.

The Employer first presented its "proposed" agreement" at the sixth meeting of the parties on June 3, over 5 months after the commencement of bargaining. Again, the Employer arrived late and Smelcer had to leave earlier than scheduled.

The Union wrote the Employer on August 8:

This is . . . to express [the Union's] concern with the inordinate delays in the bargaining process necessitated by the lack of availability by your bargaining committee. Over the past seven months we have only been able to schedule nine bargaining sessions and some of them for only short periods of time. The Union has repeatedly indicated that its schedule was open for entire week blocks of time, yet our sessions were relegated to once or twice a month because of the Company's commitments. We need to begin serious negotiations towards reaching an agreement.

The Employer even arrived late at the next session scheduled at the Federal Mediation office, where the following exchange occurred:

The Company came back [from caucus] and Smelcer stated they were very disappointed in the way the counterproposals were presented by the Union. They were not here to horse trade and they believed that is what I [Union representative Scott] was doing. I [Scott] said that that is no different than your proposal And they said, irregardless, we're adjourning for today. . . . I got upset because it was only 6:15 p.m. I said that this was just another blatant attempt of not wanting to continue to meet as previously promised.

The Employer thereafter failed and refused to show up at the October 21 meeting scheduled at the Federal Mediation office, and arrived late at the final meeting at the Federal Mediation office on November 17, stating that "we [the Employer] have been sitting across the street at the bar . . . we just didn't want to come over here." Clearly, Respondent Employer was failing and refusing "to meet at reasonable times and confer in good faith," in violation of its statutory bargaining obligation.

Respondent Employer, during this sequence of events, also eliminated three unit positions by promoting its shift leaders to newly created supervisory positions excluded from the unit and, further, implemented a safety and attendance bonus program for the unit employees, all without prior notice to and affording the Union an opportunity to bargain. The credited evidence of record makes it clear that these three former unit employees thereafter continued to perform their same "duties"; did not exercise any indicia of supervisory status; and were in fact told by Company President Riesenbeck:

During this period of time it is an unfair labor practice if we raise anyone's salary other than Management. Therefore I am recommending that the first of June we promote you three leadmen to shift supervisors.

Union Representative Scott was first given a copy of the company document promoting the three unit leadmen by a unit employee on June 1, shortly prior to the next meeting between the parties. Scott credibly explained that the parties had never discussed "promoting [unit] shift leaders to supervisory positions" and the Union had never "agreed to these promotions." In like vein, at the ninth meeting of the parties on July 21, the Employer furnished to the Union for the first time a document pertaining to a "safety and attendance incentive pool," dated July 20, 1994, signed by Company

President Riesenbeck, addressed to unit personnel, and by its terms "effective July 1." Scott credibly explained that this was "the first time" that he had "learned that the safety and attendance incentive pool would be effective July 1" and he had never "agreed to this plan." Respondent Employer, by this unilateral conduct, again acted in derogation of its statutory bargaining obligation.

Respondent Employer also repeatedly engaged in unjustified, regressive bargaining in an attempt to further frustrate and stall the collective-bargaining process. Thus, as Union Representative Scott credibly recalled, at the April 15 meeting of the parties,

Under Art. 2, . . . Union security, . . . the Company said the language was fine except . . . they had a problem with the 31st day because their current procedure was to have a probationary period of six months.

As Scott credibly noted, at no time during this session did Company President Riesenbeck claim "that he was without authority to enter into any agreement for the Company" and, "other than with respect to the grievance and arbitration procedure, did he say that he needed to speak with his advisor . . ." Further, Riesenbeck had never claimed that "only his consultant could bind the Company."

Later, at the April 21 session, as Scott credibly recalled,

[W]e went on to the job security [and the supervisory employees] provision . . . Riesenbeck said that he wanted general manager Summers to perform bargaining unit work as the needs of the business warranted. . . . [W]e were willing to insert that the Employer shall not direct [or] require any of its employees, other than the general manager, who are not included within the bargaining unit covered by this agreement, to do or perform any work . . . [W]e told them that they had leadmen [or shift leaders] for spotters and leadmen for loaders on the different shifts, and we would allow those people to work . . . they were . . . bargaining unit members and not supervisors.

Thereafter, at the May 12 meeting, as Scott credibly recalled:

With regards to not letting [General Manager] Mike [Summers] occasionally drive a truck when someone doesn't show up, that's when the discussions arose regarding the handwritten language on Secs. 2 and 3 of job security [as shown in longhand on G.C. Exh. 10]. After we did those handwritten notes [or modifications of the Union's initial proposal to reflect the Employer's concerns], [Company President] Riesenbeck agreed to Secs. 2 and 3 [as reflected in G.C. Exh. 10].

Scott again credibly noted that Company President Riesenbeck had not claimed that "he was without authority to enter into an agreement for the Employer" or that "he could not make an agreement without Smelcer."

However, when Company Consultant Smelcer finally showed up at this meeting some 3-1/2 hours late, he summarily announced: "Nothing has been agreed to yet." Union Attorney Diekemper protested:

"I beg your pardon there's been several things agreed to . . .," and he [Diekemper] started reading from his

proposals going back to the first meeting that Diekemper was involved . . . on April 15.

According to Company President Riesenbeck, "it was the Company's position at that time that any of the discussions or agreements during the March 25th, April 15th or April [21st] negotiating sessions were no longer binding."

Subsequently, at the June 3 meeting, the Company proposed that "supervisors may perform any bargaining unit work at any time needed to further the interests of the business." Scott protested:

When we started out these negotiations we had one supervisor. Today we have four. Next week [we] might have 12. And by the time I get a contract I won't have any [unit employees]. . . . I told them I could not accept that . . . I said that if they are supervisors they are not going to be in the unit, and if they are going to be supervisors they are not going to be performing bargaining unit work. . . . I had previously agreed to allow [general manager] Summers to do what Riesenbeck had said and that was to fill in for absentee problems. But now, seeing where he was going with this, I told him, absolutely not.

Thereafter, at the June 21 meeting, Company President Riesenbeck, following a discussion over his counterproposed substance abuse policy, announced that "he didn't care to have a policy on substance abuse," and the Union said "fine." However, at the July 20 meeting, Company Consultant Smelcer said that "they needed substance abuse" provisions. Scott protested:

tell me if you want one or tell me if you don't want one . . . I don't know what you want . . . you change every time I meet with you . . . we agree to something and the next meeting we don't agree.

This record shows that Respondent Employer, by the above and related conduct, repeatedly violated its statutory duty to bargain in good faith by regressively withdrawing or modifying its outstanding proposals and agreements, without justification, in order to frustrate bargaining and prevent reaching an agreement.

Ultimately, Respondent Employer, despite its repeated failures to bargain in good faith, implemented what it called its "final offer." Union Representative Scott credibly recalled that at the final November 17 meeting of the parties, the Employer announced:

The Company was going to present the Union with a final offer . . . [and] they planned on implementing it on December 17 . . . and the wages on December 15 . . .

This document . . . was distributed . . . [and the Employer stated] this was the Company's final offer.

Scott then observed that "previous negotiations had resulted in numerous agreements between the parties that have been . . . left out of the Company's final proposal." Counsel for the Employer replied:

Look, because of so many [omitted agreements], he wanted an opportunity to go back and prepare . . . an-

other complete final offer with all the agreed upon changes, and get it to [Scott's] office the following day.

Finally, on December 8, almost 3 weeks late, counsel for the Employer mailed to Union Representative Scott the "Company's last offer." Counsel stated that he "was sorry for the delay." This "last offer" was "supposed to reflect all the agreed upon changes, prior agreements, . . . along with the Company's position on unresolved items." However, as Scott credibly explained, "this document does not reflect the agreed upon" items; "inserted things that were agreed to be deleted"; and included language "never . . . discussed" or "agreed to." Scott noted, inter alia, that the Company "had always taken the position of a one year contract" and the Union "had always taken the position of a three year agreement"; however, "this [last offer] provides for a two year contract" despite the absence "of any discussion of a two year contract." Scott again credibly noted that the Employer had not "claimed that the parties were at impasse" and there were a number of "outstanding articles" at the time, including union security, discharge, vacations, holidays, grievance procedures, supervisory employees, hours, wages, picketing and struck goods, health and welfare and pensions, management rights, successor, job security, and substance abuse. The Union "was . . . willing to make proposals and movement on these articles." The Employer thereafter "implemented its final proposal." Indeed, on February 15, 1995, a unit employee was disciplined pursuant to the Employer's implemented substance abuse policy. The credited evidence of record amply establishes that Respondent Employer never previously had such a substance abuse policy or had ever tested an employee for drug abuse.

As stated supra,

an employer is only privileged to unilaterally implement such changes that "are reasonably comprehended within his pre-impasse proposals" "after bargaining to an impasse, that is, after good faith negotiations have exhausted the prospects of concluding an agreement . . ."; there must be "no realistic possibility that continuation of discussion at that time would be fruitful . . ."; "Only in this latter context where there has been a complete breakdown in the entire negotiations is the employer free to implement his last, best and final offer."

This record makes it clear that the parties, as a consequence of the Employer's unlawful conduct, had not bargained in good faith to impasse, and, consequently, Respondent Employer, by its unilateral implementation of its so-called "final offer," further violated its statutory bargaining obligation.

Company President Riesenbeck made clear to his unit employees:

He [Riesenbeck] told the employees that the Union wanted a third person to come in and be the person that decides disputes when the Union and the Company have a dispute, . . . and there was no way that he was going to allow that to happen . . .

He told the employees that the only way he was going to sign a contract was under his terms and his terms only . . .

With wages, he told the employees that the Union's proposal was utterly ridiculous and that he wanted to be able to give people that he thought deserved wage increases [their] increases . . . that is why he proposed the wage range . . . He said the only agreement on wages was going to be . . . on his terms . . . and that there was no way that he was going to agree to the Union's proposals.

Assessed in this context, Respondent Employer's insistence on a grievance system which would cede final and binding authority to Company President Riesenbeck and its insistence on a wage system which reserved sole discretion in determining unit employee wages within a wide range, were further unlawful manifestations of its refusal to bargain in good faith.

Turning to the independent 8(fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*ERR clear that Respondent Employer engaged in conduct which tended to impinge on employee Section 7 rights by informing employees that the Employer would not bargain in good faith with the Union, the duly certified collective-bargaining agent of an appropriate unit of its employees, and that the Union's bargaining with the Employer would be futile; by informing employees that the Employer would not bargain in good faith with the Union concerning employee wages; by threatening to discharge employees if they went on strike; by telling employees that supporting the Union was disloyal to the Employer; by promising to grant employees wage raises even if they were not represented by the Union; and by threatening an employee with physical harm or other reprisals because of the employee's union activities, as alleged.¹⁰

CONCLUSIONS OF LAW

1. Respondent Employer is engaged in commerce and Charging Party Union is a labor organization as alleged.

2. Charging Party Union is the exclusive collective-bargaining agent of the following appropriate unit of Respondent Employer's employees:

All full time and regular part time spotting/drivers and loading employees employed by Respondent at its St. Louis, Missouri facility, excluding office clerical and professional employees, guards and supervisors as defined in the Act.

3. Respondent Employer has interfered with, restrained, and coerced its employees in the exercise of their Section 7 rights, in violation of Section 8(fiMDBUfl*ERR17*fiMDNMfla)fiMDBUfl*ERR Relations Act, by informing employees that the Employer would not bargain in good faith with the Union, the duly certified collective-bargaining agent of an appropriate unit of its

¹⁰The Employer has not effectively relieved himself of liability here for coercively threatening to fire his employees if they engaged in an economic strike by his November 20 memorandum. (fiMDBUfl*ERR17*fiMDNMfl Exh. 23.)fiMDBUfl*ERR17*fiMDNMfl For, as the Board restated in *Passavant Memorial Hospital*, 237 NLRB 138, 138 (fiMDBUfl*ERR17*fiMDNMfl1978)fiMDBUfl*ERR17*fiM

To be effective . . . such repudiation must be timely, unambiguous, specific in nature to the coercive conduct, and free from other proscribed illegal conduct . . . [quotations and citations omitted].

On this record, the claimed repudiation falls substantially short of this mark.

employees, and that the Union's bargaining with the Employer would be futile; by informing employees that the Employer would not bargain in good faith with the Union concerning employee wages; by threatening to discharge employees if they went on strike; by telling employees that supporting the Union was disloyal to the Employer; by promising to grant employees wage raises even if they were not represented by the Union; and by threatening an employee with physical harm or other reprisals because of the employee's union activities.

4. Respondent Employer has failed and refused to bargain in good faith with the Union as the exclusive collective-bargaining representative of an appropriate unit of its employees, in violation of Section 8(a)(1) of the Act, *inter alia*, eliminating three unit positions by promoting shift leaders to newly created supervisory positions excluded from the unit and, further, by implementing a safety and attendance bonus program for the unit employees, without prior notice to the Union and affording the Union an opportunity to bargain with respect to this conduct or the effects of this conduct; by failing to meet with the Union at reasonable times and, further, by arriving late and leaving earlier than the agreed-on times at scheduled negotiation sessions; by engaging in regressive bargaining withdrawing prior agreements with respect to union security and drug-testing proposals; by making proposals regarding the grievance procedure and changes in employee wages which grant the Employer the exclusive right to determine the outcome of grievances and wage changes; by its overall conduct during collective bargaining; and, finally, by implementing its final offer which made changes in employment conditions including but not limited to wages, the grievance procedure, layoff and recall, and a mandatory alcohol and drug-testing policy for unit employees, without reaching impasse on these issues, without the Union's consent and without affording the Union an adequate opportunity to bargain with the Employer with respect to this conduct.

5. The unfair labor practices found above affect commerce as alleged.

REMEDY

To remedy the unfair labor practices found above, Respondent Employer will be directed to cease and desist from engaging in such unlawful conduct or like and related conduct and to post the attached notice. Affirmatively, to effectuate the purposes and policies of the Act, Respondent Employer will be directed to, on request by the Union, bargain in good faith with the Union and, if an understanding is reached, embody that understanding in a signed agreement. Further, Respondent Employer will be directed to, on request by the Union, rescind the unlawful implementation of its final contract offer commencing on or about December 15, 1994, and reinstitute the wages and terms and conditions of employment that existed before its unlawful conduct, and make whole the unit employees for any losses suffered as a result of its unlawful action in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), and be computed as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Respondent Employer will be directed to, on request by the Union, rescind its unlawful elimination of the three unit shift leaders out of the unit and its unlawful implementation of a safety and attendance bonus

program, and make whole the unit employees for any losses suffered as a result of its unlawful action with interest as provided above. However, to the extent that the above unlawful unilateral changes implemented by Respondent Employer may have improved the terms and conditions of employment of the unit employees, no provision of the Order should in any way be construed as requiring Respondent Employer to revoke such improvements. See *Sierra Publishing Co.*, supra, in accordance with *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962). Respondent Employer extended and not start running until Respondent Employer first commences to fulfill its statutory obligation to bargain in good faith.

The record shows that one employee, Bill Link, was disciplined and suspended as a consequence of Respondent Employer's unlawfully adopted drug abuse program. Respondent Employer will therefore be directed to, if it has not already done so, offer employee Link reinstatement and make him whole for any loss of earnings and other benefits sustained as a result of this unlawfully adopted drug abuse program, computed on a quarterly basis from the date of his suspension and discipline to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950). Respondent Employer will also be directed to preserve and make available to the Board or its agents, on request, all payroll records and reports and all other records necessary to determine backpay and compliance under the terms of this Decision and Order. And, Respondent Employer will be directed to expunge from its files any references to the above disciplinary action of employee Link and notify him in writing that this has been done and that evidence of this unlawful action will not be used as a basis for future personnel action against him, in accordance with *Sterling Sugars*, 261 NLRB 472 (1982).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹¹

ORDER

The Respondent, Golden Eagle Spotting Company, Inc., Hannibal, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interfering with employees in the exercise of their Section 7 rights, in violation of Section 8(a)(1) of the Act, by informing employees that the Employer would not bargain in good faith with the Union, Brewery Drivers and Helpers Local Union 133, affiliated with International Brotherhood of Teamsters, AFL-CIO, the duly certified collective-bargaining agent of an appropriate unit of its employees, and that the Union's bargaining with the Employer would be futile; by informing employees that the Employer would not bargain in good faith with the Union concerning employee wages; by threatening to discharge employees if they went on strike; by

¹¹ 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.

telling employees that supporting the Union was disloyal to the Employer; by promising to grant employees wage raises even if they were not represented by the Union; and by threatening an employee with physical harm or other reprisals because of the employee's union activities.

Union as the exclusive collective-bargaining representative of an appropriate unit of its employees, in violation of Section 8(b)(1) of the National Labor Relations Act, by promoting shift leaders to newly created supervisory positions excluded from the unit and, further, by implementing a safety and attendance bonus program for the unit employees, without prior notice to the Union and affording the Union an opportunity to bargain with respect to this conduct or the effects of this conduct; by failing to meet with the Union at reasonable times and, further, by arriving late and leaving earlier than the agreed-on times at scheduled negotiation sessions; by engaging in regressive bargaining with-drawing prior agreements with respect to union security and drug-testing proposals; by making proposals regarding the grievance procedure and changes in employee wages which grant the Employer the exclusive right to determine the outcome of grievances and wage changes; by its overall bad-faith conduct during collective bargaining; and, finally, by implementing its final offer which made changes in employment conditions including but not limited to wages, the grievance procedure, layoff and recall, and a mandatory alcohol and drug-testing policy for unit employees, without reaching impasse on these issues, without the Union's consent, and without affording the Union an adequate opportunity to bargain with the Employer with respect to this conduct. The appropriate bargaining unit is:

All full time and regular part time spotting/drivers and loading employees employed by Respondent at its St. Louis, Missouri facility, excluding office clerical and professional employees, guards and supervisors as defined in the Act.

ing, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

the Union as the exclusive collective-bargaining representative of the above appropriate unit of its employees with respect to their wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody that understanding in a signed agreement.

mentation of its final contract offer commencing on or about December 15, 1994, and reinstitute the wages and terms and conditions of employment that existed before its unlawful conduct, and make whole the unit employees for any losses suffered as a result of its unlawful action, with interest, as provided in the remedy section of the Board's decision. On request by the Union, rescind its unlawful elimination of the three unit shift leaders out of the unit and its unlawful implementation of a safety and attendance bonus program, and make whole the unit employees for any losses suffered as a result of its unlawful action, with interest, as provided in the

remedy section of the Board's decision. However, to the extent that the above unlawful unilateral changes implemented by Respondent Employer may have improved the terms and conditions of employment of the unit employees, no provision of this Order should in any way be construed as requiring Respondent Employer to gain or make such improvements.

In accordance with the terms of the Order, Respondent Employer shall extend its current year certification period will be extended and not start running until the Respondent Employer complies with the Order's statutory obligation to bargain in good faith.

Offer employment to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the Employer's unlawful conduct against him, with interest, as provided in the remedy section of the Board's decision.

Remove from suspension and disciplining of employee Link and notify him in writing that this has been done and that the unlawful suspension and disciplining of him will not be used against him in any way.

Preserve and, or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under and compliance with the terms of this Order.

Post at its fac "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

Notify the Re from the date of this Order what steps the Respondent has taken to comply.

¹²If 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
On request by the Union, rescind the unlawful implementation of the safety and attendance bonus program
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

Section 7 of the Act gives employees these rights.

To organize

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

WE WILL NOT interfere with, restrain, and coerce our employees in the exercise of their Section 7 rights, in violation of Section 8(f)MDBUfi*ERR17*fiMDNMfla)fiMDBUfi*ERR17*fiMDNMfi(fiMDBUfi*ERR17*fiMDNMfi)fiMDBUfi*ERR17*fiMDNMfi of the Act, by informing employees that we will not bargain in good faith with the Union, Brewery Drivers and Helpers Local Union 133, affiliated with International Brotherhood of Teamsters, AFL-CIO, the duly certified collective-bargaining agent of an appropriate unit of our employees, and that the Union's bargaining with us would be futile; by informing employees that we will not bargain in good faith with the Union concerning employee wages; by threatening to discharge employees if they go on strike; by telling employees that supporting the Union is disloyal to us; by promising to grant employees wage raises even if they are not represented by the Union; and by threatening an employee with physical harm or other reprisals because of the employee's union activities.

WE WILL NOT fail and refuse to bargain in good faith with the Union as the exclusive collective-bargaining representative of an appropriate unit of our employees, in violation of Section 8(f)MDBUfi*ERR17*fiMDNMfla)fiMDBUfi*ERR17*fiMDNMfi(fiMDBUfi*ERR17*fiMDNMfi)fiMDBUfi*ERR17*fiMDNMfi and (fiMDBUfi*ERR17*fiMDNMfi)fiMDBUfi*ERR17*fiMDNMfi, by promoting shift leaders to newly created supervisory positions excluded from the unit and, further, by implementing a safety and attendance bonus program for the unit employees, without prior notice to the Union and affording the Union an opportunity to bargain with respect to this conduct or the effects of this conduct; by failing to meet with the Union at reasonable times and, further, by arriving late and leaving earlier than the agreed-on times at scheduled negotiation sessions; by engaging in regressive bargaining withdrawing prior agreements with respect to union security and drug-testing proposals; by making proposals regarding the grievance procedure and changes in employee wages which grant us the exclusive right to determine the outcome of grievances and wage changes; by our overall bad-faith bargaining conduct during collective bargaining; and, finally, by implementing our final offer which made changes in employment conditions including but not limited to wages, the grievance procedure, layoff and recall, and a mandatory alcohol and drug-testing policy for unit employees, without reaching impasse on these issues, without the Union's consent and without affording the Union an adequate opportunity to bargain with us with respect to this conduct. The appropriate bargaining unit is:

All full time and regular part time spotting/drivers and loading employees employed by the Employer at our St. Louis, Missouri facility, excluding office clerical and professional employees, guards and supervisors as defined in the Act.

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

WE WILL, on request by the Union, rescind the unlawful implementation of our final contract offer commencing on or about December 15, 1994, and reinstitute the wages and terms and conditions of employment that existed before our unlawful conduct, and make whole the unit employees for any losses suffered as a result of our unlawful action, with interest, as provided in the Board's decision. WE WILL, on request by the Union, rescind our unlawful elimination of the three unit shift leaders out of the unit and our unlawful implementation of a safety and attendance bonus program, and make whole the unit employees for any losses suffered as a result of our unlawful action, with interest, as provided in the Board's decision. However, to the extent that the above unlawful unilateral changes implemented by us may have improved the terms and conditions of employment of the unit employees, no provision of the Board's Order should in any way be construed as requiring us to revoke such improvements.

WE WILL offer to employee John Link immediate and full reinstatement to his former job or, if this job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the unlawful disciplinary action against him, with interest, as provided in the Board's decision.

WE WILL remove from ours files any reference to the unlawful suspension and disciplining of employee Link and notify him in writing that this has been done and that evidence of this unlawful action will not be used as a basis for future personnel action against him.

WE WILL preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under and compliance with the terms of the Board's Decision and Order.

GOLDEN EAGLE SPOTTING COMPANY, INC.