

**Formosa Plastics Corporation, Louisiana and General Truck Drivers, Warehousemen and Helpers Local No. 5, International Brotherhood of Teamsters, AFL-CIO.** Cases 15-CA-12162-1, 15-CA-12177, 15-CA-12231-1, 15-CA-12394, and 15-CA-12397

January 3, 1996

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND  
TRUESDALE

On July 20, 1994, Administrative Law Judge Richard J. Linton issued the attached decision. The General Counsel, the Charging Party, and the Respondent filed exceptions and supporting briefs, and the Respondent filed a reply brief.

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

The Board has considered the record and the decision in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions only to the extent consistent with this decision.

1. The judge recommended dismissal of allegations that the Respondent violated Section 8(a)(1) by promulgation and maintenance of a rule that prohibited all handbilling and distribution of literature on company property. We reverse.

On September 15, 1993, the Respondent's general manager, Alden L. Andre, distributed a memorandum to employees discussing the upcoming unfair labor practice hearing in the instant proceeding. At a negotiating session held on the same day, Union Business Agent Doug Partin, having read the memo and taking issue specifically with Andre's representation that the

<sup>1</sup> 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 Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In sec. III.C of his decision, the judge incorrectly cited a charge in Case 15-CB-3814 filed by the Respondent against the Union on January 21, 1993.

In sec. III.G,2,b,(2) of his decision, the judge recommended dismissal of allegations that the Respondent violated Sec. 8(a)(3) and (1) by the "non-bulletin board changes" that the Respondent made on May 24, 1993. We find that the alleged unlawful changes to which the judge referred in his dismissal were not so limited. They included a change in the Respondent's bulletin board policy. Thus, the latter was also not unlawful under Sec. 8(a)(3).

In adopting the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by issuing warnings to and suspending Union President Donald McLean, we do not rely on any suggestion by the judge that an earlier incident of sexual harassment involving one of the Respondent's managers was more serious than the one allegedly involving McLean.

hearing would not be a "trial," asked the Respondent's administration manager, Patrick L. Loupe, whether he could distribute a written response (i.e., a handbill) to employees. After conferring with his attorney during a recess, Loupe told Partin that the answer was "no." Union Steward Ratcliff, who also expressed disagreement with the Respondent's memo, then asked whether he could distribute a response, and Loupe again replied in the negative. Either Ratcliff or another union negotiator then asked whether the Union could, as an alternative to handbilling distribution, post a letter on the bulletin board. Loupe responded that there was a procedure for that. The matter was not raised again at that session or in subsequent negotiations.

The judge found that the Respondent announced a new rule that in effect prohibited handbilling at the front gate, on the Respondent's property.<sup>2</sup> The judge found that the Respondent did not enforce the rule in a disparate manner. We agree. As discussed below, however, we find that the rule was promulgated for unlawful reasons, and that it is unlawfully broad. The judge found that the Respondent had not previously maintained a no-distribution rule or policy. To the contrary, he found that, for as long as it has owned the plant, the Respondent has sanctioned handbilling at its main entrance. For example, in the presence of supervisors and managers, union representatives and employees had handbilled without interference while standing at the guard shack at the main entrance to the plant. This occurred at various times over the past 12 years. Similarly, in the latter part of 1992, one union steward was given permission by Administration Manager Loupe to handbill at the gate so long as he did not aggravate employees passing through. Finally, about a week before the decertification election, a supervisor approached then-Union President Donald McLean and Union Steward Ratcliff, both employees, at the main gate and asked for a copy of the handbill they were distributing there. The supervisor then delivered to General Manager Andre two copies of the handbill he had received from the union representatives.

In sum, the Respondent did not have a prior ban on distribution in nonwork areas. The judge found that the genesis of the instant rule was a request by union representatives to reply to the Respondent's literature concerning the unfair labor practice hearing. When an employer promulgates such a rule in direct response to union activity, as the Respondent has done here, it unlawfully interferes with protected Section 7 rights. See *Pedro's Restaurant*, 246 NLRB 567, 570, 573 (1979).

<sup>2</sup> Member Cohen does not necessarily agree that an isolated prohibition of conduct constitutes the promulgation of a "rule." Inasmuch as the Respondent does not raise this point, however, Member Cohen adopts pro forma the judge's finding that a rule was promulgated.

Accordingly, we find that the Respondent has violated Section 8(a)(1).

Further, quite apart from its unlawful promulgation, the rule is substantively unlawful. An employer may lawfully maintain a rule forbidding employees to distribute union literature in working areas, but a broad rule banning distribution during nonworking time in nonworking areas of the plant is presumptively invalid. *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 616, 621 (1962). The Respondent's blanket denial of permission for the employee union representatives to distribute their literature anywhere at the plant is thus presumptively invalid on its face. Nor has the Respondent rebutted the presumption by showing that the rule was established in order to maintain production and discipline.

2. The judge found that the evidence failed to match the allegation that the Respondent violated Section 8(a)(5) by bypassing the Union and dealing directly with unit employees by soliciting employee Michael A. Bledsoe to settle a grievance.

Bledsoe was discharged in June 1992. A grievance was filed on his behalf, and it was arbitrated in May 1993. The following month, while the case was pending before the arbitrator, the Respondent's administration manager, Loupe, phoned Bledsoe, telling him that Loupe had something that would be beneficial to him if he met Loupe at his office the following morning. The Respondent did not inform the Union about the meeting. The following day, Loupe met with Bledsoe and offered him his old job back without backpay. Loupe stated that, if Bledsoe had not received bad advice from the Union and if Loupe had known all the facts that had been raised in the arbitration, he would not have been discharged. Staff Manager Roger Massey and other supervisors then joined the meeting. Massey advised Bledsoe that, should a similar incident occur in the future, he should tell everything. Massey repeated Loupe's remark that the Union had given Bledsoe bad advice by telling him not to tell everything. The following day, Bledsoe accepted the offer of reinstatement after speaking with the Union, and the parties agreed to notify the arbitrator that the issue of reinstatement was no longer before him, and that he should decide the case only as to whether the Respondent was obligated to pay Bledsoe backpay.

The judge found that the Respondent did not settle, or attempt to settle, the Bledsoe grievance by meeting with him. The judge reasoned that the offer of reinstatement was not conditioned on Bledsoe's withdrawing the grievance from the arbitrator. The judge therefore concluded that the Respondent had not engaged in direct dealing or bypassing the exclusive representative. We disagree.

An employer violates Section 8(a)(5) by (1) adjusting an employee's grievance without permitting the

collective-bargaining representative an opportunity to be present, as required by the second proviso to Section 9(a); and (2) conduct that undermines a bargaining representative's statutory authority and denigrates the collective-bargaining relationship. See *Postal Service*, 268 NLRB 876, 877-878 (1984). Here, Bledsoe's discharge grievance, which was before the arbitrator, was being handled by the Union pursuant to the grievance-arbitration provisions of the expired contract. Nonetheless, the Respondent met directly with Bledsoe to adjust the matter in part, without informing the Union, much less offering it an opportunity to be present at the meeting. Moreover, the Respondent's repeated counsel to Bledsoe that the Union had given him bad advice undermined the Union's statutory authority. Accordingly, the Respondent bypassed the Union and dealt directly with its employees in violation of Section 8(a)(5) of the Act.<sup>3</sup>

3. On May 24, 1993, the Respondent rescinded improved terms and conditions of employment that it had instituted on the prior October 1 under the mistaken impression that the Union's membership had ratified a contract containing the improvements. Also on May 24, the Respondent also made other changes that did not reflect a return to the terms and conditions of employment existing before October 1. Among these was a freeze in the pay of employees assigned to the VCM-I plant. The judge found that, because the VCM-I plant had been closed for modernization and because the management-rights provisions of the expired contract gave the Respondent the authority to operate the plant, the Respondent was privileged unilaterally to freeze the pay of these employees. We disagree.

Although the temporary closure of the VCM-I plant for repairs may have been, as the judge termed it, an "operations matter," it was not within management's discretion, once it reassigned the VCM-I employees to other work within the plant, to freeze their wages unilaterally. Wages are undisputedly a mandatory subject of bargaining that survived the expiration of the 1989-1992 contract. Accordingly, the Respondent was obligated to give the Union notice and opportunity to bargain over the matter. Having failed to do so, it violated Section 8(a)(5) and (1) of the Act.

We disagree with our dissenting colleague's conclusion that there was an additional violation of Section

<sup>3</sup> *Weinreb Management*, 292 NLRB 428 (1989), contrasted by the judge, does not suggest otherwise. In *Weinreb*, the Board found that an employer who sought unsuccessfully to obtain a written release of an employee's claim for lost wages, which had been the issue of a pending grievance, violated the Act by not including the union in the discussions. The same result obtains here, where the Respondent in fact adjusted at least part of the dispute—Bledsoe's current employment status—without including the Union. See *Gratiot Community Hospital*, 312 NLRB 1075, 1080 (1993) ("Indeed, a representative's right not to be bypassed . . . is explicitly protected by the proviso to Section 9(a) . . . .")

8(a)(5). The facts are as follows: The Union misrepresented to the Respondent that there was a contract as of October 1, 1992. Thus, as of that date, the Respondent had a good-faith but erroneous belief that the Union had agreed to a renewal contract. The Respondent instituted changes in terms and conditions of employment consistent with that belief. Those changes are not alleged to be unlawful. On May 24, 1993, the Respondent again instituted changes, this time unilaterally. To the extent that these changes restored the status quo prior to October 1, 1992, we consider them lawful. In this regard, we note that there was in fact no contract agreed upon on October 1. Thus, the pre-October 1 terms and conditions were the lawful ones, and the Respondent was simply returning thereto. In all other respects, however, the changes of May 24, 1993, were unlawful. We have revised the judge's recommended Order accordingly.

Our dissenting colleague concludes that the May 24 changes were unlawful ones insofar as they simply restored the lawful pre-October terms. She apparently concedes that the Respondent would have been privileged to order these changes in November, when it first learned that there was in fact no contract on October 1. She faults the Respondent, however, for having waited 7 months before making the changes. We disagree. We note initially that the entire problem was created because the Union represented to the Respondent that there was a contract on October 1. When the Respondent learned of this, it told the employees that it would not act immediately to take away the benefits of the purported contract. Rather, it would permit them to continue for a reasonable period of time. Most significantly, the Respondent also told the employees that it would bargain with the Union about resolving this problem. We think that the Respondent, far from undermining the Union, went out of its way to recognize the Union's statutory role in resolving the problem, even though the Union was the source of that problem.

#### AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order that it cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent violated Section 8(a)(1) by promulgating and enforcing a no-distribution rule in direct response to union activity, we shall order the Respondent to rescind the rule.

Having found that the Respondent violated Section 8(a)(5) and (1) by unilaterally freezing the wages of VCM-I employees, we shall order the Respondent to make them whole for any loss of earnings attributable to its unlawful conduct. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971), with

interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

#### ORDER

The Respondent, Formosa Plastics Corporation, Louisiana, Baton Rouge, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Selectively and disparately enforcing, against union supporters, its rule requiring employees to seek their supervisor's permission before leaving their work area.

(b) Issuing final warnings to, suspending, or otherwise discriminating against any employee for supporting Teamsters Local 5 or any other union.

(c) Refusing to bargain with Teamsters Local 5 by making unilateral changes in wages, benefits, and working conditions, without giving the Union notice and the opportunity to bargain over such changes as they affect employees in the bargaining unit described below.

(d) Bypassing Teamsters Local 5 as the exclusive collective-bargaining representative of employees in the unit described below in the adjustment of employee grievances.

(e) Promulgating and enforcing no-distribution rules that are overly broad or unjustified in direct response to union activity.

(f) In any like or related manner interfering with, restraining, 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.

(a) On request of the Union, and to the extent Formosa Plastics Corporation (FPC) has not already done so, rescind each of the following changes described in FPC's May 21, 1993 memo to all employees and implemented on May 24, 1993, and restore the conditions to the levels so changed: (1) the unilateral policy rescinding the preexisting practice of allowing employees to take 5 days of vacation 1 day at a time; (2) the unilateral policy substituting a company grievance procedure for the one that survived the 1989-1992 collective-bargaining agreement with the Union; (3) the unilateral freeze of VCM-I employees' wages, making VCM-I employees whole for any loss of earnings and other benefits suffered as a result of the unlawful action, in the manner set forth in the amended remedy section of the decision.

(b) Rescind the unilateral policy implemented May 24, 1993, eliminating payment of wages during time spent in bargaining to employee representatives of the Union's negotiating committee; on request of the Union, bargain with the Union over whether, effective June 7, 1993, the Respondent will pay wages to members (all, some, or none) of the Union's negotiating

committee; and restore the practice of negotiating with the Union over whether and how many employee members of the Union's bargaining committee the Respondent will compensate for time lost from work.

(c) Rescind the over-broad no-distribution policy instituted on September 15, 1993, in direct response to union activity.

(d) Notify the Union in writing that the Respondent withdraws its May 21, 1993 letter to the Union respecting bulletin boards, and include in such letter a statement that FPC has revoked the May 24, 1993 implementation of the policy described in its May 21, 1993 letter.

(e) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All maintenance, maintenance construction and production employees of the Baton Rouge Plant, Baton Rouge, Louisiana, Formosa Plastics Corporation, LA, except supervisory employees and foremen with authority to hire or discharge employees, actually or by recommendation, guards, head loaders, office and production clerks and technical employees.

(f) Make Donald McLean whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision.

(g) Remove from its files any reference to the unlawful June 7, 1993 final warning to and suspension of Donald McLean and notify McLean in writing that this has been done and that the warning and suspension will not be used against him in any way.

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

(i) Post at its Baton Rouge, Louisiana facility copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on 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 Re-

spondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

MEMBER BROWNING, partially dissenting.

I fully agree with my colleagues in all respects except, as discussed below, their affirmation of the judge's recommended dismissal of two 8(a)(5) allegations.

I find that the Respondent violated Section 8(a)(5) and (1) of the Act by its May 24, 1993<sup>1</sup> unilateral reduction and reversion of wages and benefits, including meal and shoe allowances, to the levels that were in effect during the period of the October 1, 1989, through September 30, 1992 collective-bargaining agreement, i.e., immediately prior to the Respondent's October 2 implementation of the terms and conditions in question that it subsequently changed on May 24.

On October 1, the Union told the Respondent that the employees had ratified the Respondent's final offer for a renewal collective-bargaining agreement. Acting on that information, the next day the Respondent implemented the terms and conditions of employment contained in what it believed was the new agreement. There is no claim that the Respondent acted unlawfully in implementing these October 2 changes. But as it later turned out, unknown to the Respondent at the time of implementation, the employees had not ratified the Respondent's full offer, and thus agreement had not in fact been reached on the new collective-bargaining agreement.

When the Respondent found out, however, in early November that its final offer had not been fully ratified, and that there was therefore no collective-bargaining agreement in effect, it nevertheless did not immediately rescind the new terms and conditions of employment it had implemented on October 2 on the mistaken belief that a new agreement had been reached. Indeed, on January 7, the Respondent informed the employees in writing about the circumstances surrounding their October 1 failure to ratify the full contract proposed by the Respondent. The letter to employees states, in pertinent part:

The Company is still very much concerned about the welfare of its employees. Because of this, Formosa will not make any wage or other fringe benefit adjustment between now and a reasonable time to be determined by Formosa, during which time the Company and Union can negotiate with a view to reaching an overall agreement.

On February 4, the Respondent informed the Union (1) that it had recommended to higher corporate man-

<sup>4</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

<sup>1</sup>All dates in this section are within the period October 1992 through May 1993.

agement that the employees “at this time should not suffer a loss of income or benefit improvement due to the union officers’ irresponsible handling” of the contract negotiations, and (2) that it would therefore continue in effect the wages and benefit improvements implemented on October 2 “for a reasonable period of time, in the hope” that the Union would negotiate realistically and straightforwardly.

Thus, the Respondent twice said that it would continue in effect the October 2 changes for a reasonable period of time, and it did so, until May 24, when the Respondent unilaterally changed certain terms and conditions of employment in seven areas.

I fully agree with my colleagues that the Respondent violated the Act by its unilateral changes in regard to (1) the wage rates of VCM-I employees; (2) vacation policy; (3) the grievance procedure; (4) compensation for employee members of the union negotiating committee; and (5) bulletin board policy. I differ only with my colleagues’ finding, in agreement with the judge, that the Respondent did not similarly violate the Act by its unilateral changes in regard to wages and benefits, and shoe and meal allowances. In that regard, my colleagues agree with the judge that the Respondent’s unilateral changes in these subjects were not unlawful because they merely restored the status quo prior to the October 2 implementation of improvements in those areas, which the Respondent implemented in its good-faith mistaken belief that the employees had ratified a new contract containing those improvements. Here, I disagree.

To permit the Respondent unilaterally to change these terms and conditions of employment after they had been in effect for over 7 months would in my view (1) create the impression in the minds of employees that the Respondent could unilaterally do as it pleased even after the terms and conditions in question had, by any reasonable assessment, become established, and (2) allow the Respondent unilaterally to determine how long it was “reasonable” to maintain the terms and conditions, and (3) permit the Respondent to change those terms and conditions when, in its sole judgment, the ongoing negotiations were not progressing to its satisfaction. In my view, these factors all work to undermine the representative role of the newly recertified Union. The fact that the Union contributed to the problem initially by misinforming the Respondent about the existence of a contract does not, in my view, alter this conclusion because it is the destruction of the Union’s role in the eyes of the employees that constitutes the gravamen of this violation. Any arguable union misconduct (particularly involving no statutory violation) does not privilege misconduct by the Respondent.

Thus, I find under the unusual circumstances here, and notwithstanding the good-faith mistaken belief

under which the Respondent initially implemented these terms on October 2, that by May 24, after the passage of almost 8 months, they had become established terms and conditions of employment. I find, therefore, that the Respondent was not privileged unilaterally to take away these established terms and conditions of employment from the employees, even by simply reverting to the levels that existed in those terms and conditions during the period of the prior collective-bargaining agreement. Consequently, I find that the Respondent violated Section 8(a)(5) and (1) of the Act by doing so.<sup>2</sup>

<sup>2</sup> See *Smiths Industries*, 316 NLRB 376 (1995) (established workplace practice became implied term and condition of employment by mutual consent of parties, even when in deviation from terms of collective-bargaining agreement; practice governs over contract); *Riverside Cement Co.*, 296 NLRB 840 (1989) (unilateral change in implied term and condition of employment established by practice to which parties have mutually consented, unlawful); *Sacramento Union*, 258 NLRB 1074 (1981), and cases cited there (employer’s unilateral change in past practice of job assignments and seniority rights, unlawful).

## APPENDIX

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT selectively and disparately enforce, against union supporters, our rule requiring you to seek your supervisor’s permission before leaving your work area.

WE WILL NOT promulgate and enforce overbroad no-distribution rules that are unjustified or in direct response to union activity.

WE WILL NOT bypass Teamsters Local 5 as the exclusive collective-bargaining representative of employees in the unit described below.

WE WILL NOT issue final warnings to, suspend, or otherwise discriminate against any of you for supporting Teamsters Local 5 or any other union.

WE WILL NOT refuse to bargain with General Truck Drivers, Warehousemen and Helpers Local No. 5,

International Brotherhood of Teamsters, AFL-CIO by making unilateral changes in wages, benefits, and working conditions without giving the Union notice and the opportunity to bargain over such changes as they affect employees in the bargaining unit described below.

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

WE WILL, on request of the Union, and to the extent we have not already done so, rescind each of the following changes described in our May 21, 1993 memo to all employees; WE WILL restore the conditions to the levels so changed: (1) the May 24, 1993 policy rescinding the preexisting practice of allowing you to take 5 days of vacation pay 1 day at a time; (2) the May 24, 1993 policy substituting a company grievance procedure for the grievance procedure surviving the 1989-1992 contract with the Union; and (3) the freeze of wages of VCM-I employees; and WE WILL make VCM-I employees whole for any loss of wages attributable to that conduct, with interest.

WE WILL rescind the policy implemented May 24, 1993, eliminating payment of wages for time spent at bargaining to employee members of the Union's negotiating committee, and, on request of the Union, WE WILL bargain respecting whether, effective June 7, 1993, we will pay wages to members (all, some, or none) of the Union's negotiating committee, and WE WILL restore the practice of negotiating with the Union over whether and how many employee members of the Union's bargaining committee we will compensate for time lost from work.

WE WILL rescind our over-broad no-distribution rule.

WE WILL notify the Union in writing that we withdraw our May 21, 1993 letter to the Union respecting bulletin boards, and WE WILL include in such notice a statement that we have revoked the May 24, 1993, implementation of the policy described in our letter of May 21, 1993, to the Union.

WE WILL, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All maintenance, maintenance construction and production employees of the Baton Rouge Plant, Baton Rouge, Louisiana, Formosa Plastics Corporation, LA, except supervisory employees and foremen with authority to hire or discharge employees, actually or by recommendation, guards, head loaders, office and production clerks and technical employees.

WE WILL make Donald McLean whole, with interest, for any loss of earnings and other benefits which

he suffered when we suspended him for 2 days on June 7, 1993.

WE WILL remove from our files any reference to the final warning and 2-day suspension that we imposed on Donald McLean on June 7, 1993, and WE WILL notify McLean in writing that this has been done and that the warning and suspension will not be used against him in any way.

FORMOSA PLASTICS CORPORATION,  
LOUISIANA

*Kathleen McKinney, Esq.*, for the General Counsel.

*Gordon A. Pugh, Esq.* and *Leo C. Hamilton, Esq. (Breazeale, Sachse & Wilson)*, of Baton Rouge, Louisiana, for Formosa Plastics.

*Randall G. Wells, Esq.*, of Baton Rouge, Louisiana, for Teamsters Local 5.

## DECISION

### STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. This is a refusal-to-bargain case. Finding that Formosa Plastics Corporation, Louisiana (FPC, Respondent, or Company) the Company (FPC) made limited unilateral changes effective May 24, 1993, I order it to rescind the changes (to the extent it has not already done so), to restore the conditions modified, and to bargain with the Union respecting one of the changes. I dismiss other refusal-to-bargain allegations, including an allegation of overall bad-faith bargaining. As to the latter, I find that FPC, holding the upper hand economically, exercised its brute economic strength in pushing for a contract (not yet reached as of the close of the trial) to its liking. Although the Union insisted on its own version of the appropriate contract (one FPC offered before the current bargaining sessions began, and then later withdrew from the table as its position strengthened), the Union was in a poor position to enforce its demands. Also finding that FPC unlawfully warned and suspended Donald McLean on June 7, 1993, I order FPC to make McLean whole, with interest. Of the remaining allegations, I dismiss most.

I presided at this 9-day trial in Baton Rouge, Louisiana, opening January 24, 1994, and closing March 10, 1994, pursuant to the January 14, 1994 third order consolidating cases, third consolidated complaint and notice of hearing (complaint) issued by the Acting General Counsel of the National Labor Relations Board through the Regional Director for Region 15 of the National Labor Relations Board. The complaint is based on a charge filed and served, in the first case, on June 3, 1993,<sup>1</sup> by General Truck Drivers, Warehousemen and Helpers Local No. 5, a/w International Brotherhood of Teamsters, AFL-CIO (Union or Teamsters Local 5) against FPC.<sup>2</sup> That first charge was amended and charges were filed later in the other cases.

<sup>1</sup> All dates are in 1993 unless otherwise indicated.

<sup>2</sup> The International union (IBT) has shortened its official name. See *Good Life Beverage Co.*, 312 NLRB 1060 fn. 1 (1993). On November 1, 1987, the Teamsters International Union reaffiliated with the AFL-CIO. See *Teamsters Local 776 (Pennsy Supply)*, 313

In the Government's complaint, the General Counsel alleges that FPC violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), since March 1993 by selectively enforcing (against union advocates) a rule requiring employees to obtain their supervisor's permission before leaving their work area, and at a bargaining session on September 15, announcing, and thereafter maintaining, a rule prohibiting all handling and distribution of literature on FPC property. The complaint alleges that FPC violated 29 U.S.C. § 158(a)(3) about May 24 by various unilateral changes in wages and working conditions, and about June 7 by issuing a final warning and a 2-day suspension to Donald McLean because of his union activities. The General Counsel also alleges that FPC violated 29 U.S.C. § 158(a)(5) about February 4 by withdrawing its September 1992 contract proposals; about May 24 by the unilateral changes; about June 7 when FPC's administration manager, Patrick L. Loupe, bypassed the Union and dealt directly with unit employees by soliciting an employee to settle a grievance; about June 30 by submitting regressive contract proposals; and by its (complaint par. 21) "overall conduct" FPC "has failed and refused to bargain in good faith with the Union as the exclusive collective-bargaining representative of the Unit."

By its answer FPC admits certain facts but denies violating the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Teamsters Local 5, and FPC, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

The pleadings establish that FPC is a corporation with a plant at Baton Rouge, Louisiana, where it manufactures chemical products. During the 12 months ending June 30, FPC purchased and received at its Baton Rouge plant goods valued at \$50,000 or more direct from points outside Louisiana. At all material times FPC has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

##### II. LABOR ORGANIZATION INVOLVED

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

##### III. THE ALLEGED UNFAIR LABOR PRACTICES

###### A. *The Company*

Alden L. Andre is FPC's vice president and general manager. (1:46; 8:1618.)<sup>3</sup> Andre testified that FPC is part of Formosa Plastics Group (FPG), a worldwide firm consisting of many companies, with Formosa Plastics, U.S.A. being one. The principal owner of FPG is its board chairman, Y. C. Wang. Wang's daughter, Susan Wang, manages FPC (and possibly all operations of FPG in the USA). Andre reports

NLRB 1148 fn. 1 (1994); C. D. Gifford, *Directory of U.S. Labor Organizations* 53, 58 (1992-1993 ed. BNA).

<sup>3</sup>References to the nine-volume transcript of testimony are by volume and page.

to Susan Wang. (1:47, 52-53; 8:1639.) Susan Wang presides over FPC from the corporate headquarters at Livingston, New Jersey. (1:47-48; 8:1699.) Patrick L. Loupe, FPC's administration manager, reports to Andre. (1:107; 8:1718; 9:1828.)

At Baton Rouge FPC manufactures two principal commercial products: PVC (polyvinyl chloride) and caustic soda. (1:50-51.) The production process involves chemicals which, if mishandled, can present a very dangerous situation. (8:1662-1663.) FPC (the Baton Rouge plant unless otherwise indicated) operates with some 300 employees plus about 100 contract employees. (1:49.) Currently FPC employs about 200 production employees. (8:1508.) The plant apparently opened in the mid-1930s under one of the predecessor owners. (1:33.) A union has represented the production and maintenance employees for about 50 years. For the first 25 years or so, representation was by the United Mine Workers (UMW), with the Teamsters providing the representation for approximately the last 25 years. (6:1133-1134; 8:1615, 1619, 1623; 9:1851.) Thus, when FPC purchased the plant and began operating it in January 1981 (1:46; 8:1616), Teamsters Local 5 was the collective-bargaining representative. (1:92.) During the 25 years that the Teamsters has been the bargaining representative, Loupe testified, only one work stoppage has occurred. That was a 1- or 2-day strike in about 1978. (9:1783, 1853.)

###### B. *The Union*

The pleadings establish that the Union was certified as the exclusive bargaining representative on November 4, 1981, September 1, 1989, and again on May 14, 1993. As the last two dates followed decertification elections won by the Union (G.C. Exhs. 17, 36; R. Exh. 37),<sup>4</sup> and in light of the evidence, it is likely that the 1981 date also followed a decertification election. In any event, the Union has been the exclusive bargaining representative for the certified unit since about 1970. I so find. Description of the recognized bargaining unit differs slightly from that for the certified unit. In the collective-bargaining agreement (G.C. Exh. 14) which expired September 30, 1992, the recognized unit, as admitted in the pleadings, is described as (G.C. Exh. 14 at 3):

All maintenance, maintenance construction and production employees of the Baton Rouge Plant, Baton Rouge, Louisiana, Formosa Plastics Corporation, LA, except supervisory employees and foremen with the authority to hire or discharge employees, actually or by recommendation, guards, head loaders, office and production clerks and technical employees.

For the last 16 years Doug W. Partin has been the Union's business manager. (6:1132.) Donald H. McLean, who has worked at the facility for nearly 29 years (4:747), is president of Teamsters Local 5. (4:748; 5:1020.) For about 4 years before May 1993, McLean also served as president of the Union's bargaining committee. (4:749, 808.) By letter dated May 10 (R. Exh. 17), McLean notified employees of his resignation as president of the bargaining committee. (4:806; 6:1064.) He testified that he resigned in order to re-

<sup>4</sup>Exhibits are designated G.C. Exh. for the General Counsel's, C.P. Exh. for the Charging Party Union's, R. Exh. for those of the Respondent FPC, and Jt. Exh. for Joint Exhibit.

move himself as the focus of any problem impeding progress. (6:1115–1116.)

### C. Summary of Events

#### 1. September 1992 to June 7, 1993 bargaining

Administration Manager Patrick Loupe has attended every contract negotiations with the Union since 1973 (9:1851), and he has been FPC's spokesperson in such negotiations for the past 10 years. (8:1719.) Loupe testified that, in the past, bargaining would begin about a month before the collective-bargaining agreement was set to expire on September 30. Beginning rather leisurely, the bargaining sessions would intensify the last week of the contract. (9:1830–1831, 1852, 1858.) Each of the Union's contracts with FPC has been for 3 years. (8:1535.) From FPC's standpoint, the September 1992 negotiations for a renewal contract were rather typical in this respect. (9:1831–1832.)

The 1989–1992 contract (G.C. Exh. 14) was set to expire September 30, 1992. As we shall see, the parties almost had an agreement for a renewal contract. Indeed, Loupe and Andre initially thought one had been reached and that the employees had voted to ratify. As it turned out, a key provision of FPC's offer was not submitted to the ratification vote. Even so, the Union proceeded on the basis that the vote had ratified a renewal contract. Later, on March 31, 1993, NLRB Region 15 dismissed (R. Exh. 24) a charge by the Union on the basis that no renewal contract had been reached.

The key provision in the Company's proposed package, the provision not submitted for ratification, pertains to a grievance filed May 21, 1990, by Thomas W. Loper (the "Loper" grievance, as the parties refer to it). After arbitration on April 17, 1991, Arbitrator John J. Maxwell, in his award of June 6, 1991, sustained the grievance. (R. Exh. 2.) In his grievance, Loper and the Union contended that Loper had lost pay by being misclassified and placed in the progressive pay schedule (G.C. Exh. 14 at 55) rather than being paid at the higher rate for a first-class operator. (R. Exh. 2 at 2–3.) When FPC declined to honor the arbitrator's award (1:83), the Union, still in 1991, filed suit to enforce the award. FPC countersued to have the award set aside. Agreeing with FPC in his May 28, 1993 findings of fact and conclusions of law and in his June 7 judgment (R. Exh. 3), the Honorable John V. Parker, Chief Judge for the Middle District of Louisiana, vacated the decision and award and dismissed the Union's suit with costs assessed against the Union. (R. Exh. 3.) The U.S. Circuit Court of Appeals for the Fifth Circuit affirmed Judge Parker by its opinion of January 31, 1994 (R. Exh. 25), and on March 2, 1994, the Fifth Circuit denied the Union's petition for rehearing. (R. Exh. 26.)

What complicated the Loper grievance situation was that some 56 other operators filed "Loper" grievances. (1:54, 86.) By his letter of July 11, 1991 (R. Exh. 9), to Loupe, Union President McLean asserted that each of the grievances is "indistinguishably similar to" the "Loper" situation, "and each grievant respectfully demands to be accorded the same contractual treatment appropriate to his situation vis a vis Thomas Loper's case." On October 1, 1992, the Union

filed suit to compel arbitration respecting the 56 post-Loper grievances. (G.C. Exh. 12; R. Exh. 5.)<sup>5</sup>

General Manager Andre (1:54, 84, 86) and Administration Manager Loupe (1:148–149) testified that, if the grievances were upheld, FPC's potential liability was some \$4 million. Loupe clarified this to explain that the projected liability was based on the number of all employees, not simply the grievants, for if the progressive system were eliminated (as a by-product of the grievance), then all employees would be affected. (1:148–149.)

The September 1992 bargaining sessions ended on September 30 with the submission of FPC's final offer. (G.C. Exh. 19; 4:800.) That final offer consists of 21 numbered items, on 7 pages, being changes to the expiring contract of 1989–1992. Thus, the 1989–1992 contract (G.C. Exh. 14) combined with the 21 items of September 30, 1992, formed FPC's final version of a proposed successor contract. By memo dated October 1 (G.C. Exh. 19, cover page), FPC distributed copies of the 21-item list to all unit employees. In the memo FPC advises employees that the offer is final and that if the employees do not vote to ratify it then they will be locked out at 6 a.m. October 2, 1992. Of the 21 items, item 10 is at the heart of the controversy here. It reads (G.C. Exh. 19):

10. The Company will abide by the final judgment on the Thomas Loper arbitration lawsuit. However, all existing grievances will be withdrawn and no additional grievances will be filed.

Andre testified that, although he wanted changes in a contract he considered antiquated in many respects (because of many contract changes over many years and because of substantial modernizations of the facility in the last several years), he thought it necessary to focus on eliminating the potential liability posed by the Loper grievance situation. (8:1619–1625). Loupe agrees that the Loper topic was of prime importance to the FPC. (1:168.) Loupe acknowledges that Donald McLean, president of Local 5 and the then president of the Union's bargaining committee, stated that the Union would not negotiate the matter because it was before the court. (1:168.) McLean was the union's spokesperson at the September 1992 negotiations. (4:756.) Business Representative Partin testified that Local 5 customarily has unit employees negotiate the collective-bargaining agreements, and that he attended no more than one of the September 1992 meetings. (6:1134.) McLean testified that FPC would not remove item 10 from its proposal and that the Union's position was that it did not want to interfere with the court proceeding on the grievances. (8:1558.)

On October 1, before the ratification vote later that evening, the Union filed a charge (G.C. Exh. 134) in Case 15–CA–11919 alleging that FPC was violating Section 8(a)(5) of the Act by insisting on (item 10). Also on October 1 the Union filed suit (G.C. Exh. 12) in Federal district court to compel arbitration on the 56 post-Loper grievances.

<sup>5</sup> Although a copy of G.C. Exh. 12 (the Union's October 1, 1992 complaint to compel) is included in the official exhibits folder, G.C. Exh. 12 was never offered or received in evidence. Because there are references to G.C. Exh. 12 in both the transcript and in the briefs, and to avoid confusion, I now receive G.C. Exh. 12 into evidence.

At the October 1, 1992 ratification meeting, McLean testified, the matter, after explanation, was submitted for vote on the basis that item 10 would be included only if the Board or the court found item 10 to be lawful. On that basis the employees voted to ratify. (4:803; 6:1068.)

Following the ratification vote McLean, that same evening, telephoned Loupe who, Andre testified (8:1626), was waiting for the call in Andre's office. Testifying that he told Loupe he had a contract, McLean concedes he said nothing about item 10. (4:806; 6:1069.) Loupe, Andre testified, repeated on the telephone, "We have a contract." (8:1626.) Loupe's own brief description is that McLean and the employees had ratified the "total package." (167.) Partin testified that he called Loupe and said they had a contract "excluding item 10." According to Partin, Loupe said "Thank you," and that ended the conversation. (6:1136-1137; 7:1348-1349.) Loupe does not address this, but Andre asserts that, when Partin called, Loupe also repeated, "We have a contract." (8:1626.) I do not credit Partin. His version of "excluding item 10" is inconsistent with everything up to this point, and inconsistent with subsequent events.

Consistent with past practice on the oral notice of ratification of the negotiated agreement, Andre testified, the following day he implemented the negotiated changes effective October 1. (8:1627.) McLean agrees that the changes were implemented. (4:806.) Andre testified that, in past practice, Loupe merges the changes (here, the 21 items of FPC's final offer, attached to G.C. Exh. 19) with the old contract (G.C. Exh. 14) to produce the new contract as an integrated document. Loupe then sends the integrated document to the Union for proofreading. The Union signs and returns and then FPC again reviews and signs. (8:1628.) Partin confirms that the integrated document (G.C. Exh. 116) was forwarded to him to review and sign. (6:1137-1138, 1244; 7:1285, 1350.)

On this occasion the Union signed, but only after removing the second sentence from item 10, the one about dropping the post-Loper grievances and entertaining no new ones. The Union, by Partin, sent this signed document to FPC with a cover letter dated November 10, 1992. (G.C. Exh. 20; 6:1135; 7:1350; 8:1629.) In his November 10 letter of over two pages to FPC, Partin advises that he has signed after removing the second sentence from item 10 (after integration into G.C. Exh. 116 at 35, item 10 became sec. 49, par. 11), that the second sentence "is a non-mandatory bargaining subject, and, among other remarks, advises that additional charges will be filed if FPC refuses to sign the document. In the course of his remarks, Partin advises that, at the ratification meeting, the employees were told that the second sentence of item 10 was "not being considered as part of the proposed contract on which they were to cast their vote." (G.C. Exh. 20 at 2.) The parties stipulated that, had item 10 remained intact in G.C. Exh. 20, FPC would have signed the document on its return from the Union. (4:780.) The Union removed the second sentence, McLean testified, for fear of liability under lawsuits and unfair labor practice charges by the affected grievants. (4:781.) McLean concedes that, before Partin's November 10 letter, he never informed FPC that the employees did not vote on the total package. (6:1070.) By letter dated November 20 (G.C. Exh. 21), Andre stated that the Union's "counter-proposal" was unacceptable. (7:1355; 8:1629.)

Between the exchange of those two letters, NLRB Region 15, on November 13, issued a complaint (G.C. Exh. 135) in Case 15-CA-11919. In the complaint the General Counsel alleges that FPC violated Section 8(a)(5) of the Act on September 30 by insisting to impasse that, as a condition of any contract, the Union agree to withdraw from processing the post-Loper grievances, such condition not being a mandatory subject for the purposes of collective bargaining. FPC's threat of a lockout is alleged as a violation of Section 8(a)(1). By its answer (G.C. Exh. 136), FPC denies any violations and denies that the alleged condition is a nonmandatory subject of bargaining. Partin testified that all this time (until March, as we shall see) the Union's position, publicly expressed, was that there was a contract. (7:1353, 1366.)

The holidays now close at hand, Andre testified, FPC decided to wait until January to launch a program to get the Union back to the bargaining table. (8:1632-1633.) With the arrival of January 1993, FPC took step one of its plan to persuade the Union to resume bargaining. (8:1633.) Step one was a January 7 letter (G.C. Exh. 24) from Andre to Partin reviewing events since September 30, and stating that FPC considers that the Union rejected the contract. FPC "offers to meet and negotiate with the Union on a mutually acceptable contract." Continuing, Andre advises that FPC implemented changes on October 1 on the basis that the total package had been accepted. Without that acceptance, and as the old collective-bargaining agreement had expired, "there is no agreement between Formosa and Teamsters Local No. 5." For a reasonable time, Andre states, FPC will not adjust any wages or benefits pending further negotiation. "However, it must be understood," Andre reminds in closing, that there is no contract. By memo (G.C. Exh. 23) of the same date, Andre gave a similar notice to unit employees. By their own January 11 jointly signed memo (G.C. Exh. 25) to employees, Partin and McLean review the events of unfair labor practice charges and Federal lawsuit, and express the position that there is a contract.

Step two in FPC's plan, Andre testified (8:1633-1634), was the January 21 filing of the charge in Case 15-CA-3841 alleging that the Union was refusing to bargain. The charge apparently was either dismissed or withdrawn. (8:1634.)

Step three, Andre testified (8:1635), was his January 21 letter (G.C. Exh. 27) to Partin advising that FPC no longer would honor the checkoff provision of the expired contract.

By letter (G.C. Exh. 28) dated January 27 to Andre, Partin asserts that G.C. Exh. 20 is the successor collective-bargaining agreement, observes that it contains a checkoff provision and warns that any failure to abide by the checkoff obligation will be deemed a breach of contract. Partin offers to meet and to discuss any concerns. On February 1 the Union filed a charge (R. Exh. 21) in Case 15-CA-12020-1 alleging a contract and bad faith by FPC. On the same date the Union filed a charge in Case 15-CA-12020-2 (R. Exh. 22) alleging an 8(a)(5) refusal to sign the negotiated contract attached to the November 10 cover letter (G.C. Exh. 116). (7:1352-1353.) Partin testified (7:1362) that FPC's letter of January 21 (G.C. Exh. 27) prompted it to file the charge in Case 15-CA-12025 (R. Exh. 23) alleging an 8(a)(5) refusal to check off union dues.

Step four was made by Andre's February 4 letter (G.C. Exh. 29) responding to the Union's letter of January 27 (G.C. Exh. 28). Andre advises Partin that they should meet

only when the Union agrees that there is no contract and when the Union agrees that they are meeting to negotiate a successor contract. In addition to stating that FPC, for a reasonable period of time, will not disturb the changes in wages and benefits, Andre advises (G.C. Exh. 29 at 1; 8:1636):

It is our hope that you and the union officers will eventually come to the conclusion that there is no collective bargaining agreement in existence and agree to meet and negotiate with representatives of the Company for a replacement contract. However, considering the time that has elapsed with no collective bargaining agreement in effect, it is the Company's current position that when negotiations do resume, both the union and the Company should start from a clean slate. Therefore, Formosa does hereby withdraw all contract proposals submitted during the negotiations in September, 1992. When we do meet for negotiations, the Company will bargain in good faith with the Union in order to resolve all differences and open issues.

As the letter's statements about "clean slate" and withdrawal of "all contract proposals submitted during the "September 1992 negotiations suggest, Andre testified that negotiations would resume "from the September 1992 position." (8:1701.) Andre meant, I find, that negotiations would resume at the status quo ante, that is, at the level of the 1989-1992 contract. Except as a tactic to force the Union to return to the bargaining table, Andre offers no specific justification for withdrawing FPC's existing proposed contract. In a generalized answer which extends to future events as well, Loupe apparently lists the \$4 million Loper hammer as the reason for the withdrawal. (1:158-159.) Andre testified that 3 days earlier, on February 1, some employees told him that a decertification petition had been filed (would be filed, presumably). (8:1637.) FPC's February 4 withdrawal of its September 1992 contract proposals is alleged (complaint par. 20a) to be an 8(a)(5) violation. I later treat that allegation.

From the standpoint of the Union, events now took a turn for the worse. On February 12, 1993, a petition (G.C. Exh. 35) was filed in Case 15-RD-704 for a decertification election. After receiving official notice (R. Exh. 31) of the petition, Andre testified, FPC did nothing further toward resuming negotiations with the Union. (8:1638.) By letter dated March 31 (R. Exh. 24), NLRB Region 15's Regional Director notified the Union's attorney that he was, in effect, dismissing the three charges filed on February 1 and 3 (R. Exhs. 21, 22, 23), including the allegations of failing to sign the document forwarded on November 10 (G.C. Exh. 20) and refusing to check off union dues. Respecting these allegations, Regional Director Hugh Frank Malone wrote (R. Exh. 24):

As to the first three alleged unfair labor practices, the Union's allegations are premised upon the Union's contention that the Employer and the Union agreed upon a labor contract in early October 1992. However, the investigation revealed that the parties never reached agreement on a successor agreement. As alleged in the outstanding complaint in Case No. 15-CA-11919, the Employer insisted to impasse upon the inclusion of a nonmandatory subject and included this proposal in its last offer to the Union. The Union conditioned its ac-

ceptance of the Employer's final offer upon the exclusion of the Employer's proposal on the nonmandatory subject of bargaining. In these circumstances, where the proposal that addressed the nonmandatory subject of bargaining was an integral part of the Employer's package of proposals, the parties did not reach agreement because the Union refused to accept the Employer's integrated package of proposals in its entirety. *Aztec Bus Lines, Inc.*, 289 NLRB 1021, 1024 (1988); and *Nordstrom, Inc.*, 229 NLRB 601-602 (1977). Accordingly, in the absence of an agreement, the Employer may lawfully refuse to execute a written agreement and communicate this refusal to unit employees. Further, the Employer, in light of the expiration of the last labor agreement and in the absence of a successor agreement, could lawfully cease the deduction of Union dues from the wages of unit employees.

Until this dismissal letter Partin believed that there was a contract. (7:1366-1367.) Regional Director Malone's dismissal letter put Partin "in shock." (7:1368.) He did not request bargaining because the Union was trying to decide whether to appeal (it decided not to appeal), because Partin was "in shock," and because he was not sure the Union would be representing the employees after the decertification election. (7:1368-1369.)

Also in March, complaint paragraph 8 alleges, FPC violated Section 8(a)(5) of the Act by disparately enforcing a rule requiring supervisory permission to leave the work area. I discuss that allegation later.

The Union's victory in the May 6 decertification election by a vote of 105 to 84 out of 189 ballots cast (G.C. Exh. 36), followed by its recertification on May 14 (R. Exh. 37), held both good news and bad news for the Union. The good news, of course, is that the Union won. The bad news (from the Union's viewpoint) is that its margin of victory had dropped from 63 percent in the July 1989 decertification election (G.C. Exh. 17; 63 to 37 out of 100 ballots cast) to 55.56 percent in the May 1993 election. The drop was of major importance to the parties. Describing a drop in the Union's dues-paying members from 135 with checkoff to about 70 (between 60 and 80) without checkoff, Partin attributes the decline to FPC's cancellation of checkoff. (8:1533-1535.) Andre testified that he thought FPC would win (that is, the Union would lose) the next decertification election. (8:1701.)

In the negotiations which resume on June 7, FPC is firm about wanting a 1-year contract. Expressing great concern that the Union needs time to rebuild its declining membership (8:1508, 1511, 1533-1535), the Union holds equally firm for a 2-year contract. Indeed, it appears that the difference over the term of a successor contract is what has prevented the parties from reaching a contract. (7:1334-1335; 8:1509-1511.)

On May 18 Partin wrote Andre requesting negotiations (suggesting the week of May 24) for "a new collective bargaining agreement." (G.C. Exh. 37.) Although he said nothing in the letter about it, Partin testified that he would have been delighted, that May 18, to have accepted FPC's September 30, 1992 proposal (that is, including item 10). (7:1370.) Andre did not respond until his letter of May 24 (G.C. Exh. 38) suggesting June 2.

While Partin was waiting for Andre's answer to the Union's May 18 request to resume negotiations, Andre wrote to the bargaining unit. By memo (G.C. Exh. 4) of May 21 addressed to all employees regarding "Clarification of our Current Situation Concerning All Bargaining Unit Employees," Andre begins by advising that the memo was prepared to answer numerous questions concerning the status of unit employees. Advising employees that there is no contract, Andre states: the old contract has expired; it was not extended; it is not applicable; FPC has not reverted to the old contract; and "We are operating under policies which management chooses to continue, with the following changes as listed." There follow some three pages of changes, the first being, "All wage and benefit improvements implemented on 10/1/92 are rescinded effective 5/24/93, unless stated otherwise below." The parties stipulated that the stated changes were implemented. (3:579.) No copy of the memo is shown as addressed to the Union, and Partin testified that it was not until the following Wednesday that someone brought a copy of Andre's memo in to him. (6:1171.)

Andre acknowledges that he gave no prior notice to the Union. (1:73.) He gave no notice to the Union because, he testified, (1) there was no contract, (2) a significant portion of the employees voted no in the May 6 decertification election, (3) the parties were about to resume bargaining, (4) the \$4 million Loper hammer was still hanging over FPC's head, and (5) he felt that FPC needed to bargain from a strong position and that meant reverting to the September 1992 status quo ante. (1:73-74; 8:1561-1562.) Cross-examination by the General Counsel elicited the fact that, in his pretrial affidavit responding to the charge of a unilateral change respecting this, Andre listed as his reasons only that (1) the Union had won the decertification election, and (2) the Union had requested to bargain for a new contract. He testified that at the time he did not think of the others. (8:1575, 1578.)

The General Counsel apparently argues (Br. at 100) that the additional reasons are mere afterthoughts and therefore (presumably) Andre should not be credited. I credit Andre in this respect. All the reasons he described at trial were either open (such as the decertification election), previously expressed (the \$4 million Loper hammer), or implied from previous positions (FPC's need to bargain from a strong position). Respecting the implied ground, FPC's February 4 letter (G.C. Exh. 29) withdrawing all contract proposals submitted in September 1992 so that bargaining could start from a "clean slate" demonstrates that Andre already had adopted that ground. In any event, what a witness records or fails to mention in a pretrial affidavit depends largely on "the energy, skill, experience, and dedication of the investigating Board agent. *Baker Mfg. Co.*, 269 NLRB 794, 815 fn. 72 (1984), modified on different point 759 F.2d 1219 (5th Cir. 1985). Accordingly, I find that the reasons Andre listed at trial are the reasons he did not give notice to the Union.

The changes implemented following Andre's May 21 letter are the subject of complaint paragraph 15, and I treat that allegation later. That allegation also covers a May 21 notice (G.C. Exh. 3) to the Union concerning postings on bulletin boards. Another incident I treat below is the subject of complaint paragraph 10. The paragraph alleges that FPC violated Section 8(a)(3) of the Act about June 7 by issuing a final warning to Donald McLean and suspending him for 2 days. Similarly, I also cover later another June 7 incident of al-

leged bypassing of the Union and dealing directly with unit employee Michael Bledsoe by soliciting him to settle a grievance.

The last item before the beginning of the 1993-1994 bargaining sessions on June 7 concerns the Loper grievance. Recall that the Union (apparently in August 1991) filed suit in Federal district court to enforce the arbitrator's June 6, 1991 decision and award (R. Exh. 2). The matter finally was tried, nonjury, on April 5, 1993, before Judge John V. Parker. (R. Exh. 3 at 2.) As noted earlier, on May 28 Judge Parker issued his findings of fact and conclusions of law (vacating the arbitrator's decision and award), and on June 7 Judge Parker signed the judgment dismissing the Union's suit. (R. Exh. 3.) Earlier, when NLRB Region 15, on March 31, dismissed the Union's February charges (on the basis the parties had not reached a contract), it left Partin "in shock." (7:1368.) Still, Partin felt he had a trump card with the Loper hammer. In Partin's words, when Judge Parker dismissed the Union's suit to enforce the arbitrator's decision and award, the Union's "trump card was gone." While Partin held out some faint hope for the success of an appeal, he appears to have realized that the possibility of a successful appeal was very slim. (7:1391-1392.) Nevertheless, throughout all the actual bargaining of 1993-1994 before the Fifth Circuit's January 31 affirmance, Partin pushed for FPC to agree to the Company's September 30, 1992 offer (with Partin agreeing to adopt the Company's demands respecting the Loper grievances). Sure enough, on January 31, 1994, the Fifth Circuit affirmed (R. Exh. 25) Judge Parker, and on March 2, 1994, it denied (R. Exh. 26) the Union's petition for rehearing. As of June 7, 1993, the day set by the parties to begin negotiations for a new contract, it is clear that, as a practical matter, the Loper grievance (and all post-Loper grievances) posed little in the way of a threat as a hammer hanging over FPC's head. It no longer appeared to be a "trump card" which the Union could play to extract concessions.

## 2. June 7, 1993, to February 25, 1994

There were eight Bargaining sessions during 1993-1994, the first (a "protocol" meeting only) on June 7, 1993, and the eighth on February 25, 1994. A list (G.C. Exh. 13) in evidence gives the dates, places, hours, and names of the attendees. (6:1194, 1200.) Partin was the chief spokesperson for the Union, and Loupe was such for FPC. In 1993 the dates were: (1) June 7; (2) July 8; (3) August 5; (4) September 2; (5) September 15; and (6) October 27. The two 1994 meetings were: (7) January 19 and (8) February 25. The meeting of February 25 was held during an adjournment between the first and second portions of the trial.

At the meetings Sherry S. McBeath, FPC's senior personnel administrator, took notes in her modified longhand on behalf of FPC. (1:99.) The parties stipulated that McBeath's notes are generally accurate and could be received in evidence on the basis that any party could offer evidence contradicting any note, expanding on items, or covering matters not mentioned. The notes (Jt. Exh. 18) were received on that basis. (6:1255; 7:1297, 1337.)

Throughout the Government's case-in-chief, FPC objected to evidence about meetings beyond the second one of June 30 on the basis (of variance) that the complaint does not specifically attack any of FPC's bargaining conduct after June 30. (2:212; 3:413, 431; 6:1045, 1047, 1101, 1180-1182,

1187–1192 being among the more prominent.) The General Counsel argued that subsequent events are relevant in order to evaluate the totality of FPC's conduct in order to establish that on June 30 FPC "submitted regressive contract proposals" (complaint par. 20b), and that by its "overall conduct" (including complaint pars. 15, 18, and 20 the unilateral changes of May 24; the June 7 bypassing; the February 4 withdrawal of the September 1992 proposals; and the June 30 submission of regressive proposals), FPC "has failed and refused to bargain in good faith" with the Union. (2:201, 213–214; 3:429–430; 6:1048, 1182–1185.)

Viewing the "overall conduct" allegation as ambiguous, and therefore subject to the General Counsel's interpretation (3:428, 434), and noting that FPC had not filed a motion for a bill of particulars respecting paragraph 21 (3:423, 428), I overruled FPC's variance objection and motion to strike. (3:434; 6:1192.) On brief FPC renews its objection. (Br. at 11–15.) I reaffirm my ruling.

An important distinction should be noted. Respecting the "overall conduct" and "bad faith" phrases constituting the heart of the allegation, paragraph 21, counsel explains that the General Counsel does not allege or argue surface bargaining. (1:29–32; 3:425–427.) Thus, the General Counsel did not cover everything said at all the meetings, particularly the ones after August 5, 1993. At trial the General Counsel hedged on whether the Government was alleging no intent of entering into *any* agreement, indicating yes at one point (3:422–423) and no at another. (3:425, 427.) On brief (Br. at 86–87) the General Counsel lists the eight factors (in addition to the specifics alleged in the complaint) given at trial (3:417–422, 447; 7:1441) which constitute the "overall conduct" and which add weight and persuasion in support of a bad-faith finding. I shall address these factors when I discuss the bargaining.

It can be argued that the complaint, as well as the Government's evidence, really attacks what FPC, in effect, contends are nothing more than its tactical positions. At trial the General Counsel acknowledged the Government's need to show that FPC's "regressive contract proposals" reflected bad faith rather than the tactic of bargaining very hard up front and then later substituting softer proposals. (2:213–214; 3:412; 6:1185.) On brief the General Counsel addresses the issue of intent by arguing that FPC failed to fulfill its duty to bargain in good faith because the evidence, such as the regressive contract proposals, shows that FPC had no "serious intent to adjust differences and to reach an acceptable common ground." (Br. at 106, quoting from *NLRB v. Insurance Agents*, 361 U.S. 477, 485 (1960).)

One additional allegation of 8(a)(1) interference falls within this time frame. Complaint paragraph 9 alleges that FPC violated Section 8(a)(1) about September 15, 1993, "through oral announcement at a contract negotiation session, promulgated and since then has maintained a rule which prohibits all handbilling and distribution of literature on Company property." Respondent denies. I treat this allegation in a moment.

#### D. FPC Waives its Motion to Dismiss

After the General Counsel (8:1555) and the Union (8:1578–1579) had rested their cases-in-chief, FPC moved to dismiss all of the 8(a)(5) allegations plus the handbilling paragraph. (8:1579–1594.) After hearing argument of coun-

sel, I denied FPC's motion. (8:1611). FPC's further position is that even if it proceeds after such denial, in my decision (the JD) I am restricted to assessing only the evidence in the record as of the motion to dismiss. (8:1611–1612.)

FPC is in error. When I denied FPC's motion, FPC then was faced with making an election. It could rest on its motion and litigate allegations not addressed by its motion, or proceed with its case-in-chief as to all allegations. It could not proceed on all allegations after my denial and, at the same time, preserve its motion either for renewal at the close of the hearing or for any appeal from the JD. In short, FPC waived its motion by proceeding with its case-in-chief on the allegations which it addressed in its motion. *Kidd Electric Co.*, 313 NLRB 1178 (1994). Furthermore, after such a motion has been made and is denied and the respondent proceeds, an administrative law judge is not restricted to the evidence existing as of the motion, but must weigh all the evidence in the entire record. *Kidd Electric*, id. at 1187; *Peter Vitalie Co.* 313 NLRB 971, 972 (1994). In reaching my decision in this case, I have weighed all the evidence in the entire record.

#### E. The 8(a)(1) Allegations

##### 1. Permission to leave work area

As established by complaint paragraph 7, and the answer, at all material times FPC "has maintained a rule requiring employees to seek their supervisor's permission before leaving their work area." This refers to the employee handbook's rule 5 which provides (G.C. Exh. 13 at 22) (emphasis added):

5. Employees are expected to devote their full attention to their assigned duties. Sleeping while on duty or **absence from the assigned working place without permission is prohibited.** Loitering, loafing, visiting, wasting time or inattention to work is prohibited. Failure to conform to the above standards of performance is a very serious offense.

Complaint paragraph 8 alleges (and FPC denies) that since about March 1993 FPC, by its agents, enforced the foregoing rule "selectively and disparately by applying it only against employees who formed, joined, or assisted the Union." By such enforcement, paragraph 22 alleges, and FPC denies, FPC violated Section 8(a)(1) of the Act.

The incident giving rise to this allegation occurred about late March 1993 when Loupe and Kenneth L. Jefferson, maintenance engineering manager, held a meeting with employees Billy Ratcliff and William "Whip" Wilson in Loupe's office. Ratcliff and Wilson, who are maintenance mechanics, have been union stewards for many years. Loupe told them that he had received reports that they had been campaigning during worktime and that from then on they must have permission from their supervisors before they could leave their work areas. (Recall that this was during the critical period before the decertification election.) When Ratcliff asked if Loupe meant for job-related reasons, Loupe said yes and that they were not to talk to anyone when proceeding from point A to point B. Jefferson said they were going to have meetings with the other employees to tell them the same, but no such meetings were held. At trial FPC of-

ferred no evidence that either Ratcliff or Wilson had in fact been campaigning for the Union during worktime. Wilson denied that he had done any campaigning during worktime. (3:605, 642.)

The General Counsel's witnesses credibly testified that before this March 1993 meeting, the mechanics (as possibly distinguished from equipment operators who generally have no work reason to leave their work stations) operated under two rules respecting leaving their assigned work locations. First, if they needed to leave for personal business or, in the case of the union stewards, on union business, they had to obtain their supervisor's permission. (That, of course, complied with rule 5.) Second, if they had to leave for a work-related reason, such as to obtain a replacement pump from the shop, they did not need permission. On this basis Ratcliff and Wilson have operated for years with knowledge of supervision and, until March 1993, were never told otherwise. After the March 1993 meeting, both Ratcliff and Wilson, in compliance with the instructions they had received in the March meeting, asked their supervisor's permission to leave even when it simply was to obtain a replacement pump from the shop. Other mechanics have been permitted to follow the practice existing before March 1993.

The record reflects that some time after the March meeting, and based on calls from the Union (Partin), Loupe called in two operators (Michael Drago and Elton White) concerning being out of their work areas. (8:1734-1735; 9:1849.)

It appears that after several months of requests by Ratcliff and Wilson, FPC eventually clarified the instruction so that the mechanics do not need to ask permission when the work assignment itself (such as pulling a pump) encompasses the need to go to the shop, for example, for a replacement. Unfortunately, that is not the instruction which Loupe gave Ratcliff and Wilson in March 1993.

Because the instructions given to Union Stewards Ratcliff and Wilson (restricting their work-related absences from their work areas) reasonably appear to have been for the purpose of singling them out because of their positions as union stewards and because of their open support of the Union, the March 1993 restrictions, which FPC applied for several months only to them out of all the maintenance mechanics, violate Section 8(a)(1) of the Act. I shall order FPC not to single out stewards or supporters of the Union for more restrictive enforcement of work rules while holding other employees to a less stringent standard.

## 2. Handbilling

### a. *Facts*

Complaint paragraph 9 alleges that about September 15, 1993, FPC, by Administration Manager Patrick L. Loupe, "through oral announcement at a contract negotiation session, promulgated and since then has maintained a rule which prohibits all handbilling and distribution of literature on Company property." FPC denies.

As Loupe acknowledges (1:137), FPC does not have a no-solicitation policy. (Indeed, the employee handbook (G.C. Exh. 13) contains neither a no-solicitation nor a no-distribution policy or rule.) Loupe concedes that FPC allows employees to conduct (on company premises) raffles and to sell tickets for various activities. (1:137.) Testimony by the General Counsel's witnesses confirms this.

General Counsel's witnesses testified that for years (since FPC acquired the plant) union representatives and employees, while standing by the guard shack at the maintenance entrance to the plant, have passed out handbills to employees entering and leaving. Those handbilling were never told they could not handbill on company property. Not only was this in the presence of the guards, but supervisors and managers use the main gate. Billy Ratcliff testified that in the latter part of 1992 Loupe gave him permission to handbill at the gate so long as he did not aggravate employees passing through. Ratcliff then handbilled. (2:349-350.)

Ratcliff also testified that about a week before the decertification election of May 6, 1993 (about Thursday, April 29) that he and another employee were handbilling by the guard shack at the main entrance when Andre drove by. Ratcliff is sure Andre observed their handbilling. Sure enough, a few minutes later Supervisor David Hebert approached and asked McLean (who was there with handbills by that time) for copies of the handbill, saying that Andre had sent him out to obtain one. Hebert said nothing about the handbilling itself. (2:342-344.) Confirming that account, Hebert asserts that Andre asked him to go ask for a copy. Hebert did and, receiving two copies, delivered them to Andre. This occurred at a staff meeting of some supervisors and managers. (4:736-739.) Andre testified that he could recall no such incident. (1:62-64.) Crediting Ratcliff and Hebert, I find that the incident occurred as they described.

Loupe testified that, to his knowledge, there has been no handbilling at the front gate of the facility since FPC purchased the plant because FPC does not allow it. (1:138; 8:1730-1731.) Loupe also testified that the guards are to report any such activity to Kirby Campbell who in turn would stop the handbilling and report it to Loupe. According to Loupe, no one has reported any handbilling to him. (1:138-139; 8:1731; 9:1835-1836.) Campbell, FPC's manager of safety and security, supervises the guards (contract guards rather than employees of FPC). Campbell reports to Loupe. Other than one incident in the last 3 years, an event not involving handbilling at the gate, Campbell has never seen handbilling at the gate, the guards (since FPC purchased the plant) have never reported any handbilling to him, and he has never reported any to Loupe. (9:1944-1948.) The previous two owners of the facility allowed handbilling at the gate, although the second one eventually stopped it. (8:1730; 9:1945.)

The evidence strongly favors a finding, which I make, that before September 1993, employees and other individuals handbilled at the main entrance (on FPC's property) and that FPC's officials were aware of this fact. Indeed, in late 1992, Loupe authorized Union Steward Ratcliff to do so and about April 29, 1993, Andre himself dispatched a supervisor, David Hebert, to obtain a copy of a leaflet being distributed by union supporters and stewards during the critical period before the May 6 decertification election. Andre did not order that the handbilling be stopped.

### b. *FPC denies the Union's September 15, 1993 request*

Turn now to September 1993. In mid-September the parties corresponded with a series of letters (G.C. Exhs. 66-70) which contain, along with other matters, charges and countercharges of delaying the negotiations and a debate over whether the unfair labor practice trial (then scheduled for De-

ember 15) would be a “trial” or a “hearing.” One of the series, a September 15 memo (G.C. Exh. 68) from Andre to all hourly employees at the plant, deals mostly with the debate over the nature of the unfair labor practice hearing. Ratcliff testified that the Andre memo was distributed to employees, but he describes one which accuses the Union’s negotiating committee (at least Ratcliff took it that way) of stalling, and “I felt that he told an untruth on me.” (3:505–505.) None of the series in evidence accuses the Union’s negotiating committee of stalling. The accusation is against Partin. Ratcliff apparently misread Loupe’s September 15 letter (G.C. Exh. 67) to Partin and misapplied Andre’s September 15 memo to all hourly employees. I have some difficulty with the reliability of Ratcliff’s testimony in this area.

Partin testified that he wanted to answer Andre’s September 15 memo (G.C. Exh. 68) to the employees, about “This is not a trial,” because he, Partin, had always said the proceeding would be before a judge. The Union wanted to distribute a letter at the gate responding to Andre’s memo, Partin testified. (6:1270–1274.) At the September 15 bargaining session (session number 5 of the 1993–1994 negotiations), Partin asked Loupe if he could distribute a letter to answer Andre’s September 15 memo to the hourly employees. The parties took a recess so that Loupe could confer with FPC’s attorney. On resumption of the session a few minutes later, Loupe said the answer was “No.” Ratcliff then asked if he could, and Loupe gave the same answer. Either Ratcliff or Stella Slater (another member of the Union’s negotiating committee) asked if the Union could post a letter (on the bulletin board), to which Loupe answered that there was a procedure for that. (1:137–138; 2:338; 3:505–505; 3:635–639; 6:1274–1275; 7:1465–1466; 8:1729–1730; 9:1832; Jt. Exh. 5 at 23–24.) The matter was not raised again at any later bargaining session. (8:1730.)

### c. Discussion

In effect, I find, FPC announced a new rule—henceforth, no one could handbill at the front gate (on FPC’s property). There is no evidence that FPC intended for the rule to apply only to union literature, or that it thereafter has selectively enforced its new rule. When Loupe was asked about union literature being posted on the bulletin board, he answered that there was a procedure for that. Finding no violation, I shall dismiss complaint paragraph 9.

## F. The 8(a)(3) Allegations

### 1. Introduction

There are two 8(a)(3) allegations, one independent and one combined with an 8(a)(5) allegation. The independent allegation attacks the June 7 discipline imposed on Donald McLean (par. 10). The unilateral changes of May 24 (par. 15), in addition to being alleged as a refusal to bargain, also are alleged to be violative of Section 8(a)(3). I shall treat the McLean matter here, and postpone summarizing the unilateral changes until I reach the general topic for 8(a)(5) allegations.

## 2. Donald McLean disciplined June 7, 1993

### a. Facts

#### (1) Background

Complaint paragraph 10 alleges that about June 7 FPC issued a final warning and a 2-day suspension to Donald McLean. Admitting this allegation, Respondent denies the additional allegation that it disciplined McLean because of his union activities.

McLean has worked at the facility for about 29 years. (4:747; 9:1782.) Karen Stewart has been a personnel assistant there since 1990. (9:1865.) Stewart doubles as a receptionist and assistant payroll administrator. (1:116; 9:1771, 1864.) In her payroll function, one of Stewart’s duties is to deliver payroll checks to the front gate. (9:1864–1865.) About April 21, 1993, Stewart complained to Loupe that McLean had been “bothering” her by asking her to have dinner with him and to supply him with employees’ names, addresses, and social security numbers and not to tell anyone. Stewart told Loupe that she was having to leave the front desk when she saw McLean approaching. She said she did not know how to handle the situation and she asked Loupe to have McLean stop. Loupe told her to put her complaint in writing and she did so by memo (G.C. Exh. 5) later that day. (1:119, 121; 9:1774, 1796–1797, 1800, 1871, 1874, 1920, 1923–1924.) At trial Stewart testified that McLean had called or approached her about half a dozen times beginning in December 1992. In her memo of April 21 to Loupe, Stewart wrote (G.C. Exh. 5):

I have been asked several times by Mr. McLean if I could print him a list of all employees including their addresses, hire dates and social security numbers. He told me not to tell anyone that he was requesting this information.

Also, he has called me at the switchboard on several occasions and told me that I should have dinner with him, and for me not to be afraid, that he wouldn’t bite. I feel that he is harassing me and that you should be made aware.

In a second memo (G.C. Exh. 6), dated May 4, 1993, Stewart wrote Loupe (G.C. Exh. 6):

This is to inform you that I heard the following comment from Mr. McLean, “God Damn this place and all the rest of you Chinese assholes.” This comment was made as he was leaving the conference room during the Arbitration.

#### (2) The June 4, 1993 investigative meeting

Loupe testified that the decertification election and a morale survey had him very busy then and he needed time to investigate. (1:120; 9:1771–1772.) Not until the evening of June 3 did Loupe call McLean (at home) to come to his office the next morning to respond to charges of sexual harassment. (4:838–839; 6:1070–1071.) The following morning McLean, Doug Partin, and Attorney Wells met with Loupe and Staff Manager Roger Massey to obtain McLean’s ver-

sion. At the meeting McLean admitted to calling Stewart and asking her to dinner (by which McLean, in the language of the South, means the noonday meal, 4:861), but that he does the same with others merely as part of being friendly, that he meant nothing by it and would stop the practice.

Contending that he asked only for a copy of a seniority list that FPC had distributed in the past, McLean denied to Loupe that he told Stewart not to tell anyone of his request. At trial McLean testified that he told Stewart not to do it if it would get her into trouble. McLean said he told her that because he had fallen into disfavor and his name was like the "plague." (4:851; 5:1021.) Stewart denies that McLean said anything about not wanting to get her into trouble. (9:1887.) Loupe said the social security numbers were confidential. McLean said he did not know that.

McLean's reference to the "plague" requires additional background. Andre testified that in 1989-1991 he assisted Formosa Chemicals and Fibers Corporation (FCFC), a sibling company of FPC, in an attempt to establish a major facility in St. John The Baptist Parish (southeast of Baton Rouge) which would employ 1000 employees. The property needed to be rezoned, so first there were zoning hearings, then two hearings before the Environmental Protection Agency (EPA) plus an environmental impact statement (EIS). McLean attended two or three of the meetings. (1:58-61; 4:841; 6:1077.)

McLean testified that he sat in the audience. (4:842.) Although it is undisputed that McLean never made any public remarks at any of the meetings, McLean concedes that some attendees from one or more of the organizations in attendance asked him about FPC's management and he told them that he did not trust Andre. (5:955-956.) During the 1993 decertification campaign FPC held "buzz" sessions with its employees. During these buzz sessions FPC's management criticized McLean in certain respects. (As I noted earlier, by letter of May 10, R. Exh. 17, McLean resigned from his position as the Union's negotiating committee president in order to remove himself as any hindrance in the upcoming contract negotiations. In his letter McLean cited the fact of personal attacks on him.) One of the topics was McLean's attendance at the 1991 EPA hearings. Andre admits that he told employees that, at the EPA meetings, McLean was sitting in the midst of environmental activists who were opposed to Formosa's plan to build a plant there. At the buzz sessions Andre said that at one of the EPA meetings an activist rose and criticized FPC's environmental practices, asserted that FPC abused its employees, and (apparently pointing to McLean) suggested that attendees and officials could confirm this by speaking with (McLean). (1:58-61.)

Nan Ya Plastics is another sibling of FPC. Located at Batchelor, Pointe Coupee Parish, Louisiana (about 50 miles northwest of Baton Rouge), Nan Ya Plastics purchases some of the PVC produced by FPC. (1:52, 61.) Andre concedes that, at the buzz sessions, he mentioned that McLean was assisting the employees at Nan Ya Plastics in organizing and that, in Andre's opinion, Nan Ya Plastics could not survive as a union plant and that FPC could not survive without Nan Ya. (1:64-69.)

For a final bit of background on incidents of ill will between McLean and Andre, and Loupe, I note McLean's testimony that in 1989 Andre telephoned him at work one night upset and protesting about pickets at his home and at

Loupe's home. McLean said he knew nothing about it but would call Partin. On calling Partin, McLean learned that Partin had ordered the pickets and that he would have the picketing stopped. At the 1993 buzz sessions, McLean testified, Andre sought to blame him and the Union for the picketing even though he tried to say that he had nothing to do with it. (6:1106-1109.)

### (3) The June 7, 1993 disciplinary meeting

Doug Partin secretly tape recorded this meeting (4:857-858; 5:879, 891-893; 6:1077), and copies of the tape (G.C. Exh. 104) and 10-page transcript (G.C. Exh. 105) are in evidence. Early in the meeting Loupe takes up the allegations and FPC's conclusions. On sexual harassment, Loupe states, "You admitted you had done some things you didn't think was sexual harassment. You made comments to a lady at work. Don't do it again or you will be discharged if you do it again. You've got to understand the position you put me in when you do that."

For the first time (4:853; 5:928), Loupe specified the microcall list, saying that "subsequent to" the Friday meeting (although the tape is very noisy, the words are "subsequent to" rather than "in" the Friday meeting as the transcript records) the "same young lady" (Karen Stewart) reported to Loupe that McLean also had asked for "the telephone numbers. For the microcall telephone numbers with a confidential listing of . . . ." (As reflected on the tape. The transcript at this point differs somewhat from the tape.) McLean and Partin observed that telephone numbers are not confidential, that FPC furnishes the Union with a list of all phone numbers. When Loupe replied that the microcall list is different, McLean pointed out that his supervisor gives it to him so McLean can get employees to cut down on the number of calls or else FPC will remove the department's telephone. (At trial the General Counsel's evidence confirms this and more. Since 1992 three supervisors have brought the microcall lists to McLean asking his help in reducing the length of calls or in preventing unauthorized calls. Two of them, Randy Riddick and John Arnold, did not testify, but David Hebert did and he substantially corroborates McLean and witness Robert Tate.)

McLean told Loupe that (because of his ready access) he had no need to ask for a copy of the list, and that he did not remember asking for it. At trial McLean testified that earlier in 1993 an employee told him that employees were making 1-900 calls. McLean called Stewart and asked her to check because he wanted to put a stop to it before someone got into trouble. Later she told him there were no such calls. (5:929-930.) Stewart testified that McLean did ask her to check the microcall list for his department to see if there were any 1-900 calls on it, and if so to give him a copy of the list (her pretrial affidavit omits the part about a copy), and she concedes that McLean stated that he wanted to see whether any 1-900 calls were being made so that he could handle the situation before it reached the department head. (9:1867, 1870, 1886, 1916-1919.)

Although the record does not show whether Stewart told Loupe the purpose of McLean's request, Loupe acknowledges, as the transcript of the meeting shows, that McLean told Loupe his purpose was to stop any 1-900 calls. (9:1776.) At the meeting Loupe, rather than addressing McLean's stated purpose, immediately switched the topic to

McLean's requesting Stewart not to say anything about his asking for what FPC considers confidential such as social security numbers. Loupe then stated, "This is a serious problem to us because you asked for this. There are avenues you go through to get this information, subject to my approval, through me or Sherry McBeath. Regarding that, we're going to suspend you for two (2) days starting at 6 p.m. Wednesday to 6 p.m. Friday. If you need that type of information dealing with our company, come in and ask me." When McLean says he has always asked McBeath for it, Loupe states, "It's a serious offense. You know what kind of trouble I get in when I give out someone's social security number." McLean then denies asking for social security numbers as such, but only for seniority lists which have included that information. (G.C. Exh. 105 at 2.)

Later, in response to a question from Partin, Loupe states (G.C. Exh. 105 at 3):

I am suspending him for the whole thing—for asking for what we consider to be a confidential document and asking somebody not to say anything about it when he knows that there is an area to get what he needs from this facility. It's available and that's not it. That avenue is not to go to some secretary and say give me this and don't say anything about it.

Still later, when Partin again asks the basis for the suspension, Loupe states that it is for (1) requesting confidential information and (2) asking Stewart not to tell FPC. After a mostly unintelligible few words by McLean, Loupe states (G.C. Exh. 105 at 5):

It is the opinion of the management of this plant now that you have not been a model employee. Your attitude is bad. Just to recap a few little things. The comments at St. John.

When McLean protested that he made none there, Loupe made remarks about McLean's comments to the environmentalists. This sparks further protestations by McLean and, in his support, Union Representative Joe Webb (5:892). When Partin asks what else, Loupe lists as another problem the \$75 gift to the payroll employee (Pam Boudreaux). McLean explains in detail that he merely loaned her the money. Loupe responded that the \$75 had even been a topic in the recent morale survey. To a question by Partin as to why he was raising the \$75 item now when he did not do so at the time, Loupe states that it is because it has come up (in the morale survey, presumably). This topic ends when McLean says he now has learned not to loan any money.

Switching to the next topic, Loupe states (G.C. Exh. 105 at 8):

The third thing I have is the comments you made to me in this office is why I say your attitude is bad. When Whip Wilson came to me about changing the policy about hiring relatives, he said he had a relative he wanted to send. Your remark was you wouldn't recommend any one to work for this company—a no good company (inaudible) talking about your attitude when you say this kind in front of management people and so forth. That's a problem.

Almost immediately Loupe moves to the next topic by stating that McLean had said, "Goddamn this place and all these Chinese assholes," or "To hell with this place and the rest of these Chinese assholes." McLean replied that it was not him but Robert Granier who said that just as they made the curve [in the hallway]. "It was not me," McLean reiterated. To this Loupe stated, "Your attitude toward this company is not the best of Formosa. About the comments you made." "I did not make it," McLean insisted. "Okay. I am putting you on final notice for harassment. You got a bad attitude." Loupe said this was McLean's final warning.

When the conversation again turns to the St. John meetings, McLean states that as a labor person he will do everything to help persons get jobs. "That's what shocked me," Loupe replies, "You heard what the man said." A moment later Loupe makes clear that he is referring to the comment by the environmental activist that FPC is "no good" and should not be given the necessary permits to build a plant. Thus, Loupe states (G.C. Exh. 105 at 10, as corrected to conform to the tape):

I am telling you what Andre said. One of the environmental people got up and made a speech and said, "You can't help these people in here. They are no good. They are trouble coming in here. They treat the employees horrible. If you don't believe what I am saying, ask that man right there. He is from that plant. He [the editorial reference in the transcript at this point shows Andre; it obviously should be McLean] just got through telling me that."

After McLean says he does not remember the man (environmentalist) saying all that, he denies the allegation that he privately spoke ill of FPC to anyone. The meeting then ends.

#### (4) The suspension letter

By letter (G.C. Exh. 9) dated June 16 Loupe wrote McLean as follows:

On 6/4/93 we had our first meeting to investigate the allegations on *sexual harassment and obtaining confidential information without going through proper channels*. The investigation rendered the following information:

##### Item #1 *Sexual Harassment*

On a number of occasions you have asked Mrs. Karen Stewart to go out with you, as well as a number of other female employees in the Company. They have declined and the statements of Mrs. Stewart indicated that you told her, "I don't bite" when you asked you out. In further investigation, I find that you have asked other ladies out and by your own admission, validated that there have been many others to whom you made the request.

Since we have received the charge and completed the investigation, the following action is to be taken in accordance with the severity of the situation. You are to receive a *warning letter* to the effect that you are to leave the lady alone and not continue approaching her for dates. She is pregnant and does not need this type of situation with which to contend. You are not to approach Mrs. Stewart concerning this incident. No contact is to be made with her other than her normal work

assignments which may put you in contact with her. This incident is not to be discussed with her or any other employees in the plant. It should be of a confidential nature. If further actions of an unwanted nature on your part continue, disciplinary action will be taken up to and including discharge, based on the facts of the case.

Item #2. *Requesting confidential information without going through the proper channels*

In further investigation, Mrs. Stewart informs me that on 4 or 5 occasions you not only tried to get her to give you the list of employees' names, addresses, Social Security numbers and phone numbers, but you also asked her to get you a list of the Microcall report, which lists the outside caller number and the number being called. Mrs. Stewart further restates that you told her not to tell anyone.

As I told you in our meeting, Mrs. Stewart will submit voluntarily to a polygraph test concerning her statements, to which you had no response.

Additional information:

(1) Approximately one to one-and-a-half years ago, another lady in the payroll area came to me and stated that you gave her \$75. She asked what she should do with it and I informed her that due to her position in the payroll area, she should have [given] it back to you. She couldn't inform me as to why you would give her \$75 when I asked her. To my knowledge she gave the money back to you. Now you have stated that you loaned her the \$75 because she need[ed] money.

(2) In previous situations, you have made negative comments about the Company, as well as ethnic slurs about Chinese owners as most recently overheard in the hallway when a request of yours was denied. The specific statement was: "God Damn this place and all the rest of you Chinese assholes."

Conclusion:

Item #2, concerning the unauthorized request of confidential documents containing employees' names, addresses, Social Security numbers and phone numbers, as well as the Micro-call report will be handled as a separate incident. The disciplinary action taken for this offense will be a *two-day suspension without pay* and you are to be placed on *Final Warning*. Further incidents of a similar nature which are indicated by your abusive attitude, language and disregard for company policy will result in your discharge.

#### b. Discussion

##### (1) Prima facie case

The General Counsel's burden is to show that McLean's union activities were a motivating reason for his discipline. If the Government succeeds in making that prima facie case, the Respondent must then demonstrate, as an affirmative defense and with a burden of persuasion, that it would have taken the same action even had there been no union activities.

I find that the General Counsel has established a prima facie case. During the decertification campaign, Andre criticized McLean for his assistance in the effort to organize the employees of Nan Ya. Andre concedes his awareness of the

assistance by McLean. (1:61.) Stewart's initial written complaint was made April 21. (G.C. Exh. 5.) According to Loupe, other events plus the need to investigate prevented his calling McLean for over 6 weeks. It is unclear what Loupe's investigation consisted of besides conferring with Stewart. If Loupe really considered the matter to be as serious as he claims, the delay of over 6 weeks seems very strange. The delay ended, however, just minutes after McLean returned home from attending a crawfish boil with the Nan Ya employees. The timing, plus Andre's knowledge and criticism, prompts the findings, which I make, that Andre learned of McLean's attendance at the June 3 crawfish boil and that he reported this to Loupe. Andre's message then caused Loupe to call McLean to report the following morning to answer sexual harassment charges.

Additionally, at all times FPC has gone out of the way to label this allegation as "sexual" harassment. At no time does Stewart call it that, although Loupe and FPC's attorney do. Stewart actually told Loupe that McLean was "harassing" her (G.C. Exh. 5) and (9:1920, 1923) "bothering" her. Stewart admits that at no time did McLean make any lewd remarks or attempt any sexual advances. (9:1924.) She felt his phone calls were harassment. (9:1924.) Yet Stewart concedes that she gave McLean her home telephone number in one of their first business encounters, apparently when he gave her his business card and told her to call him if ever he could help. (9:1889-1890.)

Repeatedly asking someone to dinner, and repeatedly being declined (but never told she prefers not to be asked), no doubt is pestering and a form of harassment. But is it sexual harassment if neither the invitee nor management tells the invitor that the invitations are not welcome and to cease? According to Loupe, only once before has he received a sexual harassment charge. It involved a secretary to a local manager. (I omit the names as an unnecessary public disclosure.) The manager invited his secretary to lunch and to dinner and asked her personal questions about what made her boyfriend love her, and he stared at her. She told him to stop. When he did not stop she went to Loupe who orally issued him a final warning. (R. Exh. 41; 1:126-127; 9:1779-1780.) Loupe's hand memo to the manager's personnel file is dated July 21, 1992. (R. Exh. 41; 9:1781.) From this memo (his notes), Loupe finally (apparently in 1993) got around to formalizing the manager's final warning in the form of a letter to the manager dated July 21, 1993. The manager admitted the truth of all allegations. (R. Exhs. 40, 41; 9:1792.) Apparently because of the letter's being typed in 1993, all dates are shown as 1993 rather than 1992.

Aside from the informal nature of the 1992 file memo respecting the manager, in contrast with the formalized handling of McLean's case, consider also an incident of harassment of a female by "B" shift VCM operators. The harassment consisted of vulgar names and derogatory remarks they were making about her. She overheard these remarks and names, but did not see the speakers. The female's manager became concerned that she would file a sexual harassment lawsuit and wrote a memo (G.C. Exh. 109), dated March 20, 1992, to the operators' manager. (5:934.) In the end, the female and McLean ended up in Loupe's office where Loupe, in effect, said he likes to defuse such situations. Loupe made no investigation to identify the employees who had been calling the female vulgar names. Andre and Loupe were content

with McLean's telling all employees in the department that such conduct should stop. (5:935-939.)

I also attach some weight to Loupe's apparent failure to interview Robert Granier respecting the vulgar reference to the Chinese following an arbitration hearing involving a grievance over his forced retirement. Granier testified that he, not McLean, made the derogatory remark in anger as they left the conference room and were walking down the hall. (3:593, 596.) Recall that McLean's first notice of this allegation came at the June 7 meeting and that his tape-recorded reaction was spontaneous—not he, but Granier said it. Loupe apparently did not see fit to extend the investigation to encompass an interview of Granier.

The alleged confidentiality of social security numbers is facially suspect because social security numbers appear on a variety of documents, including documents furnished to the Union. The numbers also appear on timesheets which hang in public view. (2:366-367; 3:520-521.) In August 1992, Ratcliff testified, Loupe told him that social security numbers were not confidential because they are sent monthly to departments where anyone can see them. (2:373, 375.)

I also attach weight to FPC's apparent failure to investigate, respecting the microcall list, McLean's explanation to Loupe on June 7 that at least one supervisor enlists McLean's help in holding down the length of telephone calls. To do so, Supervisor Riddick hands McLean the microcall list for the department. (G.C. Exh. 105 at 2.) Riddick did not testify.

FPC's discipline of McLean has the initial appearance of being contrived, as imposing overkill in contrast to a past procedure, in one situation at least, of defusing potential sexual harassment charges without so much as an investigation of apparently improper conduct. Rather than a simple notice to McLean that his invitations to Stewart were unwelcome, and to cease, and a notice that henceforth all social security numbers and microcall lists are considered confidential and to ask for them only through him or his assistant, Sherry McBeath, Loupe imposed a final warning and a 2-day suspension. Clearly FPC was motivated in part by McLean's union activities at Nan Ya Plastics. The Government having established a very strong prima facie case, I turn now to examine whether FPC proved what is, by law, its affirmative defense—that it would have imposed the discipline even in the absence of any union activity by McLean.

(2) Respondent's affirmative defense

(a) *Sexual harassment*

FPC has a written progressive discipline system involving three steps of (1) oral warning, (2) written warning, and (3) suspension. It provides that the level of discipline assessed in a given case "is based on the individual guilt and prior disciplinary record of the particular employee involved." (G.C. Exh. 13 at 24; 1:109.) Loupe testified that each case stands on its own merit and steps can be skipped. (8:1744.) And for sexual harassment, Loupe testified, company policy bypasses progressive discipline and imposes a final warning. Any further episode of sexual harassment results in "severe" discipline. (1:131; 9:1781, 1789.)

In his nearly 29 years at the facility, McLean has been disciplined only once—a 1985 oral warning for inattention to his job. (1:110; 4:834-835.) Loupe concedes that McLean

has never previously been spoken to (counseled) about any of the topics of the allegations in question here. (1:136.) He concedes that FPC does not have a no-fraternization policy. (1:138.) He concedes that he has never told McLean that social security numbers are confidential. (1:136.) He concedes that he has never told McLean he could not have social security numbers. (9:1802.) He concedes that there is no written procedure for requesting information. (1:134.) And Loupe concedes that McLean is one of the best operators in the plant, possibly the very best. (1:137; 9:1784.)

In Loupe's view, however, McLean's status as an excellent employee began to deteriorate after he became president of the Union's negotiating committee in 1989. That is when McLean developed a "bad attitude" (1:136) and began showing his "true colors" of renegeing on deals by filing grievances on matters Loupe considered as closed by agreement with McLean. (1:137, 159.)

FPC is entitled to credit one of its employees over another and to impose whatever discipline it wishes, so long as its action is not for an unlawful purpose. Thus, how quickly FPC responds to a charge, whom it credits and why, and the severity of the penalty become subject to governmental scrutiny only when an unlawful purpose is alleged. The Government having made a prima facie showing that a motivation for the penalty imposed here was McLean's union activities, it is FPC's burden to persuade, as its affirmative defense, that it would have imposed the penalty regardless of any union activities by McLean. That is, FPC not only must separate its tainted motivation here from any legitimate motivation, but it must persuade that its legitimate motivation outweighs its unlawful motivation so much that the Company would have imposed the discipline even in the absence of any union activities.

Respecting the "sexual" harassment ground as the occasion for the final warning to McLean, I note that FPC's past practice, involving two 1992 incidents, is a bit mixed. With the VCM operators and the female employee, Loupe and Andre were content to see the situation defused by McLean's speaking to the employees. There was no investigation to determine which employees were making the derogatory remarks, and, therefore, no penalty was imposed. By contrast, the manager's secretary named a specific person and requested action after the manager had ignored her request that he stop. The manager admitted all allegations. Even though the manager admitted everything, Loupe gave him only an oral final warning (until he formalized the matter with a letter at some point in 1993).

The formal manner in which Loupe imposed the penalty here is a departure from FPC's past practice. Moreover, the timing of the whole episode (beginning only minutes to a very few hours after McLean had returned home from a crawfish boil with Nan Ya employees), I have found tainted. Additionally, on June 7 Loupe accompanied the penalty notice with references to McLean's "bad attitude" (G.C. Exh. 105 at 9), as if such attitude somehow caused him to invite Stewart to have "dinner."

The "bad attitude" which Loupe mentions on June 7 clearly refers to Andre's perception, as described by Loupe on June 7 (G.C. Exh. 105 at 10), that McLean had provided aid and comfort to environmentalists (at the 1991 EPA hearings) who were viciously attacking FPC's policies on both the environment and on the treatment of its employees. How-

ever unintentional on McLean's part (although he admits to telling attendees privately that he did not trust Andre, and claims he does not recall hearing the environmentalist say everything Andre was attributing to him), McLean allowed himself to be used by the group of environmentalists in a way which Andre deemed harmful to FPC, or at least to FPC's corporate parent and corporate sibling. Moreover, Loupe added his own interpretation of a remark by McLean that, to Loupe's understanding, was to the effect that McLean would not refer a job applicant to FPC because FPC was a no good company. (G.C. Exh. 105 at 8.)

Respecting the vulgar remarks about the Chinese, Loupe asserts that Stewart was positive in her identification of McLean, even though she only heard his voice, which she recognized, and could not yet see McLean and Granier as they approached the reception area in the hallway from the conference room. Loupe disregarded McLean's spontaneous explanation that it was Granier, not he, who had made the remarks. Although the June 7 meeting was to be for the notice of decision made, it turned out to include new allegations (vulgar remarks about the Chinese; microcall lists)—allegations answered and explained on the spot by McLean. McLean's responses to these new allegations reasonably called for additional investigation by Loupe, yet none was made. With McLean's explanations disregarded, Loupe (obviously implementing a predetermined decision made after earlier conferring with Andre and Massey, 1:131) announced a decision which relies in part on the new allegations.

All this haste to discipline McLean was sparked after Andre, as I have found, learned of McLean's attendance at the Nan Ya crawfish boil. Recall that Andre thinks Nan Ya cannot survive unionization, that FPC cannot survive without Nan Ya, and that McLean should not be helping the Nan Ya employees organize. That attitude alone reflects Andre's motivation toward McLean. When one also recalls that FPC thinks the Union will lose the next decertification election at FPC, it takes but a short step to conclude that Respondent would like to get rid of McLean as an employee. Although McLean resigned as president of the negotiating committee, he remains as president of the Local. Imposing a final warning sets the stage for a discharge well before the next decertification election.

Based on the record here, it seems apparent that, in the absence of McLean's union activities, FPC would not have treated McLean's calls and dinner invitations to Stewart as "sexual" harassment until McLean had been put on notice (either by a request to stop by Stewart or instruction from Loupe to cease) that his overtures to Stewart were not welcome and should cease. While FPC's past practice has no incident directly in point, in the secretary/manager situation the secretary had requested the manager to stop, a request he ignored, and in the case of the VCM operators, no investigation was made, with Andre and Loupe simply allowing McLean to tell the operators to stop.

Finding, therefore, that FPC has failed to establish its affirmative defense respecting the sexual harassment allegation, I further find, as alleged, that it violated Section 8(a)(3) and (1) of the Act by issuing McLean a final warning on June 7, 1993. I shall order FPC to expunge the warning from McLean's personnel records.

#### (b) *Suspension*

Turn now to the 2-day suspension. Loupe's June 16, 1993 disciplinary notice (G.C. Exh. 9) to McLean concludes by referring to his "disregard for company policy." In fact there is, or was, no company policy other than that social security numbers are printed on a variety of documents and that Loupe had told Ratcliff in August 1992 that they are not confidential. Although Loupe claims to rely on a supposed 1981 or 1982 grievance settlement with the Union to keep social security numbers confidential (8:1738), FPC offered no documentary evidence. More in point, FPC does not treat social security numbers as confidential when dealing with the Union, and McLean is the Union's president.

It is clear that FPC treats social security numbers as being confidential only because, as Loupe claims, the Union wants it that way. But when McLean acts on union business, he is acting as the Union. If Loupe had a question of McLean's authority to act for the Union, he easily could have telephoned Business Manager Doug Partin. At most there could have been a misunderstanding respecting whether McLean really told Stewart not to tell anyone, or, in McLean's version, not to do it if it would get her in trouble. Even accepting her version, Loupe easily could have clarified this direct with McLean far short of a disciplinary action which jumped two steps of the penalty levels.

To the extent that Loupe was justified in wanting to correct any requests to his staff "not to tell anyone," FPC has failed to demonstrate any special reason for it to leapfrog the first two steps of its progressive discipline system. Absent McLean's union activities, I find that, at most, FPC would have given McLean nothing more than an oral warning, if that. Loupe's last-minute addition of the microcall list as a ground for McLean's punishment, in the face of McLean's explanation that his supervisor gives him the department's copy and enlists his support in reducing the time of calls made, further demonstrates that FPC was merely grasping at every pretextual straw available in an effort to lay a foundation for quickly ridding itself of McLean's thorny presence. FPC's effort here was less than deft in that it did not postpone imposing the punishment in order to "investigate" McLean's microcall statement and thereby give an air of detached fairness and objectivity to its procedure and decision.

Finding that FPC has fallen far short in carrying its affirmative defense burden respecting the suspension grounds, and finding that FPC has violated Section 8(a)(3) of the Act as alleged in suspending McLean, I shall order FPC to revoke the suspension, expunge it from McLean's records, and to make him whole, plus interest, for his 2 days of lost pay during his suspension.

#### G. *Specific 8(a)(5) Allegations*

##### 1. Contract proposals withdrawn February 4, 1993

Complaint paragraph 20(a) alleges that about February 4, 1993 FPC "withdrew its September 1992 contract proposals." Admitting this factual allegation, FPC denies allegations of the conclusory paragraph that this withdrawal violates Section 8(a)(5) of the Act.

Much earlier in this decision I summarized Andre's "step four" in getting the Union to the bargaining table as being Andre's February 4 "clean slate" letter (G.C. Exh. 29). Re-

call that in the letter he advises Partin that when negotiations resume, the parties should begin from a clean slate. Therefore, FPC “does hereby withdraw all contract proposals submitted during the negotiations in September, 1992. When we do meet for negotiations, the Company will bargain in good faith with the Union in order to resolve all differences and open issues.” As I found earlier, Andre meant a return to the terms of the 1989–1992 collective-bargaining agreement.

As I also found earlier, an implied reason for the withdrawal is FPC’s need to bargain from a stronger position. In a rather convoluted fashion, Loupe explains, in this connection, that FPC was concerned about the \$4 million Loper hammer hanging over Respondent’s head. (1:158–159.)

Complaint paragraph 20(a), in conjunction with paragraph 24, alleges the withdrawal as, in effect, an independent violation of the Act, and not as evidence of bad-faith bargaining (par. 21 does that). Considering events as of February 4, 1993, and paragraph 20(a) as an alleged violation independent of overall conduct, I shall dismiss complaint paragraph 20(a). As the Union had rejected the Company’s package proposal, FPC was at liberty to withdraw its own proposal. *Pittsburgh-Des Moines Corp. v. NLRB*, 663 F.2d 956, 959 (9th Cir. 1981). When I reach the allegation of overall bad faith, I shall consider whether the withdrawal, in light of the whole record, is evidence of overall bad faith.

## 2. Unilateral changes made May 24, 1993

### a. Introduction

Complaint paragraph 15 (in conjunction with other paragraphs) alleges that FPC violated Section 8(a)(3) (par. 23) and Section 8(a)(5) (par. 24) about May 24, 1993, by the following seven unilateral changes (par. 17) respecting unit employees:

- (a) Reduced the wages and benefits of its employees.
- (b) Froze the wage rates of its VCM–I employees.
- (c) Reduced the meal and shoe allowance of its employees.
- (d) Changed its vacation policy.
- (e) Abandoned the grievance procedure and implemented a company grievance procedure.
- (f) Discontinued its practice of compensating employee negotiating committee members. and
- (g) Enforced its bulletin board rule.

The parties have addressed the bulletin board allegation as an individual matter (perhaps because they litigated it rather extensively), and I shall do likewise.

### b. The nonbulletin board changes

#### (1) Facts

As I noted much earlier, Andre acknowledges that he made the changes specified in his May 21 memo (G.C. Exh. 4) without consulting with the Union (1:73–74), and the parties stipulated (3:579) that the changes were made. The correspondence shows that FPC treated the Union’s deletion of item 10 as rejection of FPC’s contract package. On January 7, 1993, FPC, by Andre, wrote both the Union (G.C. Exh. 24) and unit employees (G.C. Exh. 23) advising that, although the Union had rejected the Company’s contract pro-

posal and there was no contract, FPC would not (in effect) roll back the improvements in wages and benefits immediately. The last paragraph in both documents reads (G.C. Exhs. 23, 24):

Formosa, therefore, offers to meet and negotiate with the Union on a mutually acceptable contract. Formosa implemented wage adjustments and other provisions of its proposal on the understanding that its total comprehensive proposal was accepted. Since the Union now says that that is not the case, and since the previous collective bargaining agreement has expired, there is no agreement between Formosa and Teamsters Local No. 5. Formosa will not make any wage or other fringe benefit adjustment between now and a reasonable time to be determined by Formosa, during which time the Company and Union can negotiate with a view to reaching an overall agreement. However, it must be understood that there is no collective bargaining agreement in existence between Formosa and Teamsters Local No. 5.

In his “clean slate” letter of February 4 (G.C. Exh. 29), Andre concluded with this paragraph (G.C. Exh. 29):

In conclusion, I wish to address the Company’s position concerning the wage and benefit increases which were implemented in good faith by the Company after we received your assurance by phone that we had a ratified contract. Personally, I have recommended to our Corporate Management in New Jersey that our employees at this time should not suffer a loss of income or benefit improvement due to the union officers’ irresponsible handling of these negotiations. Therefore, we will continue the wage and benefit improvements for a reasonable period of time, in the hope that you and your officers will eventually face the reality of your acts, start to negotiate in a straightforward manner, and have the integrity to be honest with your members concerning the status of the contract.

#### (2) Discussion

Clearly, the improvements which FPC made effective October 1 were based on a false report of ratification from the Union. As the changes were contingent on ratification, and implemented only after the Union’s false report, it is clear that they never became part of FPC’s “established” wages, hours, and working conditions. Although FPC was at liberty to rescind the changes immediately, it postponed that action in the hope the Union would return to the bargaining table. And FPC even directly informed unit employees of the status of the changes and that FPC might well revoke them in the future. The Union never told FPC that it wanted to bargain before FPC rescinded the improvements. Did the Union waive any right to bargain? While waiver outside of negotiations may be inferred, under established Board law, any waiver during negotiations must be conscious, clear, and unmistakable. *Intermountain Rural Electric Assn.*, 305 NLRB 783, 786 (1991), *enfd.* 984 F.2d 1562 (10th Cir. 1993). Although the Fifth Circuit does not approve that distinction, *NLRB v. Construction Services*, 954 F.2d 306 (5th Cir.

1992), I am bound to follow established Board law. Thus, I find no waiver here by the Union.

In any event, instead of exercising its right to roll back all changes, FPC unilaterally left certain changes intact. As it told unit employees in its May 21 memo (G.C. Exh. 4 at 1), "We are operating under policies which management chooses to continue, with the following changes as listed." This is no different from granting unilateral pay increases for some unit job classifications, or unilaterally switching to a different grievance procedure. Although there was no contract, the Union was still the bargaining representative. FPC was bound by law to consult first with the Union before doing anything more than returning to the terms and conditions existing as of October 1, 1992, the date of the extended contract.

As FPC failed to consult with the Union before making selective unilateral changes, it violated Section 8(a)(5). Most of the May 24 changes are merely reversions to the September 1992 levels, such as for wage rates and health benefits. The General Counsel (Br. at 101) lists only three modifications: (1) freezing of wages, (2) substituting a new grievance procedure, and (3) the decision not to pay the union negotiating committee. The wage freeze was an operations matter. Andre testified that it currently affected the VCM-I employees who were not in their progression training because their VCM-I plant was shut down for modernization. (8:1620-1621, 1652-1655.) Under the 1989-1992 contract, FPC had authority under section 43 to operate the plant. (G.C. Exh. 14 at 30.) Rather than laying off the employees, FPC kept them on the payroll, "making work for them" (8:1654), and laid off contract employees instead. The Union did not file a grievance. (8:1655.) I find no violation. As the first three items in the complaint are mere reversions to what existed in September 1992, I shall dismiss complaint paragraphs 15(a), (b), and (c).

Respecting the vacation policy (par. 15d), Partin testified that, while it was not in the written contract, the parties had agreed during the contract that employees could take a week of their vacations a day at a time. (6:1173.) In its proposed interim agreement (G.C. Exhs. 66, 79; Jt. Exh. 8 at 10), FPC proposed to reinstitute the practice. The May 24 change was unilateral and effective before the Union ever received notice. Although that change violated the statute, the General Counsel requests no particular remedy as to this item. The record even suggests (G.C. Exh. 90 at 2; Jt. Exh. 8 at 10) that the interim agreement, with the Union's approval, may have been implemented on February 28, 1994.

By unilaterally substituting a new grievance procedure (par. 15e), FPC violated Section 8(a)(5) of the Act. *White Oak Coal Co.*, 295 NLRB 567, 567-568 (1989). FPC must be ordered to reinstate the contractual grievance system if it has not yet been reinstated.

As for discontinuing the "practice" of paying employee members of the Union's negotiating committee (par. 15f), FPC argues (Br. at 36-37) that Andre's May 21 letter was not the adoption of a new term and condition of employment, but "merely a statement of bargaining position with respect to a nonmandatory subject of collective bargaining." Respondent unsuccessfully seeks, posthearing, to remove the spots so that the May 21 animal facing us is a tabby rather than a leopard. That effort fails. Traditionally the parties did discuss the topic at their protocol meetings. (6:1064-1065.)

In the recent past FPC paid for all of the Union's employee committee persons, but this dropped to a bit more than half in 1992. (1:76-77; 6:1065.) At the June 1993 protocol meeting, Loupe explained that FPC, not expecting negotiations in 1993, had not budgeted for payment in 1993 to employee members of the Union's negotiating committee. (6:1212; 7:1381; 8:1722; Jt. Exh. 1 at 2.) Although Casey Sharpe complained that the Union was not happy with the decision, Loupe testified that such complaint was the last the union said about the topic. (8:1722; Jt. Exh. 1 at 6.) At trial Andre (1:77) and Loupe (8:1722) confirmed the budgetary explanation.

The critical point is that, by his letter of May 21, Andre advised the bargaining unit that the new policy was effective May 24. Thus, as to the Union, the new policy was a fait accompli before the Union ever heard of it. FPC cannot now escape liability by arguing that the Union did not bargain to reverse a fait accompli. *Intersystems Design Corp.*, 278 NLRB 759, 760 (1986). I shall order FPC to revoke its new policy and, on request, bargain with the Union on this topic, effective for the negotiations which began June 7, 1993.

The complaint alleges that Respondent also violated Section 8(a)(3) in making these changes, and other than labeling the nonbulletin board changes as retaliation because the employees voted for the Union in the May 6 decertification election (Br. at 102), the Government cites no evidence in support of this speculation. Indeed, as FPC anticipates winning the next decertification election, it seems unlikely that it would risk antagonizing unit employees by retaliating against them. Finding insufficient evidence to support the General Counsel's speculation, I shall dismiss the allegation that the nonbulletin board changes of paragraph 15 violated Section 8(a)(3) and, derivatively, Section 8(a)(1) of the Act.

### c. The bulletin board change

#### (1) Facts

The employee handbook provides (G.C. Exh. 13 at 17) (emphasis added):

#### BULLETIN BOARDS

Each section has bulletin boards for posting of notices and memoranda conveying information to employees. Bulletin boards are also located at each of the gates. These bulletin boards will be used for posting job bids and other **approved** information of interest to you.

The Company allocates the Union one suitable bulletin board in each of the locker rooms in addition to the main bulletin board for the **purpose of posting notices of Union meetings, notices of election of officers and other noncontroversial** information for the benefit of its membership.

Violation of the Company rules may result in disciplinary action, **including discharge**. (G.C. Exh. 13 at 21.) Rule 18 provides (G.C. Exh. 13 at 23):

18. Company bulletin boards are to be used only for the posting of notices, **authorized by proper authority**. Defacing or unauthorized alteration of any posted notice is prohibited.

Section 40 of the expired 1989–1992 collective-bargaining agreement provides (G.C. Exh. 14 at 28) (emphasis added):

The Company will allocate the Union one suitable bulletin board in each of the locker rooms in addition to the main bulletin board for the purpose of posting notices of Union meetings, notices of elections of officers, and other **noncontroversial** information, for the benefit of its membership **when signed** by an authorized representative of the Union.

The employee handbook has other rules which forbid profane or abusive language toward other persons or the making of fraudulent statements.

There is no dispute that before May 21, 1993, FPC had never enforced the provisions about approval. Although there is some dispute about whether everything was signed, most of the evidence is that signatures were not required. On the other hand, apparently most, perhaps all, of the posted items indicated at least general authorship, such as notices of union meetings, union newsletters, or union picnics. There is no dispute that during the 1993 decertification campaign obscene cartoons (R. Exh. 10) and tracts (R. Exh. 20) highly critical of management began appearing. The tracts were authored by “Fed Up.” The cartoon in evidence (R. Exh. 10) criticizes the Union in an obscene fashion. It is not signed by Fed Up. None of the witnesses here ever learned the identity of Fed Up. Most of the materials were found lying around the plant. Although there were reports that cartoons and tracts had been seen posted on bulletin boards, none of the witnesses here found any posted. All agree that the cartoons and Fed Up’s tracts are highly inappropriate for posting on the bulletin boards.

Loupe testified that in the past there has been no occasion to enforce the rules because nothing controversial has ever been posted. (9:1832–1833, 1860–1861.) The General Counsel has not shown otherwise. Stephen Dyson, a member of the Union’s negotiating committee, testified that copies of “charges” have been posted (2:314), but it is unclear whether they were charges against FPC, the Union, or some other kind of charges. Although Billy Ratcliff suggests that items expressing disagreement with the Company have been posted (3:499), he gives no examples or further description. In short, there is no evidence that there has ever been posted anything similar to copies of exchanges in the heated literature of a decertification campaign.

Because of these cartoons and Fed Up’s materials, on (Friday) May 21, 1993, Andre (8:1648) wrote Partin and McLean, jointly, a letter reading (G.C. Exh. 3):

Effective [Monday] 5/24/93, bulletin boards will be used only for posting notices of union meetings, notices of election of officers and other noncontroversial information.

All notices must be signed by an authorized representative of the union.

Failure to comply with these guidelines by anyone will result in disciplinary action up to and including discharge. Notification of these guidelines to your officers, committee persons and membership—I will leave in your hands.

Andre admits that he did not consult with the Union before issuing the letter (1:70; 8:1564–1565), and that after his letter FPC enforced the stated policy (1:79). For example, Dyson describes being informally warned by management when he posted (after signing the posted copy) a copy of Partin’s September 22, 1993 letter (G.C. Exh. 69), of over two pages, to Andre and Loupe. This letter, one in their series, blasts Andre and Loupe for trying to undermine him with unit employees and for denying the Union the right to handbill in order to explain what is transpiring in the negotiations. Partin asks whether they are afraid of the truth and afraid to bargain in good faith, and accuses them of delaying negotiations so that another decertification election can be held. It continues and concludes in this vein. PVC Production Manager Albert Halphen informally warned Dyson that he should not post material without obtaining approval from him or from Loupe and that, in any event, he would hate to see Dyson get into trouble for posting something like the Partin letter (2:316).

## (2) Discussion

The General Counsel argues there is a violation because there was a change in that previously there was no penalty (an incorrect position in view of rule 18), because there was no enforcement, because the change was unilateral, and because there was no need in that FPC had other rules covering obscene, insulting, racist, or scurrilous materials. FPC argues that there is no change, that Andre’s May 21 letter merely informs the Union that the existing policy will be enforced, and that approval and signatures are not an onerous burden in exchange for the privilege of posting materials on FPC’s private property.

To be unlawful, a unilateral change must affect a material, substantial, and significant matter. *Civil Service Employees Assn.*, 311 NLRB 6, 7–8 (1993). (Requirement of beepers not a change in principle.) While an occasional laxity in enforcement may not result in the creation of a new employee right, *Civil Service* at 8, a consistent laxness or only sporadic enforcement before an election, followed by strict enforcement after an election, is a violation of the Act. *Lovejoy Industries*, 309 NLRB 1085, 1106–1107 (1992). When an employer allows one of its rules or policies to slip into “desuetude,” it may not lawfully revive it without bargaining with the union. *New York Telephone Co.*, 304 NLRB 183, 184 fn. 12 (1991) (after condoning use, without express permission, of employees’ lounge by employees for union meetings, employer could not unilaterally require advance permission).

The question here is whether, by its failure to enforce as to routine matters (such as notices of union meetings) where general authorship was known, FPC waived its right to enforce its rule generally (so that it may not unilaterally require all postings to be signed and approved) even if it did not waive as to controversial items. Finding that FPC has waived the right to enforce its stated rule, and that it has violated Section 8(a)(5) of the Act as alleged by complaint paragraph 15(g), I shall order that it notify the Union it has revoked the May 21, 1993 bulletin board letter, and that should FPC desire to reissue such a letter, it must give prior notice and opportunity to the Union to bargain concerning the proposed change. *New York Telephone*, supra.

## (3) Sanctions not requested

As summarized above, the complaint (par. 15g) alleges that Respondent began enforcing its bulletin board rule and (par. 17) that FPC did so without prior notice to the Union and without affording the Union an opportunity to bargain about it. In its answer, Respondent denies these allegations. But as we know from Andre's admissions (1:70; 8:1564-1565) at trial, FPC did not consult and thereafter FPC enforced (1:79; 3:579) the stated policy. Unlike the other unilateral changes, which FPC had announced might be revoked at some point, the bulletin board rule was not affected by the improvements implemented effective October 1, 1992. Thus, there was not even a generalized notice before May 21 that FPC would begin enforcing its bulletin board rules. Of particular importance here, nothing indicates any doubt by Andre, or FPC's attorneys, because of any particular facts. Yet in its answer, FPC denies that there was no prior notice and denies that about May 24 FPC began enforcing its bulletin board rule.

Under 29 CFR 102.21, the signature of an attorney constitutes a certificate "that he has read the answer; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay." "For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action." See *Graham-Windham Services*, 312 NLRB 1199 fn. 2 (1993) (sanctions of strong disapproval and warning); *Worldwide Detective Bureau*, 296 NLRB 148 fn. 2 (1989) (same); and *M. J. Santulli Mail Service*, 281 NLRB 1288 fn. 1, 1289-1290 (1986) (same). Lawyers must pay attention to the topic of possible sanctions in Board proceedings, for it is clear that the Board is serious about sanctioning lawyers who act in bad faith in Board proceedings, such as filing frivolous pleadings which consume Agency time and the taxpayers' money without legitimate cause.

Because the General Counsel has not moved that I recommend sanctions, and because I am satisfied that FPC's attorneys will pay closer attention to this matter in future cases before the Board, I shall not address the matter further.

## 3. Bypassing the Union June 6, 1993

## a. Facts

Complaint paragraph 18 alleges that about June 7 FPC, by Loupe, "bypassed the Union and dealt directly with employees in the Unit by soliciting an employee to settle a grievance." Respondent denies.

In June 1992 FPC fired unit employee Michael A. Bledsoe. (2:245.) The Union filed a grievance over Bledsoe's discharge, and the matter was arbitrated in late May 1993. (1:145; 2:245.) The parties were represented by counsel. During the arbitration hearing, Loupe testified, FPC learned facts which caused management to decide that Bledsoe should not have been fired and that he should be offered reinstatement. (1:146; 8:1747-1748.) About 8 p.m. on Sunday, June 6, 1993, Bledsoe testified, Loupe called him at home and said that he had something that may be beneficial to Bledsoe if he would meet with Loupe the next morning at 8 o'clock. Bledsoe said he would be there. (2:245-246.) Bledsoe then telephoned Union Attorney Randall Wells, who

had represented the Union at the arbitration, and informed him of Loupe's call. (2:263.)

There is no dispute that the following morning Loupe met with Bledsoe privately for a few minutes. No union representative or attorney attended. (2:247.) Three other management persons then joined Loupe and Bledsoe for a short meeting. In their private meeting, Bledsoe testified, Loupe said that he was offering Bledsoe his job back and that had Bledsoe not received bad advice from the Union, and had Loupe known all the facts, Bledsoe would not have been terminated. (2:247.) A moment later Staff Manager Roger Massey (possibly still the plant manager, 1:111; 8:1618; 9:1828), PVC Section Manager Albert Halphen, and PVC Supervisor Donnie Kissinger entered. Massey told Bledsoe that, should a similar incident occur in the future, to tell everything, that the Union had given him bad advice by advising him not to tell everything. Loupe then said they were offering his job back, that he would be reinstated with all rights, except there would be no backpay. Bledsoe said he would answer the offer within a day or so. He returned to work the following Monday. Before accepting the offer, he spoke with the Union. (2:249-251, 262-263.)

Later, but not before June 9, Attorneys Pugh (FPC) and Wells (Union) agreed to notify the arbitrator that he should decide the case only as to whether FPC was obligated to pay Bledsoe backpay. (2:264; 8:1751, 1754-1756; R. Exhs. 38, 39; R. Exh. 6 at 4.) At trial I rejected FPC's offer of the July 18, 1993 arbitrator's decision (R. Exh. 6), even though no party objected to its receipt, because I saw no relevance to the document. (2:266-267.) At this point I consider the decision of limited relevance to assist in showing that the arbitrator was notified to limit his decision to the backpay issue (R. Exh. 6 at 4) and that his decision denied backpay. (R. Exh. 6 at 8.) I now reverse my ruling, receive Respondent's Exhibit 6 in evidence, and transfer the document to the folder for Respondent's exhibits.

## b. Discussion

FPC's defense is not that the event did not occur substantially as described by Bledsoe, but that the Bledsoe event conforms to past practice. In support of this argument, FPC cites the fact that Loupe also telephoned McLean the evening of June 3 to instruct him to report the next morning to answer a charge of sexual harassment. Although McLean brought union representatives with him, Loupe did not notify the Union and the Union never protested. In a similar fashion Loupe called in maintenance mechanics (and Stewards) Ratcliff and Wilson, and the Union did not protest. The General Counsel counters (Br. at 104) that the situations are different because Bledsoe already was represented by the Union, and the Union's attorney, in the very matter on which FPC bypassed the Union. Not only did FPC bypass the Union, but in doing so it attempted to undermine the Union by criticizing advice that the Union allegedly gave Bledsoe in the Company's disciplinary investigation.

The parties do not address the basic fact assumption set forth in the allegation: Did FPC "deal" directly with Bledsoe? That is, did FPC negotiate with him? Did it settle, or attempt to settle, the reinstatement portion of the grievance with him? Had it done so, then clearly FPC would have violated Section 8(a)(5) of the Act. *Gratiot Community Hospital*, 312 NLRB 1075, 1079-1080 (1993); *Weinreb Manage-*

ment, 292 NLRB 428, 432 (1989). Conversely, if there was merely employer-employee communication, then there was no bypassing and no direct dealing. *Colorado Ute Electric Assn.*, 295 NLRB 607, 619, 622–623 (1989), enf. denied on other grounds 939 F.2d 1392 (10th Cir. 1991). It is clear that there was no negotiating or dealing here. Management said nothing about settling the grievance in exchange for reinstatement. Nothing was said about canceling the grievance from the arbitrator. Although statements by Loupe and Massey (that the Union gave Bledsoe bad advice) were calculated to undermine the Union, the allegation here is not about statements undermining the Union, but about soliciting the settlement of a grievance. The evidence fails to match the allegation, and FPC was not put on notice that anything else was to be litigated. As the pleading is not supported by the evidence, I shall dismiss complaint paragraph 18.

#### 4. Submitting regressive contract proposals

Complaint paragraph 20(b) alleges that during the period of September 1992 until August 1993 FPC “(b) about June 30, 1993, submitted regressive contract proposals.” As paragraph 20(b) is an independent allegation, I shall treat it as such here, although I also shall consider it in conjunction with the overall bad-faith allegation (par. 21). Paragraph 20(b) is presented almost as a per se allegation—if FPC did it, then it violated the Act. FPC contends (Br. at 48) that the General Counsel argues (no citation given to the record) that FPC’s contract proposal of June 30, 1993 (G.C. Exh. 45), is so bad that “no self-respecting union” could be expected to accept it. FPC argues, in effect, that such a standard is nothing more than an evaluation of the lawfulness of the content of the company’s contract proposals under a verbal formula designed to determine what FPC should give by looking at what the Union wants. That kind of formula is forbidden under the Act.

By his letter of June 30, 1993 (G.C. Exh. 45), Andre submitted FPC’s “proposal for contract language.” A wage proposal is not included. The language proposal consists of 36 single-spaced articles presented on 32 pages. Although it covers most items addressed in collective-bargaining agreements, it clearly is regressive from the Union’s standpoint because it removes many of the rights the Union enjoyed under the 1989–1992 contract. For example, article 2 does not provide for checkoff of union dues, whereas both the 1989–1992 contract did (G.C. Exh. 14 at 4), and FPC’s September 30, 1992 final proposal did not modify that provision. The management-rights article is so broad that at trial Andre even admits he can think of nothing left to the Union for representing unit employees. (8:1676–1677.) Andre frequently conditioned his answers, however, “if that became the final document.”

In short, the June 30 proposal was merely FPC’s opening shot, not its final proposal. (8:1670.) Indeed, Partin concedes that in contract negotiations parties propose and then decline to pursue everything; they normally do not take the first no as final; and in prior negotiations the Company had made proposals that it eventually dropped after getting “holy hell” from the Union. (7:1447–1449, 1470.) That is, the concept of progressive concessions is a normal bargaining tactic. (8:1542.)

Moreover, by June 30, 1993, FPC felt that it was in the catbird seat. Unlike in September 1992 when, Andre testi-

fied, FPC perceived that the Union held the strong position, by June 30 the Union had lost all its advantages, including its “trump card” (7:1392, Partin), and FPC perceived that it held the economic power. (8:1624, 1659.)

As paragraph 20(b) stands as an independent allegation, I shall dismiss that allegation, although I shall consider FPC’s June 30 contract proposal (G.C. Exh. 45) when I treat the allegation of overall bad faith.

### H. Overall Bad-Faith Bargaining

#### 1. Introduction

Complaint paragraph 21 alleges (and Respondent denies) that FPC:

21. By its overall conduct, including the conduct described above in paragraphs 15 [May 24 unilateral reduction of benefits and enforcement of its bulletin-board rule; merit], 17 [no prior notice to the Union respecting paragraph 15; merit], 18 [June 7 bypassing respecting Bledsoe; dismissed], and 20 [February 4 withdrawal of September 1992 contract proposals and June 30 regressive contract proposal; dismissed], Respondent has failed and refused to bargain in good faith with the Union as the exclusive collective-bargaining representative of the Union.

As I summarized much earlier, the complaint’s manner of pleading overall bad faith is somewhat confusing because it combines an open-ended phrase (“By its overall conduct”) with reference to allegations of specific conduct (“including the conduct described above in paragraphs 15, 17, 18, and 20”) in a time frame going beyond the specifics but ending in August. At trial there was extensive colloquy concerning this. As I mentioned earlier, when summarizing events from June 7, 1993, to February 25, 1994, the General Counsel advised that the Government does not allege or argue surface bargaining. Turn now to a summary of each of the bargaining sessions.

#### 2. The 1993–1994 bargaining sessions

##### a. First session—June 7, 1993

Although this session was designated for protocol (G.C. Exh. 113; 6:1209; 8:1721), Partin testified (6:1233; 7:1374–1375, 1407) that at the meeting (and all others) he proposed the Company’s final proposal (G.C. Exh. 19 plus G.C. Exh. 14) from the September 1992 negotiations. Unfortunately, Partin does not mention this until describing the third meeting, on August 5. McBeath’s notes (Jt. Exh. 1) do not record the purported offer, and Loupe denies any mention before August 5. (8:1721.) I credit Loupe.

The General Counsel faults the Company for wanting to limit the sessions to weekday afternoons, and for having “open” sessions (parties free to talk to unit employees about the progress). Nevertheless, the Union agreed to most such conditions. One it did not was the Company’s May 24 unilateral change in its practice of paying the wage rates of a certain number of the employee committee members of the Union’s negotiating committee. That was change number (8) in Andre’s May 21 memo (G.C. Exh. 4) made effective Monday, May 24, as a fait accompli. As Andre explains

(1:76–78), and as Loupe explained at the protocol meeting (8:1722; Jt. Exh. 1 at 2), FPC had included money for this in its budget for the September 1992 negotiations but not for any 1993–1994 negotiations. Accordingly, it had no budgeted money for that purpose now. Andre concedes that he gave no prior notice to the Union of the change (1:73, 76–78), a fact Partin (6:1176–1177) confirms.

One item discussed at the first meeting, and which complicated matters for a while thereafter, was the 29-page request for information (G.C. Exh. 40) which the Union presented at this protocol meeting. Although the witnesses dispute whether Casey Sharpe (the Union’s spokesperson at this protocol meeting) ever said that the Union could not bargain without the information, McBeath’s notes reflect that Sharpe’s concluding statement was (Jt. Exh. 1 at 7):<sup>6</sup>

We need that info to bargain. Let us know as soon as possible. Try to respond by 14th.

Partin’s concluding paragraph of the request (the document is signed by him and addressed to Andre) ends with, “Please respond no later than June 14, 1993.”

Loupe describes the Union’s June 7 request for information as “humongous.” (9:1856.) Among the hundreds of items (including subitems) requested are copies of the Company’s financial statements for the last 5 years (G.C. Exh. 40 at 2, 17), 23 categories of requested items for 12 suspected alter ego companies in 13 locations from Pennsylvania and Florida to California and Oregon, and points in between, (G.C. Exh. 40 at 24–26), plus personal grooming items (for bargaining purposes) such as the “height, weight and, if they were men, whether they had beards or other facial hair” for all employees during the last 5 years (G.C. Exh. 40 at 22), and these two from request number 33 pertaining to discrimination and harassment (G.C. Exh. 40 at 20–21):

2. A list of all employees who applied for work but were turned down showing their race, national origin, sex, sexual preference, or religion during the last five years.

5. Please provide copies of all charges or complaints received from any State or Federal administrative agency or any court suit concerning discrimination or harassment based upon race, national origin, sex, sexual preference, age or religion during the last five years. With respect to any such complaint, charge or lawsuit please provide not only a copy of the complaint, charge or lawsuit but a copy of any document, showing the resolution or conclusion of that litigation, complaint or charge.

Among the many other items requested in this one from request number 3 (G.C. Exh. 40 at 3):

9. A listing of all management employees, their salaries and benefits including expenses for the last two years.

<sup>6</sup>Citations to Jt. Exh. 1 need to be by quotation because p. 4 duplicates p. 2 and p. 5 duplicates p. 3. A corrected Jt. Exh. 1 was not substituted because the duplication was not discovered until after some testimony referring to the extended page numbers. (7:1377–1384, 1388–1389.)

The point to be made here is not that these and the many other items could never become relevant at some stage in the negotiations. But where the Government is here attacking the hardnosed or regressive proposal submitted by FPC on June 30, and alleging overall bad faith by the Company, it is important we not overlook the fact that it was the Union who threw the first hardball of the bargaining sessions. At trial Partin testified that the purpose of the request was to find out, for bargaining purposes, about all the benefits FPC, during the decertification campaign, had touted about its non-union plants. Unfortunately, Partin was not able to point to any of the many requests which would serve that stated purpose. (6:1167–1168; 7:1372–1374, 1408.) To the extent that any may serve that function, it is abundantly clear that they are far outnumbered by the other requests.

*b. Second session—July 8, 1993*

McBeath’s notes for the second session reflect that Partin said he had not had time to review the Company’s June 30 proposal. (Jt. Exh. 2 at 1.) The balance of the meeting was spent discussing the Union’s request for information. (Jt. Exh. 2.) Loupe delivered a partial response letter of seven pages (G.C. Exh. 46) in which he supplied some data, said other data and documents were not relevant and would not be furnished, or asked the Union for more details. (8:1724.) Advising Partin that the balance of the requested data would require copying tons of documents (with the 1 topic on training involving 20 to 30 file cabinets), Loupe gave Partin three choices regarding copying. One, the Union could copy the items at the Union’s expense. Two, the items could be copied commercially. Three, the Union could wait for FPC to copy the items at the Company’s expense, but only as time (estimated in months) permitted. (8:1723–1724.) Loupe testified that he never got an answer on how FPC was to collect the data (8:1724), and Partin concedes (8:1546) that before the third meeting, on August 5, he never told Loupe. (8:1546.)

According to Partin, FPC supplied the data, or at least what the Union needed, at the August 5 meeting. (8:1546.) That is when, Partin testified, Loupe brought in a single cardboard box about one-eighth full of documents. (6:1242; 7:1314, 1413, 1422–1423.) Apparently uncertain of which meeting it was, Loupe recalls it being at the fourth meeting, September 2, but agrees that it was in a single box. He estimates that it was about 10 percent of the items requested. (8:1726–1727.) McBeath’s notes do not cover the matter. As Partin was more certain, and as correspondence about the topic ends on August 4 (G.C. Exhs. 47–51, 58), I find that the production by Loupe occurred at the August 5 meeting.

Although the topic of the Union’s request for information passes from the scene on August 5 (the General Counsel, understandably, disavows any contention that it figures in the Company’s “overall” bad faith, 3:443–444), the point here is that no actual contract bargaining occurred until the third meeting, August 5, 1993.

*c. Third session—August 5, 1993*

As the parties begin their actual bargaining, it is pertinent to take a brief overview of their goals. Andre testified that he must have a revised contract in order to manage the plant. (8:1619.) He wanted that in 1992, but, with the Union’s then

having the stronger hand, he opted for removing the \$4 million Loper hammer. (8:1619–1625.) As noted earlier, however, by June 7 FPC found itself in the catbird seat. While by June 1993 the Union, as Partin testified, would have accepted and recommended the Company's September 30, 1992 offer, item 10 and all (and would have been delighted to have gotten it), FPC now began its own game of hardball. Although at trial Loupe never describes FPC's bargaining strategy, the notes of the sessions and admissions elicited from Partin at trial effectively describe it. That strategy was to obtain the contract it wanted by progressive concessions of its own after an initial tactic of shock bargaining (that is, offering the regressive proposal of June 30 which effectively would have vested FPC with discretion in all matters).

As a practical matter, there was little the Union could do. Its dues-paying membership was suffering severe attrition, the Local had faltered in surviving a decertification election with an unhappy prospect if another were held in May 1994, and it would be economic suicide to call a strike. Powerless except for whatever slight leverage existed in the Union's appeal of Judge Parker's decision and in the first complaint that issued in this case on July 30, the Union appears to have been mostly at the Company's mercy. As bargaining commenced, FPC, extending no mercy, displayed savage economic force with its June 30 proposal and its refusal at the August 5 meeting to agree to anything as written in its final 1992 offer. As Loupe said many times during the sessions, FPC wanted to change the language in that offer which no longer was on the table.

After the parties resolved the document-production matter at this August 5 session, they turned to contract bargaining. Partin tendered, as the Union's proposed contract, a document (G.C. Exh. 116) which Partin assured Loupe was identical to the Company's final offer in 1992 (G.C. Exh. 19, the proposed changes, in conjunction with G.C. Exh. 14, the 1989–1992 contract). Loupe explained that FPC would not agree to the 1992 offer because there would have to be a new contract. After a break the parties reconvened and, to Partin's chagrin, Loupe disclosed that the Union's proposed contract was not identical to the Company's 1992 final offer because the Union's document (G.C. Exh. 116) did not contain item 10. As McBeath's notes record, Loupe said, "Talking about trust—you said identical." (Jt. Exh. 3 at 6.) The Union then supplied the missing item 10. The omission appears to have been an honest mistake on the Union's part. The parties further stipulated that when Partin referred to General Counsel's Exhibit 116 at trial, his reference was meant to include item 10. (8:1525–1526.)

Although Loupe wanted to discuss FPC's June 30 proposal (G.C. Exh. 45), at Partin's urging they went through the Union's General Counsel's Exhibit 116. To all provisions Loupe said no, explaining that he would not agree to anything as written in General Counsel's Exhibit 116. Turning to the Company's proposal, the result was the same, with the Union not agreeing. (Jt. Exh. 3; 1:143–144; 6:1243; 7:1437–1438; 8:1725.)

*d. Fourth session—September 2, 1993*

In this session of a little less than 3 hours, the parties again began going through the Union's proposal (G.C. Exh. 116). Unlike the "No" Loupe gave the first time to each provision, this time Loupe began saying FPC would consider

various provisions, and Loupe even said FPC had a counter on some others. As Partin concedes (7:1449–1450), at this meeting there were signs of movement. About midway or later in the meeting, Loupe told Partin that if the Union dropped the Loper matter and related grievances that FPC would add money increases and the Union would "have a contract this afternoon. We have intentions of getting a contract." Partin replied that the Union would accept based on adoption of the Company's final 1992 contract proposal. Loupe said FPC would not do that because that proposal no longer is on the table. "Your intentions," Partin accused, "are to offer a piece of shit contract" (so that, or as a delay device until the employees) "vote to decertify." Not so, Loupe replied, that indeed FPC was there to negotiate and was negotiating. Then why not agree to the 1992 proposal, Partin asked. "That contract needs some changes," Loupe replied. (Jt. Exh. 4 at 12.)

*e. Fifth session—September 15, 1993*

By letter dated September 10 (G.C. Exh. 66), Loupe submitted to the Union a proposed Interim Agreement. (G.C. Exh. 66.) The stated purpose was to restore (during the negotiations) the pay increases (and many of the benefit increases) provided by the Company's 1992 final offer, including scheduled increases for October 1, 1993. An attached alcohol and drug policy also was proposed. Item 10 (the original, that is) was now modified. Recall that item 10 originally was phrased so that FPC would abide by "the final judgment on the Thomas Loper arbitration lawsuit," all other Loper-type grievances would be withdrawn and no additional ones filed. (G.C. Exh. 19 at 3.) Regardless of any anticipation that the Fifth Circuit would affirm Judge Parker's decision dismissing the arbitration litigation, FPC, in the September 10 proposed interim agreement, provided (item 7) that the Union would drop its appeal in the Loper case and (item 8) withdraw all other grievances and file no additional ones. One other stumbling block was a provision, item 9 of the interim agreement, that grievances could be filed using the expired grievance procedure, but there would be no binding arbitration. In a 4-hour bargaining session on September 15, the parties discussed this interim proposal at length. The Union continued to ask for agreement on its proposal (G.C. Exh. 116) while indicating it could agree with most of the interim agreement. Loupe advised that it was a package proposal because FPC wanted to get rid of the \$4 million Loper hammer. (Jt. Exh. 5 at 3, 17, 21.) Loupe also made it clear that FPC could not afford both a \$4 million liability and pay raises. (Jt. Exh. 5 at 9.) As Loupe there phrased it, "Loper either goes away or no one gets any improvement in wages & benefits." (Jt. Exh. 5 at 12.)

Following this meeting, on September 24, Andre sent a one-page memo to all hourly employees. The memo reads (G.C. Exh. 70):

The Company made an interim proposal to your negotiating committee on September 1, 1993, which included a substantial wage increase and other benefits, in return for Local 5's dropping all Loper related arbitrations and agreeing to a drug testing program. This gesture was made by the Company after considering that our employees had not had an increase in wages or benefits since October 1, 1991, which will be two

years on October 1, 1993. When the negotiations concluded, after some 4.5 hours of discussing this proposal, your committee refused to accept this offer which would have given you the wage increase and benefits you deserve.

We have no idea why your committee refused this offer. However, we want to assure you that there is no NLRB ruling or court ruling requiring the Company to take any action, as you are being led to believe by Local 5. FPC will institute the wage increase as soon as Local 5 agrees to drop all Loper related grievances.

Many hourly employees are asking management people why Local 5 will not accept the interim agreement. We highly recommend that this question be directed to your negotiating committee. We do not believe that you should continue to be deprived of this wage and benefit increase while the Company and the union continue to negotiate on other items.

Our proposal and commitment made to your negotiating committee on September 1, 1993, remains on the table at this time. If your committee continues to reject this offer, then obviously there is nothing management can do to change that decision.

Please be assured that FPC is willing to work with your committee to come to a conclusion on this matter.

By letter dated October 4 (G.C. Exh. 72), Andre wrote the Union "to confirm" that at the September 15 meeting, "the Company withdrew Item 9 of its proposal for an interim agreement. Therefore, the Company is willing to accept an interim agreement without including Item 9." Apparently there was a miscommunication between Andre and Loupe, for item 9 was not withdrawn until later.

f. *Sixth session—October 27, 1993*

At this 3-hour session the parties continued discussing the Company's proposed interim agreement with item 9 (no binding arbitration) being one of the main sticking points. Stating FPC's position, Loupe explained that there can be no arbitration without a contract. (Jt. Exh. 6 at 5.) Even so, toward the end of the meeting Loupe indicated that FPC would include arbitration if the Union accepted the interim agreement. The Union did not accept. The Loper grievance and related grievances remained the other major obstacle.

Following the meeting, by letter dated November 2 (G.C. Exh. 77), Loupe informed Partin that continuing reports of the use of illegal drugs was prompting FPC to implement its proposed alcohol and drug policy no later than November 15. Loupe offered to meet and discuss the matter.

g. *Seventh session—January 19, 1994*

Interim correspondence reflects that the parties never could find a mutually satisfactory time to hold their seventh session until the date of January 19. Moreover, Partin was busy with other contract negotiations and with the business of the Union. (8:1504.)

By letter dated November 4 (G.C. Exh. 79) Loupe forwarded to Partin the modified proposal by FPC for an interim agreement, amended at the October 27 bargaining session so as to delete item 9. "We made this concession," Loupe wrote, "at the October meeting because at that meeting and the September meeting your main objection to the

interim agreement was the failure to include final and binding arbitration." The letter ends by stating that FPC desires to see Formosa's employees obtain increases in wages and benefits during contract negotiations. Partin responded on November 9 (G.C. Exh. 80) suggesting that FPC proceed to give the increases.

Also preceding the meeting was an agreement (prompted by Loupe's letter of December 6 (G.C. Exh. 83) to Partin) for a one-time bonus of \$750. On December 9 Partin responded with his letter agreeing with the one-time bonus. (G.C. Exh. 85; 7:1315.)

The January 19, 1994 meeting begins with Loupe reminding the Union that FPC had dropped item 9 from the points in the proposed interim agreement. Loupe also announced that, under the interim agreement, pay increases would be *retroactive* to October 1, 1993. (Jt. Exh. 7 at 1.) After some discussion Partin states (Jt. Exh. 7a at 2):

We want a contract but we want a fair contract. We're not going to settle for just anything.

The meeting continues with the parties still debating the Loper grievance matter.

The parties began alternating their discussion between the Union's proposal (G.C. Exh. 116) and the Company's (G.C. Exh. 45), tentatively agreeing to a very few items, saying they would consider others, rejecting some, and advising that they would counter respecting others.

The following day, January 20, Andre sent a memo to all hourly employees. After an opening paragraph stating that the parties had been unsuccessful in their attempts after October 27 to schedule a meeting until January 19, the memo reads (G.C. Exh. 90):

On September 10, the Company made an interim proposal such that our hourly employees could be given the raises that they would have received had there been a contract in place on October 1, 1993. One objective of the interim proposal was to get the union to drop its Bud Loper lawsuit and all related grievances, which have a \$4,000,000 potential impact on the Company. The second objective was to begin paying the wages that you would have been receiving had the union not unilaterally changed the contract that was negotiated in September of 1992, thus rendering it *null* and *void*. The Company was and is concerned about the fact that you have not had a pay raise in two years. If we could reach agreement on the interim proposal, we then could move on with the negotiations on all other matters related to the contract, which will take some time and you would not be deprived of your wage increases. We have never been able to get your negotiation committee to agree to this interim proposal.

To make the interim agreement even more attractive, on January 19 the interim proposal was amended as follows:

The original term proposed was the effective date would be the first Monday following the agreement. The term was changed on January 19 to state that the effective date would be October 1, 1993, whereby the pay would be retroactive to that date. That date was picked because that would be the first date, had you

been under the negotiated 1992 contract, in which you would receive the second wage increase. Again, we were not successful in reaching agreement—in fact, we have been put on notice by Mr. Partin that he will not consider signing an interim agreement, only the total contract. You are therefore advised that the Company negotiating committee is fully prepared to continue negotiating on the total contract at all future negotiation meetings.

However, you are also advised that the interim proposal, as modified on January 19, is still an offer on the table for your union negotiating committee to agree to at any time. The retroactive October 1, 1993 date will not change. In addition, when the court rules in favor of the Company on the Bud Loper lawsuit, the Company intends to implement the wages of the interim proposal effective 10/1/93.

I trust that you understand the concern that the Company has for its hourly employees not receiving wages that would have been due them had the union not taken action to void the agreed-to contract of 1992 and the concern that the Company has over the long standing potential \$4,000,000 impact to this plant of the unresolved Bud Loper lawsuit and other related outstanding grievances.

*h. Eighth session—February 25, 1994*

For the first half or so of this last meeting (which apparently was held from about 1 p.m. to just short of 4 p.m.) the parties discussed a variety of topics other than contract provisions. Eventually they reached the contract and, as is reflected in McBeath's notes (Jt. Exh. 8) and Partin's own marginal notes on his copy of the Union's proposed contract (G.C. Exh. 116), further progress was made. The parties ended their discussion as they reached the Company's section 8.4, pertaining to changes in work schedules, and with Partin's telling Loupe, "I appreciate the way you're handling negotiations." (Jt. Exh. 8 at 22.)

Much earlier I referred to this last meeting and stated that it appeared the critical difference between the parties really is over the term of the contract. During a recess at this last meeting, Partin met privately with the Company's attorney, Gordon Pugh. As Partin explains, it is normal for chief negotiators to meet privately and try to work out a solution to present to their bargaining committees. (8:1509, 1532–1533.) Although Loupe was FPC's chief negotiator, with Pugh not attending the actual bargaining sessions, it is clear that Pugh (who, apparently with Andre, was usually in a nearby room) was an important bargaining adviser to FPC as well as its attorney. In any event, Partin and Pugh met privately during a break at the eighth bargaining session.

At trial Partin confirms that, in the private meeting, he told Pugh there were three major items for the Union—checkoff, binding arbitration, and the term of the contract (with the Union holding for a 2-year term). Pugh said he would confer with management, that he thought concessions could be made on checkoff and arbitration, but that he thought the term would have to be 1 year. (8:1509.)

That February 25 was a Friday. The following Monday, February 28, Pugh called Partin and expressed the opinion that they could resolve problems with contract language, that FPC would consider a checkoff and binding arbitration, but

that FPC wanted a 1-year term for the contract. (8:1510.) As I mentioned earlier, Partin testified that he needs a 2-year term in order to rebuild the Union's membership at the plant in order to survive the next decertification attempt. (8:1511, 1533–1535.) Neither Andre nor Loupe explains why FPC wanted or needed a 1-year term, but it seems clear that, anticipating that the Union will be decertified in the next election, FPC does not want a contract bar (to a decertification petition and election) which extends beyond 1 year.

### 3. Discussion

The allegation of overall bad-faith bargaining would seem to be a major allegation. FPC does not argue the overall aspect because of its position, described earlier, that anything beyond the specific grounds alleged varies from the complaint. Although the General Counsel briefs some of the bargaining sessions, not all are covered and, perhaps by inadvertence, no argument is presented addressing the allegation of overall bad faith, except to the extent it is incorporated into the argument respecting the regressive proposal allegation.

In addition to the allegations of specific conduct which complaint paragraph 21 cites, at trial the General Counsel enumerated eight other factors as part of the "overall conduct" and which assertedly add weight and persuasion in support of a bad-faith finding. The eight factors (of the Company's conduct) listed by the General Counsel at trial (3:417–428, 447; 7:1440–1441) and restated on brief (Br. at 86) are, with all dates being 1993–1994:

1. Continued insistence on its June 30 regressive proposal (G.C. Exh. 45).
2. Insistent refusal to enter into an agreement identical to its final proposal of September 1992 (G.C. Exh. 19 with G.C. Exh. 14).
3. The Company's September 10, 1993 interim proposal (G.C. Exh. 66).
4. Its October 4, 1993 amendment (G.C. Exh. 72) to the proposed interim agreement.
5. The November 4 second amendment (G.C. Exh. 79) to its proposed interim agreement.
6. Andre's memos of September 24 (G.C. Exh. 70) and January 20 (G.C. Exh. 90) to all hourly employees.
7. The Company's refusal, at the third bargaining session on August 5, to agree to a single provision from its own September 1992 final proposal (G.C. Exh. 10 with G.C. Exh. 14).
8. Delaying the Union on reaching the bargaining sessions by correspondence a day or two earlier notifying the Union that it could not meet on the specified date. (For a shorthand word at trial I used "hassling" the Union, and while not an elegant description, it conveys the meaning. 3:447–448.) The General Counsel has shifted in describing this factor. Her initial description was as stated here. (3:447.) Later she redefined it to be, "But by that [hassling], we were really looking at the fact that they were only negotiating from 1:00 till 4:00. . . ." (7:1440–1441.) On brief she has reverted to her original description. (Br. at 86–87.)

This case appears to be one in which the Company flexed its economic muscle to force the Union (1) to give the Com-

pany what it wants in contract language, and (2) to drop all the Loper grievances (a moot point after the Fifth Circuit affirmed Judge Parker on January 31, 1994, and, on March 2, denied the Union's petition for rehearing). After Judge Parker, on June 7, 1993, dismissed the Union's suit to enforce the arbitrator's award, the Union was in a poor position to make bargaining demands. At that point it had only two items of leverage: (1) its appeal of Judge Parker's decision, and (2) its charges in this case which ripened into the first complaint on July 30, 1993. Despite the Union's weak position, throughout the bargaining sessions until the Fifth Circuit's January affirmation of Judge Parker, Partin clung to the Union's position that FPC should adopt the Company's final proposal of 1992, with the Union's agreeing to recommend items 7 and 8 of the September 10 interim agreement (that all the Loper grievances be dropped) to the membership.

Considered by itself, Partin's position seems entirely reasonable. Unfortunately, the Union, even before the Fifth Circuit's January 31, 1994 decision, was in no position to compel FPC to do anything. Considered by itself, the Company's June 30, 1993 proposed contract seems downright mean. But it was shock bargaining and a reflection of the Company's position of superior economic power as compared to that of the Union. In any event, FPC demonstrated that its hard-nosed position was subject to negotiation, and events indicate that FPC was engaged in progressive concessions (as had been the case in previous years) with the goal of obtaining a contract to its liking. For most of the bargaining sessions both parties bargained as if each held a strong position. As late as the next to last session, that of January 19, Partin was holding out for "a fair contract," warning that the Union was "not going to settle for just anything."

Unfortunately for the Union, its bargaining position was supported by little more than quicksand. To the extent it appears there were many meetings and not a lot of progress, we should not forget that the Union opened negotiations by throwing its own time-consuming hardball, the "humongous" request for information. Moreover, it must be remembered that there was only one meeting after the Fifth Circuit's decision of January 31 (finally eliminating the \$4 million Loper hammer), and the parties made additional progress in the last meeting. In their Monday conversation following the final meeting, Partin and Pugh made clear that only one item separated the parties from a contract—the term of that contract.

The eight additional factors listed by the General Counsel mainly highlight the evidence already summarized. Because the General Counsel failed to include an argument for this allegation in the Government's brief, no contention is available respecting the significance of these items. For example, Andre's memos of September 24 (G.C. Exh. 70) and January 20 (G.C. Exh. 90) are not alleged in the complaint as being unlawful and the General Counsel does not contend that they are inaccurate in any respect. As for the Company's "has-sling" the Union respecting meetings, the General Counsel fails to point to any letters showing this, and I see no such misconduct by FPC. Most of the items specified by complaint paragraph 21 I have dismissed (withdrawal of September 1992 proposals; submission of June 30 regressive proposal; and the Bledsoe direct dealing). Even the allegation of unilateral changes (par. 15) has merit only in minor part. While it is unfortunate that Andre saw fit to bypass the

Union in sending his May 21 memo direct to the bargaining unit, with not so much as a courtesy copy to Partin and the Union, that act of discourtesy does not taint the bargaining which followed.

In short, the evidence is insufficient to show any overall bad faith on the part of FPC. The Company's position, initially very hardnosed, appears to be one of progressive concessions geared to obtaining the kind of contract it can live with. FPC is not required to agree to a contract which either strengthens the Union or makes it happy. Accordingly, I shall dismiss complaint paragraph 21.

#### I. *Correction of Transcript*

In her June 1, 1994 unopposed motion to correct the record, the General Counsel's attorney seeks to correct some 67 errors in the transcript. Nearly all the errors either are minor typos (such as "Ye,s" rather than "Yes"), obviously wrong words (such as "quite" rather than "quit"), or words whose meaning is clear from the context (such as "community" when it should be "communicating"). Many of the obvious errors (not unusual in these proceedings) are the type which parties generally do not pause to correct because the intended meaning is clear and the time needed for correction is not justified by the cost such time entails. Examples of these are obvious errors such as "Ye,s" for "Yes," "wit-ness?F" rather than "witness?," "basically, m" rather than "basically," and words which the context shows are wrong, such as "tow" instead of "two," "you" rather than "your," "too" when it should be "two," and similar errors. Ordinarily it is sufficient for such motions to focus on errors that can cause confusion if not corrected.

I grant the General Counsel's motion to correct except in the following respects. In the first item, the General Counsel's citation to (volume 1) page 17 is incorrect, with page 217 (2:217:21) probably the intended reference. I grant the motion as to 2:217:21. I deny the motion respecting "dinner" at 9:1872:21. The correction for 9:1874:16 should be "quit," not "quiet." At the top of page 4 of the motion, first item, the correct line should be 23, as in 9:1875:23. The three corrections for 9:1899 apparently are intended for 9:1894. As to the first of the three, 9:1894:6, the correction should be "quit." I deny the motion as to the third item, 9:1894:17, for it is not apparent what the correct word should be. The suggested "unite" is not it. ("Offices" is probably the correct word, but the error is not critical.) Finally, the correction for the last item, 9:1917:13, should be "22 on 6."

There are other errors in the transcript, errors not listed by the General Counsel, but for the most part the correct word, spelling, meaning, or speaker is clear from the context. In fairness, I should note that some wrong-word errors in some of our proceedings are the fault of the speaker. Ordinarily, however, a court reporter notes this with a "[sic]."

A couple of the other errors here could cause confusion. At 8:1525:6, the reference to Joint Exhibit 40 should be to Joint Exhibit 3. At 8:1529:23, correct "should be" to "should not be." Delete 9:1840:4-6 (and the index reference for received at 9:1761) where the court reporter records Joint Exhibit 5 as being received in evidence. The preceding examination concerned General Counsel Exhibit 140, an affidavit, and the receipt at 9:1840:2-3 is of a stipulation, not an exhibit. Joint Exhibit 5 was received at 6:1255. Delete

9:1843:8-10 where the court reporter shows General Counsel's Exhibit 140 being received in evidence (and delete the index reference, for received, at 9:1761). Again, it was a stipulation that was received in evidence. General Counsel's Exhibit 140, an affidavit, was never offered or received in evidence and it is not contained in the official exhibits folder.

#### CONCLUSIONS OF LAW

1. By selectively and disparately (beginning in March 1993) enforcing (against union supporters) its rule requiring employees to seek their supervisor's permission before leaving their work area, Respondent FPC has violated Section 8(a)(1) of the Act.

2. By issuing, on June 7, 1993, Donald McLean a final warning and a 2-day suspension, Respondent FPC has violated Section 8(a)(3) and (1) of the Act.

3. By unilaterally changing, effective May 24, 1993, the established policy on vacations, grievance procedure, negotiating with the Union respecting payment of wages to employee members of the Union's negotiating committee, and use of bulletin boards, Respondent FPC has violated Section 8(a)(5) and (1) of the Act.

4. Respondent FPC has not violated the Act in the other respects alleged.

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

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Because Respondent has discriminatorily suspended Donald McLean for 2 days (and it appearing that he was reinstated), it must make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of suspension to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

FPC made unilateral changes effective May 24, 1993, respecting vacations, the grievance procedure, paying employee members of the Union's negotiating committee, and bulletin boards. To the extent FPC has not already done so, it must rescind such changes and restore the conditions and practices that were changed. Respecting payment of wages to a number of members of the Union's negotiating committee, FPC must rescind its unilateral action of May 24 and, on request, must bargain with the Union respecting such payments, effective for the negotiations which began (or resumed) June 7, 1993.

[Recommended Order omitted from publication.]