

Sartorius, Inc. and Sindicato Puertorriqueño de Trabajadores. Cases 24-CA-7248, 24-CA-7406, and 24-CA-7431

July 17, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX
AND HIGGINS

The issues presented in this case¹ are whether the judge correctly found that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee María Santiago and violated Section 8(a)(5) and (1) of the Act by unilaterally eliminating a bargaining unit position and implementing a wage increase.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief² and has decided to affirm the judge's rulings, findings,³ and conclusions⁴ and to adopt the recommended Order as modified.⁵

We agree with the judge that the Respondent caused María Santiago's termination when it insisted that she transfer permanently to a job which the Respondent knew was personally onerous for her to perform.⁶ As fully explained in the judge's decision, the General Counsel has shown that the Respondent's asserted justification of the transfer was pretextual and that it acted in reprisal against Santiago's recent protected

union activities.⁷ We specifically reject the contention in the Respondent's exceptions that Santiago refused the transfer to stanza machine work because she considered it unsuitable for someone, like herself, who had a college education. Indeed, in response to the Respondent counsel's question whether she "found machine work demeaning, below your status," Santiago directly answered "no," and noted that she operated other manufacturing machines that did not pose the personal physical problems which the stanza machine posed for her. In context, the most reasonable interpretation of her references to a college education is that it better enabled her to perceive the pretextual nature of the Respondent's actions and to understand that her reassignment was due to her union activities.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Sartorius, Inc., Yauco, Puerto Rico, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Insert the following as paragraph 2(d) and reletter the subsequent paragraphs.

"(d) Make María E. Santiago whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the judge's decision."

¹On February 4, 1997, Administrative Law Judge William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief.

²The Respondent has requested oral argument. The request is denied as the record, exceptions, and brief adequately present the issues and the Respondent's position.

³The 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 Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

⁴In adopting the judge's finding that the Respondent violated Sec. 8(a)(5) by unilaterally eliminating the group leader bargaining unit position in the flat filters department, we rely on *Intermountain Rural Electric Assn.*, 305 NLRB 783, 786 (1991), rather than *Holy Cross Hospital*, 319 NLRB 1361 (1995). We emphasize the general obligation of parties engaged in negotiations for a collective-bargaining agreement to discuss all proposed changes in the context of those negotiations and to refrain from making any unilateral changes unless impasse is reached on negotiations as a whole.

⁵We shall modify the recommended Order by adding appropriate language referring to the Respondent's backpay liability for Santiago's unlawful discharge.

⁶We agree with the judge's findings that the Respondent discharged Santiago after she refused a transfer which the Respondent knew she would not be able to accept. Because the Respondent discharged Santiago under these circumstances, we find it unnecessary to pass on the judge's alternative conclusion that Santiago was constructively discharged.

⁷Chairman Gould and Member Fox do not rely on the Respondent's March 12, 1996 letter to certain employees as evidence of animus supporting the finding of unlawful motivation for Santiago's discharge.

Member Higgins does not rely on the March 12 letter, nor would he rely on Plant Manager Schlapp's February 27, 1996 letter to employees or Human Resources Manager Quinonez' September 14, 1995 letter. As to the September 14 letter, Member Higgins notes that when Quinonez wrote employees that the Respondent would oppose them to the full extent of the law in the event of a recurrence of the September 11 work stoppage, Quinonez expressly cited the Union's claim that "this would be one of the many intermittent or occasional stoppages that the union would hold against the enterprise." Because such strikes are generally unprotected, Member Higgins would not find that Quinonez' statement established animus.

Virginia Milan, Esq., for the General Counsel.

Vincente J. Antonetti, Esq. (Goldman, Antonetti & Cordova), of San Juan, Puerto Rico, and *Michael F. Rosenblum, Esq. (Mayer, Brown & Platt)*, of Chicago, Illinois, for the Respondent.

Roberto Pagan Rodriguez, Union President, of Ponce, Puerto Rico, for the Charging Party.

Lydia Quinones, Interpreter.

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This is a refusal to bargain in good faith and wrongful discharge case

prosecuted by the National Labor Relations Board's (the Board) General Counsel acting through the Regional Director for Region 24 of the Board following an investigation by Region 24's staff. The Regional Director for Region 24 of the Board issued an order consolidating cases, second consolidated amended complaint and notice of hearing (complaint) on July 31, 1996,¹ against Sartorius, Inc. (the Company) based on unfair labor practice charges filed on August 15, 1995, in Case 24-CA-7248; April 8 in Case 24-CA-7406; and May 14 in Case 24-CA-7431 by Sindicato Puertorriqueño de Trabajadores (the Union). I heard these cases in trial in Hato Rey, Puerto Rico, on October 1, 2, and 3.

Specifically, the complaint alleges the Company, on or about March 15, eliminated the position of group leader in its "flat filters" department, transferred unit work to supervisors and nonunit employees, and terminated the employment of its employee María E. Santiago (Santiago), thereby discouraging membership by its employees in the Union in violation of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). It is further alleged that the elimination of the position of group leader in the "flat filters" department and the termination of employee Santiago, violated Section 8(a)(5) and (1) of the Act. It is also alleged that the Company failed and refused to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of certain of its employees in an appropriate unit by: (a) refusing to provide and/or delaying the submission of offers or counteroffers on economic matters for a collective-bargaining agreement; (b) delaying and disrupting negotiations by insisting on negotiating economic matters on a piece meal basis; by insisting on negotiating over a production incentive bonus while failing and refusing to bargain over, and/or make offers or counteroffers on other economic terms and conditions of employment, and (c) as noted above, by unilaterally eliminating the position of group leader in its "flat filters" department.

In its answer to the complaint and by admissions made at trial, the Company admits the Board's jurisdiction is properly invoked² and that the Union is a labor organization.³

It is admitted, stipulated, and/or undisputed that Plant Manager Ulrich Schlapp (Plant Manager Schlapp), Human Resources Manager Nilda Vazquez Quinones⁴ (Human Resources Manager Quinones), Vice President and Production Manager Marcus Lopez (Production Manager Lopez), and Flat Filters Supervisor Gladys Frontera (Supervisor Frontera) are supervisors and agents of the Company within the meaning of Section 2(11) and (13) of the Act. It is admitted that

¹ All dates are in 1996 unless I indicate otherwise.

² The Company admits, and I find, it is a Delaware corporation with an office and place of business located in Yauco, Puerto Rico, where it is engaged in the manufacture of membrane products. The Company admits that in conducting its business it purchased and received at its Yauco, Puerto Rico facility goods valued in excess of \$50,000 directly from points outside the Commonwealth of Puerto Rico. It is alleged in the complaint, the parties admit, the evidence establishes, and I find, that at all times material, the Company is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.

³ It is alleged in the complaint, the parties admit, the evidence establishes and I find the Union is, and has been at all times material, a labor organization within the meaning of Sec. 2(5) of the Act.

⁴ Quinones is also an attorney.

on December 30, 1994, the Union was certified, and since that time has been, the collective-bargaining representative of the Company's production, maintenance, and warehouse employees employed at the Company's Yauco, Puerto Rico facility.⁵ It is admitted that at various times commencing in January 1995 through January 1996, the Company and Union met for the purpose of collective bargaining with respect to wages, hours, and other terms and conditions of employment for employees in the unit just referred to. It is also admitted that on March 6, 1996, an "Association" of employees of the Company filed a "Decertification Petition" (Case 24-RD-407) with the Regional Director for Region 24 of the Board seeking to have the Union decertified as bargaining representative of the unit employees referred to above.

The Company denies it wrongfully discharged Santiago or that it bargained in bad faith or engaged in any action of an unlawful nature that is alleged in the complaint.

I have studied the whole record, the parties' briefs,⁶ and the authorities they rely on. Based on more detailed findings and analysis below I will conclude and find that the Company violated the Act essentially as outlined in the complaint.

I. FINDINGS OF FACT

In attempting to establish, or defend against, the allegations set forth in the complaint the parties called some nine witnesses and presented various documents.

A. Brief Background

The Company is based in Germany and was established to produce mechanical measurement instruments in approximately 1817. In approximately 1927 the Company commenced manufacturing micro porous membranes. During the past several years the membranes or filtration devices portion of the business has grown considerably. The Company's Yauco, Puerto Rico facility, the only facility involved, exclusively manufactures filtration devices.

At the facility the Company has a casting department in which membranes are produced from solvent and plastic resins. The membranes are processed in the cartridge and flat filters departments where cartridge, capsule, and/or discs type filtration devices are manufactured. The discs type filtration devices that are produced in the flat filters department range in size from large (217 mm) discs which are produced once or twice a month to discs of 50 mm in diameter or less.⁷ The membranes, which come to the flat filters department in 640 mm by 320 mm sheets, are cut to 220 mm sheets and placed on a cutting or punch machine called a Stanza machine,⁸ where dies of specified sizes are placed into the hydraulic machine and the membranes are cut to specification by a machine operator. The Stanza machines operate, for safety reasons, only when buttons on both sides of the cutting arm are simultaneously depressed by the operator. When both buttons are depressed the hydraulic cutting arm automatically de-

⁵ Excluded from the unit are all office clericals, secretaries, laboratory technicians, chemist, professional employees, guards, and supervisors as defined in the Act.

⁶ Counsel for the General Counsel's unopposed motion to correct certain "inadvertent and human errors" in her brief is granted.

⁷ Approximately 90 percent of the Company's business is in the smaller discs.

⁸ Plant Manager Schlapp stated Stanza is not a trade name but merely a German word for "punching."

presses onto the membrane making or punching out filtration discs corresponding to the size of the cutting die utilized at the time. Sometimes only one sheet of membrane is cut while on other occasions three or four sheets are cut at the same time with the membranes separated by specialized paper placed between the sheets of membrane.⁹

At relevant times the flat filters department employed approximately eight production employees¹⁰ who were and continue to be supervised by Flat Filters Supervisor Frontera. For a time Santiago served as group leader¹¹ in the flat filters department.

B. Santiago's Work History and Discharge

Santiago received a Bachelors Degree in Business Administration from the University of Puerto Rico at Mayaguez in 1983 and commenced working for the Company in the flat filters department in August that year. Santiago worked a series of jobs in that department. Santiago stated that one of the very first assignments she was given was to operate the Stanza machine. Santiago operated the Stanza machine for approximately 1 month but said, "It caused a lot of backache and pain in my arms and headaches from having to exert certain strengths with my arms." Santiago testified:

I wasn't producing the quantity that the Company required, because I had back pains and headaches from it. I was forcing my body to do more than I could. And I would come into work the next day exhausted. And my production was not adequate.

Santiago was thereafter reassigned from a Stanza machine operator to other duties in the flat filters and other departments. She worked final packing and quality control in the flat filters department, and on inspection of production and finished membranes in the electrophoresis department. Santiago packed and sealed products for shipment in the cartridge department and in the final packing area. Santiago also created the labels that were placed on the products and entered all such information into the Company's computer system.¹² Santiago served as group leader for the flat filters department and substituted for Supervisor Frontera during any absences by Frontera. As group leader in the flat filters department, Santiago daily assigned the work orders to be performed by the production employees.¹³

After assigning the various work orders to the flat filters department employees¹⁴ Santiago would determine and ob-

tain from the semifinish area the materials needed to accomplish the orders. As group leader Santiago checked with the warehouse personnel to ascertain where each order filled by the flat filters department would be inspected, packed, and stored. Santiago created on the computer the product labels for each order. Santiago also noted in the computer what materials were utilized daily, as well as, what materials would thereafter be needed.

Santiago was not involved when the Union initially began its organizing activities at the Company. She became involved after the December 1994 Board-conducted election was held. Santiago said she was one of approximately four women employees supporting the Union. She said she talked with fellow workers urging them to support the Union for "a good salary," "medical plan," and "respect." Santiago distributed prounion leaflets to employees on various occasions.

On or about August 15, 1995, Santiago distributed a leaflet to employees entitled "THE LACK OF RESPECT TOWARD THE WORKERS CONTINUES." A portion of the leaflet reads:

Yesterday, Monday August 14, we met for the seventh time to try to negotiate a collective bargaining agreement with the management of Sartorius. The intransigence and the bad faith on the part of Ulrich Schlapp, continues to be every day's pattern in the negotiations.

This gentleman maintains the attitude of believing himself to be superior to everyone, and does not allow a different idea than his own. For Ulrich Schlapp, he is the one who manages and nobody can question his decisions or actions. That is why he has had problems even with the attorneys who are negotiating the agreement for him. That is why he had replied in the negative, in an unreasonable and bad faith manner, to the Union's non economic proposals.

Yesterday, the Union required the employer to reply to our request submitted by us about an increase in salary and other economic conditions for the workers. The reply was that they could not answer our petitions because the Corporation has not yet (after having submitted it more than six months ago) discussed our proposal!

They also informed us that Schlapp will be on vacations since August 25 and does not come back until October 4, for which reason we will not have an answer after that date. Are we or aren't we right when we say that the employer is disrespectful toward the workers?

The employer still has the incorrect understanding that the workers accept its actions and are not willing to fight in a militant fashion to obtain some improvements in their working conditions.

Our job is to show Schlapp that he is wrong. Within the next few weeks, we will be carrying out a show of force, which must receive the full support of all the workers.

Fellow worker Roberto Prez informed Ulrich Schlapp yesterday that: "The workers are tired of your intransigent attitude at the bargaining table. The em-

ated the "bore machine," however, Martinez and Cruz did not because they "had certain health problems . . . that they could not operate the machine." Elsie Feliciano was a quality control employee designated to the flat filters department to do final inspections.

⁹The membranes are sold primarily to the pharmaceutical industry in the United States for laboratory testing purposes.

¹⁰There are approximately 90 to 100 employees at the facility here with approximately 50 to 60 in the bargaining unit. The employees in the flat filters department are bargaining unit employees.

¹¹The Company utilizes group leaders in the semifinishing, casting, and cartridge departments. The duties of a group leader are addressed elsewhere in this decision.

¹²Santiago was one of a select number of employees trained by the Company in computer operation.

¹³Supervisor Frontera and Santiago are the most senior employees in the flat filters department.

¹⁴Santiago testified that at certain material times the following employees worked in the flat filters department performing the following jobs. Angel Valantin, Jose Mercado, and Jose Figueroa were Stanza machine operators. Lillian Cruz, Wilma Martinez, Sara Gonzalez, and Hilda Rodriguez were inspectors with Cruz occasionally working in final packing. Gonzalez and Rodriguez sometimes oper-

ployees are tired of your attitude in the production area. The era of slavery ended a long time ago." We know that these statements summarize pretty well the feeling of the workers. Let us demonstrate it to management!

Against an abusive employer, a struggling laborer!

Santiago testified that certain employees engaged in a 24-hour work stoppage in September 1995. Santiago testified:

I was in front of the gate with the other co-workers, with a sign. And the management and supervisors were on the other side of the gate. And from there, they communicated with the employees, trying to get them to come into the Company. They called them to the gate. And at the gate they would speak with the employees and try to convince them to come in. So they were observing us the whole time, from the plant manager to the supervisors.

Santiago stated that she handed out (on/or about February 27) the following leaflet to coworkers in the plant announcing picketing that would take place the following day at the main gate at the Company.

EVERYBODY TO THE PICKET!

Tomorrow Wednesday, February 28, 1996, from 10:30 a.m. to 12:30 p.m.

To stop the employer's abuses, attend the picket in front of the main gates of Sartorius.

UNITED WE STAND!

Santiago and certain coworkers picketed at the gates to the plant during breaktimes on February 28 and March 5. Santiago testified:

[I] participated in the picketing that was done. And the last two pickets were done at noon time, in my case, at 12:00. And at that time, almost all of management personnel was at lunch. And they were at the cafeteria, in the cafeteria area.¹⁵

Santiago testified that, although other women supported the Union, she (Santiago) was "the most active within the female group."

Santiago served as acting flat filters department supervisor during all of February and the first half of March 1996, while Supervisor Frontera was absent due to an illness.

Flat Filters Supervisor Frontera returned to work from sick leave on or about mid-March. Santiago testified Frontera told her that the next day she (Santiago) would have to start operating a Stanza machine. Santiago reminded Supervisor Frontera that when she operated the Stanza machine when she first started with the Company it had caused her considerable backaches, arm-aches, and headaches, and that she was not very effective on that machine. Santiago asked Flat Filters Supervisor Frontera why the sudden decision in that she had not contemplated any such change. According to Santiago, Frontera said, "It was an administrative decision" and if she had any questions about it to speak with Human

Resources Manager Quinones. Santiago asked Frontera if she thought she would be more productive on the Stanza machine with her previous experience thereon than she would be to continue performing her normally assigned functions. Supervisor Frontera told Santiago that with her being a physically weak person she thought Santiago would be more effective where she was than on the Stanza machine. Santiago testified she also asked Flat Filters Supervisor Frontera what would happen to the group leader position she currently held and Frontera told her it would be "closed."

The next day Santiago spoke with Human Resources Manager Quinones. Santiago testified:

I asked her what had happened, why the decision to change me to the machine. I explained to her my limitations. And she told me that at that time what they needed was a person for the Stanza machine specifically. And I told her at that moment that I understood—

I told her that I had a B.A. in—a Bachelors Degree in business administration, that I was not a person—an ignorant person, and that I understood that there was work there for a group leader position.

Santiago told Human Resources Manager Quinones she could not work the Stanza machine "because [she] had a traumatic experience with the machine when [she] started working there." Santiago testified, "I asked her if there wasn't any other type of work that I could perform." She stated she was told "they had nothing to offer [her]."

Santiago testified she spoke again with Human Resources Manager Quinones on Friday, the day she was discharged. Quinones asked Santiago if her position from the previous day that she would not work the Stanza machine was still the same. Santiago told Quinones it was the same, that she could not accept what Human Resources Manager Quinones was proposing, and asked whether there was any other position she could perform somewhere in the Company. Human Resources Manager Quinones told Santiago there was not at that time based on the needs of the Company. Santiago reminded Quinones she had studied 4 years at the University and was not an "ignorant" or "slow" employee and she understood there was work in other positions at the Company that she could efficiently perform. Santiago told Quinones that she understood "that what was happening was due to my activities in the Union." Quinones told Santiago that was not so on her part, "but she could not speak for other people." Human Resources Manager Quinones told Santiago if she would not accept the assignment to operate a Stanza machine she would have to lay her off, which Quinones then did.

On April 8 and 20, 1996, the Company provided letters of recommendation for Santiago. The April 20 letter from Santiago's immediate supervisor, Frontera, reads in pertinent part:

By this means I certify that Mrs. Mara Santiago worked for 12 years at the Production Department of Sartorius, Inc. In the same, she performed in various functions in an excellent manner, among which she stood out in the Group Leader one. In absence of the supervisor, she was in charge of the supervisory tasks. She also worked on data entry in the computer.

¹⁵ Santiago testified the cafeteria is an open-air area next to the guard house and near the gates where she and the others picket.

Mrs. Maía Santiago possesses leadership qualities and self reliance at work, for which reason she always enjoyed our full confidence.

The other letter of recommendation for Santiago dated April 8 and signed by Quality Assurance Manager Margarita Bez reads in pertinent part:

Mrs. Mara Santiago, in addition to her responsibilities in the production area, was an active member of the internal auditing team at Sartorius, Inc., from August 1994 to March of the present year. As auditor, Mrs. Santiago performed in an excellent fashion. She has knowledge in the Good Manufacturing Practice standards (GMP) and ISO 9000.

C. The Company's Actions Related to Santiago

Flat Filters Department Supervisor Frontera testified she was away from work on sick leave from January 30 to March 11, 1996. Frontera stated Santiago acted as supervisor in the flat filters department during her absence. Frontera testified that when she returned to work she was faced with the problem of one of the Stanza Machine operators (Hector Velez) being absent due to his wife's illness and another department employee (Lillian Cruz) being absent due to a personal illness.

Flat Filters Department Supervisor Frontera testified she, with Plant Manager Schlapp and Production Manager Lopez, met "to see who we could put in the department to work on the machine" while "Velez was absence." Plant Manager Schlapp testified the three of them after taking a "look inside . . . the department to see what we can do to get out of the situation more or less [came to] a common decision that [Santiago] could be the person that could help [them]."¹⁶

Flat Filters Department Supervisor Frontera stated that after the decision was made she met with Santiago and told her the Company "needed people to work the [Stanza] machine" and explained that since Santiago did not have enough work to perform in her current position she [Frontera] "felt that [Santiago] could work on the [Stanza] machine." Frontera testified, "I told her that it would be a temporary position. That it could be a week, a month, depending on the time that Hector Velez was going to be absence." According to Frontera, Santiago asked why she had been chosen and Frontera told her it was because "she [Santiago] really didn't have enough work to do." Frontera testified she also told Santiago the Company "would accommodate her in every way," adding "[I]f we had to buy her a chair so that she could work the machine, we would buy it." Frontera testified Santiago said she "would not work the machine because . . . she had studied four years in the University and she was not going to wear her eyes out working the machine." According to Frontera, Santiago then asked if she would "have to speak with someone else" and Frontera told her to speak with Human Resources Manager Quinones.

Human Resources Manager Quinones testified Flat Filters Department Supervisor Frontera informed her she had notified employee Santiago that she was being "transferred tem-

porarily" to operate a Stanza Machine, but that Santiago had "refused" the assignment and had requested to meet with Quinones. Quinones testified:

I explained to her that this was a temporary assignment, that it was a reasonable assignment because we had at that moment some difficulties of the departments—the difficulty—there was a very low number of orders coming in and we needed all the hands that we could get in the machines in order to get some profit from what was pending in the department.

We also understood that what she—that the work she was performing at that moment was a direct result of the coming of the incoming orders that was in need of at that moment so we needed her to work on the machines.

Mrs. Santiago was very firm in refusing that assignment. She specifically told me that she hadn't been working—or studying at the university for four years to sit down to work on the machines.

I told her, "Listen, this is a temporary assignment. Of course, if there is—as soon as things go back to normal, I will be able to transfer you again to your former position." This does not imply any change in your terms and conditions of employment nor on your title nor on your salary.

This is just the help that we are requesting from you to cope with this difficult situation.

Quinones explained to Flat Filters Department Supervisor Frontera that she had been unsuccessful in explaining to Santiago the need for, and importance of, her working on the Stanza machine. Quinones testified she and Frontera decided to speak with Santiago together. Quinones said she and Frontera explained to Santiago the importance of her accepting this "temporary assignment" but that Santiago again refused. Quinones testified, "When she refused this work assignment, I understood this was insubordination." Quinones explained "I told her that I had nothing else to offer her at that moment and I have to let her go." Human Resources Manager Quinones testified Santiago asked if there was anything else she could offer her, Quinones told Santiago the only thing she could offer her was work on the Stanza machine. Quinones stated Santiago said "her physical constitution—make up did not allow her to work on that machine" that she was not able "to fit the bill." Human Resources Manager Quinones told Santiago "[j]ust give it a try and if you are not able to perform, then we will make accommodations for you."

Quinones testified Santiago asked "like a hypothetical question, what if I bring a medical certificate that says I cannot work." Quinones told Santiago "listen, [if] you have a medical certificate you can bring it to me and if you need any reasonable accommodation, I will be willing to do them." Quinones contends Santiago did not pursue the matter but rather replied, "No, I am not going to work in the machines."

Human Resources Manager Quinones testified that once Santiago refused the Stanza machine work assignment and was terminated, "We decided . . . we are not going to replace her." Quinones explained the Company decided to eliminate the position of group leader in the flat filters de-

¹⁶Plant Manager Schlapp testified he concluded Santiago was under utilized in the department in that she had been serving as acting supervisor without anyone assuming her normal group leader duties.

partment because the functions of the group leader was unnecessary and redundant with those duties and functions of the supervisor in that department. Quinones testified the Union was not notified that the Company was eliminating the group leader position in the flat filters department because she did not think it was necessary for the Company to do so.

D. Credibility Determinations

The events, actions, and conversations related to Santiago, Human Resources Manager Quinones, and Flat Filters Department Supervisor Frontera require certain credibility determinations. Based primarily on demeanor, I have credited Santiago rather than opposing witnesses who were supervisors and/or managers of the Company. Santiago, a frail, fragile, rapid speaking, soft spoken individual impressed me as attempting to testify truthfully to the best of her recollection and ability. Her deep convictions regarding what she perceives to be the rightness of her cause was visibly evident, but such I am persuaded did not interfere with her ability, willingness, and effort to testify truthfully. It was apparent Santiago is pleased with her educational background (at the University of Puerto Rico); however, I am convinced such heightened her desire to testify fully, accurately, and to the best of her ability truthfully. I am fully convinced her convictions and educational background did not cause her to mold or shape the truth to achieve any particular end or result. Simply stated, Santiago appeared to be, and I am convinced was, a truthful witness.

E. Discussion, Analysis, and Conclusions Regarding Santiago

Did the Company discharge Santiago because she engaged in union activities as contended by the General Counsel, or was her discharge as a result of insubordination as contended by the Company?

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982),¹⁷ the Board announced the following analytical mode for resolving discrimination cases turning on the employer's motivation. Under that test the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. On such a showing the burden shifts to the employer to demonstrate that the same action would of taken place even in the absence of the protected conduct. In *Manno Electric*, 321 NLRB 278 fn. 12 (1996), the Board restated its test as follows:

[T]he General Counsel has the burden to persuade that the protected conduct was a substantial or motivating factor in the challenged employer decision. "The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity."

A prima facie case (or burden of persuasion) is made out where the General Counsel establishes union activity, employer knowledge, animus, and adverse action taken against

those involved or suspected of involvement which has the effect of encouraging or discouraging union activity. See, e.g., *Farmer Bros. Co.*, 303 NLRB 638 at 649 (1991). The burden of establishing every element of a violation under the Act is on the General Counsel. See, e.g., *Western Tug & Barge Corp.*, 207 NLRB 163 fn. 1 (1973). Stated differently, the issue is the employer's motive and the burden is on the General Counsel, that is, the General Counsel must establish unlawful motive or union animus as part of its prima facie case. Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case; even without direct evidence. For example, evidence of suspicious timing, false reasons given in defense, and the failure to adequately investigate alleged misconduct all support such inferences. See, e.g., *Adco Electric*, 307 NLRB 1113, 1128 (1991); *Fluor Daniel, Inc.*, 311 NLRB 498 (1993), and *Asociacion Hospital Del Maestro*, 291 NLRB 198, 204 (1988).

At the time of her separation from employment with the Company, Santiago was a group leader in the flat filters department and had been acting supervisor in that department for an extended time (approximately January 30 to approximately March 11, 1996). Santiago was not initially involved with the Union, but became so after the Union was certified in December 1994. Santiago testified, and Flat Filters Department Supervisor Frontera acknowledged, that Santiago told Frontera she favored the Union. Santiago was one of approximately four women employees supporting the Union and she spoke with coworkers urging them to support the Union. Union President Roberto Pagan (Union President Pagan) described Santiago as "one of the activists of our union." He said she participated "prominently" in the work stoppage and demonstrations held by the Union. Pagan testified she also distributed union literature at the plant. Union President Pagan stated Santiago "was the person among all of the female employees that we identified as our link" with the women of the work force. Pagan further explained, "we sent [union] bulletins to her [Santiago], so that she would distribute" them to the employees.

On August 14, 1995, Santiago distributed a leaflet to employees at the plant, in which Plant Manager Schlapp's attitude and negotiating tactics were described in unfavorable terms. The leaflet concluded with the words "against an abusive employer, a struggling laborer!" Santiago participated in a work stoppage at the gate to the Company in September 1995. She, along with certain other coworkers, carried picket signs on the occasion. Santiago testified managers and supervisors came to the gate and urged workers "to come into the Company." Santiago stated "they [Plant Manager and Supervisors] were observing us the whole while."

On February 27, 1996, Santiago, while acting as supervisor and group leader of the flat filters department, distributed leaflets to coworkers inviting them to picket at the Company's main gates the following day "to stop the employer's abuses" and urged her coworkers to stand united. Santiago and approximately 12 to 20 of the approximately 90 to 100 employees, picketed at the main gate on February 28, 1996 and again on March 5, 1996.

In light of the above, I am persuaded company management was fully aware of Santiago's various activities related to the Union. For example, when she handed out union literature on February 27 and picketed at the main gates on

¹⁷The Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Corp.*, 462 U.S. 393, 399-403 (1983).

February 28 and March 5, she was acting as supervisor for the flat filters department. While Santiago and the others were picketing on February 28 and March 5, the Company was showing "some auditors from other companies [around the plant] to observe . . . to see if they would become clients" of the Company. In summary, Santiago was an active, visible, and vocal supporter of the Union, specifically among the women employees, and the Company was fully aware of her activities in that regard.

Did the Company harbor unlawful animus toward its employees' (Santiago's in particular) union activities; or, as contended by the Company "is [there] no evidence through statements or otherwise that the Company was anti-union in general or hostile to Ms. Santiago in particularly [sic] because of her support of the Union?"

Direct evidence of antiunion animus is not plentiful; however, the General Counsel demonstrated from the record, as a whole, that the Company harbors sufficient union animus to meet its burden of persuasion with respect to the Company's action against Santiago. For example, following the September 11, 1995 work stoppage that Santiago and others participated, in Human Resources Manager Quinones sent a letter (September 14, 1995) to the Union with a copy to all employees stating, among other things, the Company would "not tolerate" this type of interruption to its operations and if it should occur in a repeated manner the Company would take all means allowed by law against the employees that participated in such interruptions of its operations. On February 27, the day Santiago distributed a leaflet to coworkers urging them to picket at the Company the next day, "to stop the employer's abuses," Plant Manager Schlapp wrote the Union a letter with a copy to all employees in which Schlapp made reference to "the latest leaflet sent by the Union, which is filled with offensive, disrespectful and untrue statements." Schlapp informed the Union and employees that the "insults and abuses that you have published against Sartorius, Mr. Marcus Lopez, and myself cannot help the relationship between Sartorius and the Sindicato." Plant Manager Schlapp asserted in his letter that the employees were not "repressed and exploited" and that "every employee" worked "out of his/or her own free-will" and added the Company was doing the best it could "in a fiercely competitive environment." Plant Manager Schlapp then stated in his letter that many companies had left Puerto Rico to manufacture in less costly financial environments and noted, "we have avoided that alternative, although it is an option that we have considered."

The chilling effect of these letters could not be lost on the employees. I am persuaded the message, to the employees was clear, although somewhat veiled in legal assertions, that if activities such as picketing and leafleting continued action would be taken against the employees involved or the Company might move out of Puerto Rico. The Company's somewhat subtle but nonetheless antiunion animus is further illustrated by Human Resources Manager Quinones' letter to the Union with a copy to all employees on March 1, 1996. That letter which followed the February 28, 1996 picketing by Santiago and others stated in part:

February 28, 1996 [the Union] held a two (2) hour stoppage that interrupted the operations of Sartorius. . . . [T]his is not the first time that [the Union] has in-

cited and organized a temporary or intermitten stoppage.

By the present letter we inform you that we will not tolerate this type of interruption in the operations since this is not an activity protected by law.¹⁸ Should it be repeated, we will take those measures allowed us by law, including against those employees who participate in the same.

This is a very serious matter and should not be taken lightly.

The Company's efforts to cast the Union in a bad light, thus reflecting its animus against the Union, is also demonstrated by letters the Company sent to certain employees on March 12, notifying those employees of a wage increase, "higher than the one received by the majority of the employees" and noting "we had to notify the Union and wait for any reaction on their part before implementing it." The tenor of the letter is to blame the Union for the delay in certain employees receiving the announced increases. It is in this atmosphere of communications by the Company against the Union that a decertification petition was filed on March 6.

In summary on this aspect of the Santiago's case, I am persuaded the General Counsel has demonstrated, by the above and other circumstances, that the Company harbored antiunion animus sufficient for the General Counsel to meet its burden of persuasion in establishing a prima facie case.

Did the Company discharge (constructive or otherwise) its employee Santiago and, if so, was it motivated by unlawful considerations? I am persuaded the answer is yes to both considerations. First, the timing of Santiago's work reassignment that ultimately resulted in her loss of employment is noteworthy. The timing of her reassignment to a Stanza Machine could not easily have happened earlier than it did because Santiago was filling in for Flat Filters Department Supervisor Frontera who was absent due to an illness until the week of March 12. The Company's timing is suspect in that the most senior employee in the department is reassigned as a machine operator although she had for an extended time, not only served as group leader of the department, but as the acting supervisor for the department. She is reassigned to operate a Stanza Machine almost simultaneous with a less senior employee being promoted to group leader in another production department in which Santiago could have served. It is clear the Company had a policy and practice, as testified to by Plant Manager Schlapp, of moving employees around as needed from, for example, the janitor in the Cartridge Department to the most senior employees being transferred between departments. It would have been in keeping with the Company's policies and practices for it to have transferred Santiago to the group leader position it filled at approximately the same time that she was reassigned from acting supervisor and group leader to Stanza Machine operator. In this regard it is noteworthy that Santiago was a 12-year employee cross-trained in numerous functions such as quality control, membrane inspection, packing and sealing products, and had been specifically trained on computers by the Company. Additionally, Santiago served as an internal auditor for the Company. She was college educated and had been rec-

¹⁸ It is noted that Santiago testified she participated in the February 28 picketing during her lunch break when she was not working.

ommended for training to prepare for supervisory positions with the Company. Simply stated the Company failed to follow its policies and practices with regard to Santiago.

The Company knew when it reassigned Santiago from the group leader position to Stanza Machine operator that she could not perform that function well, and was fully aware operating the machine created serious health problems for her. The Company, in my opinion, knew full well that Stanza Machine operation was work so intolerable as to effect Santiago's discharge. Flat Filters Department Supervisor Frontera even told Santiago, as credibly testified to by Santiago, that she (Santiago) was a physically weak person and would be more effective for the Company doing her normally assigned tasks than operating a Stanza Machine. While an assignment to the Stanza Machine might not have affected another employee such as to constitute a constructive discharge it was sufficient in Santiago's case to do so. Santiago credibly testified she was not told the reassignment would be temporary or that she could retain her title of group leader in the flat filters department. In fact Santiago was told by Flat Filters Department Supervisor Frontera that her current position of group leader would be "closed." Thus, Santiago was faced with accepting as a permanent work assignment a task she knew she could not physically perform or being without a job. Santiago was offered no alternatives. In fact, Santiago was told by Human Resources Manager Quinones that the Company had nothing to offer her. It is noteworthy that when Santiago inquired of Quinones if her reassignment was a result of her union activities the only assurance Santiago was given by Quinones was that as far as she was concerned the reassignment was not based on union activities but she could not speak for others in the Company.

In light of all the above, I am persuaded the General Counsel has established the Company was motivated, in part, for the constructive discharge, termination, or unilateral elimination of Santiago's job, because the Company did not want Santiago to occupy positions (acting supervisor and group leader) it believed should be closely allied with management while at the same time being a visible and vocal supporter of the Union. This was particularly so at a time when the Company was anticipating a Board-conducted election resulting from the decertification petition currently pending before the Board.

I find the Company did not meet its burden of persuasion that it would have taken the same action even if Santiago had not engaged in protected conduct. The Company took the position at trial and in its posttrial brief that Santiago refused a temporary work assignment and was discharged for insubordination. The credited evidence does not, however, support the Company's contention. Santiago was never, for example, told her reassignment was temporary. Quiet to the contrary, the Company eliminated her group leader position altogether.¹⁹ Until the trial, the Company had never advanced "insubordination" as a reason for Santiago's loss of employment. In her separation letter dated March 15, 1996, and signed by Human Resources Manager Quinones, Santiago was told that due to production conditions at the Company her position of group leader in the flat filters de-

¹⁹I reject the Company's contention it simply decided not to fill Santiago's position and as such its actions did not constitute an elimination of the position.

partment "has been eliminated until further notice" and because she had stated she was unavailable to perform alternative work, with or without accommodations, she was laid off until further notice. As alluded to elsewhere in this decision, a group leader position was filled at approximately the same time in another department by a less senior employee for work Santiago could have performed and under the Company's policies and practice of transferring employees as needed Santiago would have been transferred under normal circumstances. After Santiago's discharge, the Company hired into the flat filters department a number of employees (Alice Sierra, Evelyn Santiago, Jose Camacho, Edwin Feliciano, and Hector Veles). After approximately 3 days working on the Stanza Machine Evelyn Santiago commenced to perform inspection-type work previously performed by Santiago. If, as the Company's dismissal letter reflects, Santiago was simply laid off, the Company does not explain why she was not recalled when it commenced to hire into the flat filters department. The Company's contention there was no work to be performed or that Santiago's functions were redundant is not born out by the record evidence. The Company, for example, continues to have and utilize group leader positions in other departments. The computer work previously performed by Santiago is now performed in the Company's front offices.²⁰ Furthermore, the Company, after it discharged Santiago, has had one of its office clerical employees (Iris Maldonado) perform inspection and packing functions in the flat filters department, work previously performed by Santiago. The evidence tends to indicate an increase in flat filters department work as opposed to a decrease. The Company by its practice and policies transferred employees between departments yet it did not do so in Santiago's case even though it filled a group leader's position with a less senior employee in a department Santiago was trained in at approximately the same time it removed Santiago from her group leader position and eliminated the position. The Company advanced lack of work, redundancy, and insubordination at various times as justification for its action with respect to Santiago. None of which it was able to substantiate. Thus, I am persuaded the Company failed to demonstrate Santiago's employment with the Company would have ended in the absence of any protected conduct on her part.

I find the Company violated Section 8(a)(3) and (1) of the Act when it discharged Santiago.

F. Elimination of the Group Leader Position

Did the Company eliminate the position of group leader in the flat filters department? The answer is clearly yes. First, Flat Filters Department Supervisor Frontera told Santiago on the date she was reassigned as a Stanza machine operator that her position of group leader was "closed." Flat Filters Department Supervisor Frontera stated in her pretrial Board affidavit given on May 28:

The reason why the position of group leader was eliminated was because there was hardly any work to enter into the computer and it was decided that the final packing would be done between the girl who used to

²⁰The flat filters department is the only department that has its computer data entry work performed by office personnel in the Company's offices.

help her and I . . . I did not participate in the decision to eliminate the group leader position. I do not know who took the decision to eliminate the group leader position.

The Union affiliation did not have anything to do with the elimination of the group leader position.

When asked by the General Counsel when the Company decided to eliminate the group leader position in the flat filters department, Human Resources Manager Quinones testified:

After I met with [Santiago], then I met with my principal and because [Santiago] was not accepting work on them machines and we could have had that during [Flat Filters Department Supervisor Frontera's] absence, we had realized that we really didn't need two persons to do the work that they performed and we thought fit not to replace her and that is when we decided to eliminate or not to replace [Santiago's] position.

Human Resources Manager Quinones further testified that after meeting with Plant Manager Schlapp and Production Manager Lopez, "we decided that we were not going to replace her and that we eliminated that position." Human Resources Manager Quinones stated in part in her pretrial affidavit:

The decision to eliminate the group leader position of the Flat Filters Department was taken the second week of the month of March 1996. This decision was taken by the Plant Manager.

The Company did not notify the Union the intention to eliminate the functions of group leader of the Flat Filters Department and transfer some of those functions to other areas. The Union did not ask to negotiate the elimination of said position despite that about a week had gone by from the time when [Santiago] was informed the intention of eliminating the position and when the same was eliminated.

As alluded to earlier, it is clear the Company eliminated the group leader position in the flat filters department. I reject the Company's contention, in its posttrial brief, that the position was not eliminated, that what took place "simply" was that the Company requested Santiago to fill in as operator on a temporary basis during the illness of another operator and it thereafter decided "not to replace her" and the "position of group leader itself remained."

Union President Pagan testified the Union was never notified the position was being eliminated or the work previously performed by Santiago was being reassigned to other employees. Human Resources Manager Quinones acknowledged the Company did not notify the Union of its intention to eliminate the position and transfer the functions to others. Simply stated, the Union was never notified of the elimination of this bargaining unit position.²¹

It is undisputed the group leader's position in the flat filters department was a bargaining unit position occupied by a bargaining unit employee. The elimination of such a position is an action of the sort that materially, substantially, and

significantly effects the bargaining unit and the Company may not unilaterally eliminate the position without violating the Act. I reject the Company's contention the Union never requested to bargain over the elimination of the position and hence waived its right to do so. I note the Union complained of Santiago's termination in a letter dated April 2, in which the Union among other things protested that the "employer acted in bad faith when it eliminated the position that [Santiago] occupied." It is clear the elimination of a bargaining unit position is a mandatory subject of bargaining and an employer cannot remove such a position without first securing the consent of the union. See, e.g., *Holy Cross Hospital*, 319 NLRB 1361 fn. 2 (1995). Thus, when the Company here unilaterally eliminated the group leader position in the flat filters department without notice to, bargaining with, or the consent of the Union it violated Section 8(a)(5) and (1) of the Act and I so find.

G. Production Incentive Bonus

It is alleged at paragraphs 8 and 9 of the complaint the Company violated Section 8(a)(5) and (1) of the Act, when on August 15, 1995, it unilaterally implemented its proposal for a production incentive bonus. It is further alleged the Company failed and refused to bargain collectively and in good faith by delaying and disrupting negotiations by insisting on negotiating economic matters, and in particular its production incentive bonus, on a piecemeal basis.

At the parties first formal negotiating session on March 8, 1995,²² various "ground rules" for negotiating was agreed to including an agreement that noneconomic matters would be dealt with prior to economic matters.

At the May 9, 1995 negotiating session, the Company informed the Union it wished to establish a production incentive bonus program for certain employees. The Union requested the Company reduce its proposal to writing which the Company did by letter dated May 11, 1995. In its May 11 letter the Company proposed implementing its production incentive bonus program as soon as possible thereafter. The Company outlined the amounts per hour it was willing to pay and linked such payments to production quantities and scrap rate.²³ The Company noted it wished to "be able to change the requirements or the amount of the bonus from time to time." The Company suggested that if the Union desired to discuss its production incentive bonus program the parties' could do so at their scheduled May 22, 1995 negotiating session.²⁴

The Company wrote the Union about its proposed production incentive bonus program on July 6, 1995. In its letter the Company noted no agreement had been reached on that particular issue at the parties May 22, 1995 negotiating session. The Company further noted, "[T]he Company once more urged the Union to express its position in relation to the incentive program but no agreement was reached." In its

²² The parties met on January 5, 1995, to discuss some ground rules and scheduling procedures. Negotiating sessions were also held on April 19, May 9 and 22, June 21, July 14, August 14, October 6 and 20, November 22, and December 21, 1995.

²³ Scrap rate as utilized pertains to waste materials generated in producing filters.

²⁴ The parties discussed the Company's proposed production incentive bonus program at negotiating sessions from May 22 until August 14, 1995.

²¹ I also reject the Company's contention that any changes that did take place were insignificant and hence bargaining about the changes was not required.

July 6 letter the Company also urged the Union to meet at the plant with the employees involved regarding the Company's proposed production incentive bonus program. The Company ended its July 6 letter by stating, "We urge the Union once more to establish its position in writing in relation to the production incentive bonus not later than July 17, 1995²⁵ or regretfully we will be obligated to withdraw our offer."

On July 28, 1995, Plant Manager Schlapp wrote the Union in part as follows:

We are hereby informing you that Sartorius is considering implementing the production incentive bonus for the position of pleating machine operator and Casting Machine Shift leader for a trial period of three (3) months, starting on August 15, 1995.

The Company raised the matter of its production incentive bonus program again at the parties' August 14, 1995 negotiating session. The Company's bargaining notes for that session reflects in part:

In regard to the production incentive bonus the Union rejected it because it was insufficient; they believed this was an economical proposal and had to be discussed together with the other economic articles . . . the Union insisted that they would not consider or discuss incentive bonus program unless the Company made it part of a total economic proposal.

The Company informed the Union at their August 14, 1995 negotiating session it could not present its economic proposals until the second week of October, but it would implement its production incentive bonus program the next day, August 15, 1995. As alluded to earlier, the Company implemented its program on that date.

It is undisputed the Company implemented a production incentive bonus for certain bargaining unit employees on August 15, 1995—a time when the parties were engaged in negotiations for a collective-bargaining agreement.

Plant Manager Schlapp testified the Company was interested in implementing its production incentive bonus program for two reasons, namely, the high scrap rate generated on a new type machine being utilized in the cartridge department and the Company had obtained "unexpected high orders" for membranes produced in the casting department. Plant Manager Schlapp testified regarding implementing the production incentive bonus program on August 15, 1995:

When we finally implemented this incentive bonus program in August, I had already had so much discussions with these employees and they really performed well and did everything to support us and we needed this to continue over the next month and I felt obligated to implement this and give them this additional benefit.

H. Discussion, Analysis, and Conclusions Regarding Production Incentive Bonus

Section 8(d) of the Act provides, in pertinent part, that "to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees

to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment."

An employer violates its duty to bargain with its employees exclusive bargaining representative by unilaterally implementing changes in terms and conditions of their employment which terms and conditions constitute mandatory subjects of bargaining. *NLRB v. Katz*, 369 U.S. 736 (1962).

The parties are in agreement that the principles outlined in *RBE Electronics of S.D.*, 320 NLRB 80, 81-82 (1995), govern the issue. Inasmuch as the Board set forth the principles in detail, I shall set forth the following extended quote:

The Board held in *Bottom Line Enterprises*, [302 NLRB 373 (1991)], that when, as here, parties are engaged in negotiations for a collective-bargaining agreement, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to provide notice and an opportunity to bargain about a particular subject matter; rather it encompasses a duty to refrain from implementation at all, absent overall impasse on bargaining for the agreement as a whole. The Board in *Bottom Line* recognized two limited exceptions to that general rule: when a union engages in tactics designed to delay bargaining and "when economic exigencies compel prompt action." *Id.* at 374.

The "economic exigency" exception set forth in *Bottom Line* derives from the Supreme Court's decision in *NLRB v. Katz*, 369 U.S. 736, 748 (1962), as discussed in the Board's decision in *Winn-Dixie Stores*, 243 NLRB 972, 974 fn. 9 (1979). Although those decisions essentially condemn piecemeal bargaining, they provide support for the view that there might be some circumstances justifying or excusing an employer's taking action while bargaining is ongoing. These circumstances were described in *Winn-Dixie* as involving "extenuating circumstances" and a "compelling business justification." In cases subsequent to *Bottom Line*, the Board has characterized the economic exigency exception as requiring a heavy burden,⁴ and as involving the existence of circumstances which require implementation at the time the action is taken⁵ or an economic business emergency that requires prompt action.⁶

Of course, there are certain compelling economic considerations that the Board has long recognized as excusing bargaining entirely about certain matters. The Board has limited its definition of these considerations to "extraordinary events which are 'an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action.'" *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995), quoting *Angelica Healthcare Services*, 284 NLRB 844, 852-853 (1987). Absent a dire financial emergency, the Board has held that economic events such as loss of significant accounts or contracts,⁷ operation at a competitive disadvantage,⁸ or supply shortages⁹ do not justify unilateral action.¹⁰ Thus, even when parties are involved in contract negotiations, the existence of compelling economic considerations will allow an employer to act unilaterally, just as it may in other situations when negotiations are not in progress. The Board's exigency exception in *Bottom Line* recognizes that compelling eco-

²⁵In a letter dated July 17, 1995, the Company extended its "deadline" until July 21, 1995.

conomic considerations justify unilateral action. *Triple A Fire Protection*, supra.

We believe, however, that there are other economic exigencies, although not sufficiently compelling to excuse bargaining altogether, that should be encompassed within the *Bottom Line* exception. Thus, in *Dixon Distributing Co.*, 211 NLRB 241, 244 (1974), a case predating *Bottom Line*, the administrative law judge acknowledged that when negotiations for a contract are ongoing, matters may arise where the exigencies of a situation require prompt action for which bargaining is appropriate. The judge noted that in these and other related circumstances, "management does need to run its business, and changes in operations toward that end often cannot await the ultimate full-fledged contract bargaining." *Dixon*, 211 NLRB at 244.¹¹ When these circumstances occur, we believe that the general *Bottom Line* rule foreclosing changes absent overall impasse in bargaining for an agreement as a whole should not apply.¹² Instead, we will apply the traditional principles governing bargaining over changes in terms and conditions of employment referred to in *Bottom Line*. Thus, where we find that an employer is confronted with an economic exigency compelling prompt action short of the type relieving the employer of its obligation to bargain entirely, we will hold under the *Bottom Line Enterprises* exigency exception, as further explicated here, that the employer will satisfy its statutory obligation by providing the union with adequate notice and an opportunity to bargain. In that event, consistent with established Board law in situations where negotiations are not in progress, the employer can act unilaterally if either the union waives its right to bargain or the parties reach impasse on the matter proposed for change.

⁴*Our Lady of Lourdes Health Center*, 306 NLRB 337, 340 fn. 6 (1992).

⁵*Firefighters*, 304 NLRB 401 (1991).

⁶*Intermountain Rural Electric Assn.*, 305 NLRB 783 (1991), enf. 984 F.2d 1562 (10th Cir. 1993)

⁷See *Farina Corp.*, 310 NLRB 318, 321 (1993), and *Angelica*, supra.

⁸*Triple A Fire Protection*, 315 NLRB 409, 414, 418 (1994).

⁹*Hankins*, supra.

¹⁰The Board has similarly held that under exigent circumstances an employer need not give notice and bargain concerning the effects of closing its operations, but has limited its definition of such exigent circumstances to situations such as where an employer lacked funds to continue operating and paying employees, or lost performance bonds required by law and had the bank end the employer's line of credit. See *Your Host, Inc.*, 315 NLRB 295, 297 (1994); *Compu-Net Communications, Inc.*, 315 NLRB 216, 223 (1994), and cases cited therein.

¹¹In *Dixon*, Member Penello agreed with the judge that the employer did not violate the Act by making unilateral changes for the reasons stated by the judge; Member Kennedy found "no violation . . . in accord with his dissent in the representation case on which the [union's] certification [was] predicated"; Member Jenkins disagreed with the judge's reasons and would have found that the employer violated the Act by making unilateral changes, but he expressed no disagreement with the above-quoted proposition of the judge. 211 NLRB at 241-242.

¹²Chairman Gould would also require the Employer to show a compelling and substantial justification for individual bargaining in such circumstances.

The foregoing analysis attempts to maintain the delicate balance between a union's right to bargain and an

employer's need to run its business. We recognize that an analysis accommodating these interests of both the union and employer is not easily susceptible to bright line rules. In defining the type of economic exigency susceptible to bargaining, however, we start from the premise, derived from the cases discussed above, that not every change proposed for business reasons would meet our *Bottom Line* limited exception. Thus, because the exception is limited only to those exigencies in which time is of the essence and which demand prompt action, we will require an employer to show a need that the particular action proposed be implemented promptly.¹³ Consistent with the requirement that an employer prove that its proposed changes were "compelled," the employer must additionally demonstrate that the exigency was caused by external events, was beyond the employer's control,¹⁴ or was not reasonably foreseeable.¹⁵

¹³See *Firefighters*, supra. Cf., e.g., *Rain-Ware, Inc.*, 263 NLRB 50 (1982), in which the Board rejected an employer's argument that an economic exigency rather than a discriminatory motive compelled its action where the facts failed to demonstrate that economic conditions required action of a precipitous nature.

¹⁴Cf. *P & C Food Markets*, 282 NLRB 894 (1987), in which the Board reversed a finding that an employer did not have a business justification for violating returning strikers' replacement rights but did not dispute the judge's reasoning that an exigency resulting from an employer's own action does not constitute a substantial and legitimate business justification.

¹⁵The Board in *Stone Container*, 313 NLRB 336 (1993), similarly declined to apply the *Bottom Line* analysis foreclosing changes absent overall impasse where a foreseeable, recurring event was scheduled to occur during contract negotiations. In such circumstances, the Board held that the established "notice and opportunity to bargain" analysis was appropriate. Chairman Gould and Member Browning did not participate in the decision in *Stone Container*, and express no views on its continuing validity.

First, the production incentive bonus program proposed by the Company is a mandatory subject of bargaining. Second, there is no contention the parties were at an overall impasse in bargaining. Third, there is no contention the Union engaged in tactics designed to delay bargaining. The parties had agreed to negotiate noneconomic matters prior to considering economic issues. The question turns to whether or not "economic exigencies" compelled prompt action such as to bring the Company's actions within the limited exceptions to the general rule that an employer may not unilaterally implement changes during contract negotiations absent an overall impasse in bargaining. I am persuaded there were no "extenuating circumstances" or "compelling business justifications" that would have relieved the Company of its duty to refrain from unilaterally implementing its proposed production incentive bonus program. The Company advanced two reasons for unilaterally implementing its production incentive bonus program, namely, an increase in the scrap rate on a particular type machine in the cartridge department and unexpectedly high orders for membranes involving the casting department. The Board in *RBE Electronics of S.D.*, supra, noted the fact that an employer may be operating at a competitive disadvantage or with a supply shortage such as might be generated by an increased scrap rate does not justify unilateral action. Unexpectedly high orders for membranes, in the circumstance, does not justify the Company's unilateral action. The Company had known of the increase in orders

since at least early May 1995. In fact, Plant Manager Schlapp's testimony tends to indicate the employees had responded to that need in that he testified he had already discussed the incentive bonus program with the employees and they "really performed well and did everything to support us." It appears Plant Manager Schlapp's motive was to reward the employees he had already been talking to (dealing directly with) rather than responding to an emergency of the nature that would excuse the Company for its unilateral action. Along these same lines the Company tended to move away from any dire emergency contention when in its July 6, 1995 letter to the Union it urged the Union to accept the Company's position on the production incentive bonus program not later than July 17, 1995, "or regrettably we will be obligated to withdraw our offer." It appears the Company was attempting to reward its employees for stepping up to the asserted "unexpected high orders" rather than meeting a dire emergency. The Company argues its production incentive bonus program "was not presented to the Union as one of the Company's economic proposals, but rather as a possible experiment on a limited basis to determine whether it would make sense to make the incentive bonus part of the collective-bargaining agreement." Stated differently the Company argues in brief, what it did was to institute an experiment with respect to its incentive bonus program in order to decide whether to propose such an incentive to the Union as part of a collective-bargaining agreement. I reject the Company's asserted justification. Unilateral experimental testing of contract proposals relating to mandatory subjects of bargaining are prohibited by the Act. I find the Company, by insisting on negotiating on a piecemeal basis its production incentive bonus program, and, by unilaterally on (August 15, 1995) implementing same, violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. Sartorius, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Sindicato Puertorriqueño de Trabajadores is a labor organization within the meaning of Section 2(5) of the Act.
3. The following employees of the Company (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

Included: All production, maintenance, warehouse employees employed by the Company at its factory located in Yauco, Puerto Rico. Excluded: All office clerical, secretaries, laboratory technicians, chemists, professional employees, guards and supervisors as defined in the Act.

4. At all times since December 30, 1994, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.
5. The Company violated Section 8(a)(5) and (1) of the Act by on/or about August 15, 1995, unilaterally implementing its proposal for a production incentive bonus at a time when it was in negotiations toward, and absent impasse on, a collective-bargaining agreement.
6. The Company violated Section 8(a)(5) and (1) of the Act by eliminating the position of group leader in its flat filters department without notice to, bargaining with, or the consent of the Union and by transferring that unit work to

supervisors and nonunit employees and by terminating the employment of its employee Flat Filters Department Group Leader María E. Santiago.

7. The Company violated Section 8(a)(3) and (1) of the Act when on/or about March 15, 1996, it discharged its employee María E. Santiago, because she engaged in union activities.

8. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found the Company has engaged in certain unfair labor practices, I recommend it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes and policies of the Act.

Having found the Company unilaterally implemented its production incentive bonus at a time when no impasse had occurred, I shall order the Company, on request, to bargain collectively and in good faith with the Union on this and other terms and conditions of employment of unit employees and, if an understanding is reached, to embody the understanding in a signed agreement. I shall order the Company, if requested by the Union, to reinstate the terms and conditions of employment that existed before it unlawfully implemented its production incentive bonus. To the extent that the unlawful unilateral changes implemented by the Company may have improved the terms and conditions of employment of unit employees, I note that no provision of my recommended Order shall in any way be construed as requiring the Company to revoke such improvements. Having found the Company on/or about March 15, 1996, unlawfully discharged María E. Santiago, I recommend the Company be ordered to offer her reinstatement to her former position without prejudice to her seniority or other rights and privileges or, if such position no longer exists, to a substantially equivalent position and to make her whole for any loss of earnings she may have suffered by reason of the Company's unlawful conduct, with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Backpay shall be computed in the manner described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950). Having further found the Company unlawfully eliminated the position of group leader in the flat filters department, I shall order that it reestablish the position in that department. Finally, I shall recommend the Company be ordered to post an appropriate notice to its employees both in English and Spanish. Copies of which are attached hereto as "Appendix" for a period of 60 days in order that employees may be apprised of their rights under the Act and the Company's obligation to remedy its unfair labor practices.

On these conclusions of law, and on the entire record, I issued the following recommended²⁶

ORDER

The Respondent, Sartorius, Inc., Yauco, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

²⁶If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Discharging employees because of their membership in or activities on behalf of the Union or because they engaged in other protected concerted activities.

(b) Refusing to bargain collectively and in good faith with Sindicato Puertorriqueño de Trabajadores by unilaterally implementing a production incentive bonus and by eliminating the position of group leader in the flat filters department without notice to, bargaining with, or consent of the Union.

(c) 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, rescind the unilaterally implemented production incentive bonus implemented on/or about August 15, 1995.

(b) Reestablish the position of group leader in the flat filters department.

(c) Within 14 days from the date of this Order offer María E. Santiago full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent job without prejudice to her seniority or any other rights or privileges previously enjoyed.

(d) Within 14 days of this Order remove from its files any reference to her unlawful discharge and within 3 days thereafter notify María E. Santiago in writing that this has been done and that the discharge will not be used against her in any way.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents, for its examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analysis the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Yauco, Puerto Rico facility copies of the attached notice marked "Appendix."²⁷ Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. The notices shall be printed and posted both in English and Spanish. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail at its own expense a copy of the notice to all current employees and former employees employed by it at any time since August 15, 1995.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

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 refuse to bargain in good faith with Sindicato Puertorriqueño de Trabajadores as the exclusive bargaining representative of our employees in the unit described below by unilaterally implementing changes in wages and terms and conditions of employment of these employees at a time when no impasse in bargaining with the Union has occurred.

WE WILL NOT eliminate group leader positions without notice to, bargaining with, or the consent of the Union.

WE WILL NOT discharge our employees for engaging in union activities.

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, reinstate the position of group leader in the flat filters department.

WE WILL, on request, rescind the production incentive bonus we unilaterally implemented on August 15, 1995.

WE WILL, within 14 days from the date of this Order, offer María E. Santiago full reinstatement to her former job or, if her former job no longer exists, to a substantially equivalent position without prejudice to her seniority or any other rights or privileges previously enjoyed and WE WILL make her whole for any loss of earnings and other benefits resulting from her discharge less net interim earnings plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of María E. Santiago and within 3 days thereafter, notify María E. Santiago in writing that this has been done and that the discharge will not be used against her in any way.

SARTORIUS, INC.

²⁷ 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."