

National Steel and Shipbuilding Company and International Brotherhood of Electrical Workers, Local Union No. 569, AFL-CIO and International Association of Machinists and Aerospace Workers, Local Lodge 389, District Lodge 94, AFL-CIO and International Union of Operating Engineers, Local 12, AFL-CIO and International Brotherhood of Painters and Allied Trades, Southern California Painters and Allied Trades District Council No. 36, Local No. 333, AFL-CIO and Shipwrights, Boatbuilders and Helpers, Carpenters Local 1300, affiliated with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO and Shopmen's Local Union No. 627 affiliated with the International Association of Bridge, Structural, and Ornamental Iron Workers, AFL-CIO and Building, Material, Construction, Professional and Technical Teamsters, Local Union No. 36, International Brotherhood of Teamsters, AFL-CIO. Cases 31-CA-2186131-CA-21862, 31-CA-21863, 31-CA-21864, 31-CA-21865, 31-CA-21866, 31-CA-21867, and 31-CA-21868

November 7, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On December 2, 1996, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The General Counsel filed exceptions and a supporting brief, as did the Charging Party, International Union of Operating Engineers, Local 12, AFL-CIO. The above-captioned additional six Unions also filed exceptions and a supporting brief. The Respondent filed an answering brief in opposition to the exceptions of the General Counsel and the Unions. The Respondent further filed cross-exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions, cross-exceptions,¹ and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.²

¹In light of our agreement with the judge that the Respondent did not engage in bad-faith bargaining, we find it unnecessary to pass on the Respondent's cross-exceptions asserting that the Respondent complied with the June 1995 settlement agreement, and that the complaint allegations are barred by Sec. 10(b) of the Act.

²The General Counsel and International Union of Operating Engineers, Local 12, have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 363 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Contrary to the Respondent's contention in its answering brief, we note that the May 3, 1994 memorandum prepared by NASSCO

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

President Vortmann was admitted into evidence to show the communications that occurred between Vortmann and Manager of Industrial Relations Hinrichson, and not for the truth of the matter asserted regarding employee disaffection from the Unions.

Chairman Gould notes that it is the responsibility of all parties to a collective-bargaining agreement to ensure that all of the provisions, including the union-security provisions, are lawful. Chairman Gould does not pass on whether any of the Respondent's proposals, if agreed to, would have resulted in a lawful union-security clause. See his dissenting opinion in *Teamsters Local 443 (Connecticut Limousine Service)*, 324 NLRB No. 105 (Oct. 2, 1997), and his concurring opinion in *Monson Trucking*, 324 NLRB No. 149 (Oct. 31, 1997). However, to the extent Respondent's proposals were directed toward ensuring that any agreed to union-security clause was lawful, Chairman Gould commends that effort and he encourages all parties to the collective-bargaining agreements with union-security clauses to carefully review these clauses to ensure that they are valid.

Ann L. Weinman, Esq., for the General Counsel.

William C. Wright, Esq. and *Theodore R. Scott, Esq. (Littler, Mendelson, Fastiff, Tichy & Mathison)*, of San Diego, California, for the Respondent.

David P. Koppelman, Esq., of Pasadena, California, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

MARY MILLER CRACRAFT, Administrative Law Judge. National Steel and Shipbuilding Company (NASSCO or the Respondent) and the seven Unions¹ representing its shipyard employees began coordinated bargaining shortly before expiration of the 1988-1992 contracts. No agreement has been reached to date. The broad issues herein are whether NASSCO bargained in bad faith by presenting and insisting on regressive union-security proposals on and after May 19, 1994;² whether the charge underlying this allegation was timely as to six of the Unions; and whether NASSCO bargained to impasse on a permissive subject, yard security,

¹The seven Unions are International Brotherhood of Electrical Workers, Local Union No. 569, AFL-CIO (IBEW Local 569); International Association of Machinists and Aerospace Workers, Local Lodge 389, District Lodge 94, AFL-CIO (Machinists Local 389); International Union of Operating Engineers, Local 12, AFL-CIO (Engineers Local 12); International Brotherhood of Painters and Allied Trades, Southern California Painters and Allied Trades District Council No. 36, Local No. 333, AFL-CIO (Painters Local 333); Shipwrights, Boatbuilders and Helpers, Carpenters Local 1300, affiliated with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Carpenters Local 1300); Shopmen's Local Union No. 627 affiliated with the International Association of Bridge, Structural, and Ornamental Iron Workers, AFL-CIO (Iron Workers Local 627); and Building, Material, Construction, Professional and Technical Teamsters, Local Union No. 36, International Brotherhood of Teamsters, AFL-CIO (Teamsters Local 36).

²The charge underlying this allegation was filed on September 1, 1994, in Case 31-CA-21861 (formerly Case 21-CA-30245) by IBEW Local 569. IBEW Local 569 amended the charge on November 21, 1994, to include an allegation of bad-faith bargaining as to NASSCO's bargaining with the six other Unions.

since on or about August 1, 1995.³ Hearing on these consolidated cases occurred on various dates in May 1996 in San Diego, California.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the brief filed by NASSCO,⁴ I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATIONS STATUS

NASSCO, a corporation, operates a commercial shipyard at its facility in San Diego, California, where it annually purchases and receives goods and products valued in excess of \$50,000 directly from points outside California and annually performs ship overhaul services valued in excess of \$50,000 for the United States Navy. NASSCO admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the seven Unions are labor organizations within the meaning of Section 2(5) of the Act.

³The charges underlying this allegation were filed in Case 31-CA-21862 (formerly Case 21-CA-31009) by IBEW Local 569 on November 20, 1995; in Case 31-CA-21863 (formerly Case 21-CA-30918) by Machinists Local 389 on September 22, 1995, and amended on December 14, 1995; in Case 31-CA-21864 (formerly Case 21-CA-31007) by Engineers Local 12 on November 20, 1995; in Case 31-CA-21865 (formerly Case 21-CA-31008) by Painters Local 333 on November 20, 1995; in Case 31-CA-21866 (formerly Case 21-CA-31010) by Carpenters Local 1300 on November 20, 1995; in Case 31-CA-21867 (formerly Case 21-CA-31011) by Iron Workers Local 627 on November 20, 1995; in Case 31-CA-21878 (formerly Case 21-CA-31013) by Teamsters Local 36 on November 20, 1995, and amended on December 1, 1995.

⁴Counsel for the General Counsel, apparently at the direction of the Region, elected to make oral argument and not to file a brief herein. Where possible, I have considered this oral argument. However, although not a comment on the abilities of counsel for the General Counsel, without benefit of transcript citations, exhibit pages, and citation to more than the sparest authority, such oral argument was not especially helpful in this long and factually complex case. Cf. NLRB Casehandling Manual (Part One) Unfair Labor Practice Proceedings, Sec. 10408 which notes that cases involving less complicated factual issues are appropriate for oral argument. Moreover, it does not appear that it is within the discretion of the administrative law judge to deny a request for oral argument. Rule 102.42, as revised effective March 1, 1996, states that, "Any party shall be entitled . . . to a reasonable period . . . for oral argument." while it provides that, "In the discretion of the administrative law judge, any party may . . . file a brief." Prior to the experimental modification of Rule 102.42, made permanent effective March 1996, the rule stated for both oral argument and brief filing that, "Any party shall be entitled." This language had been interpreted as a grant of the right to file a brief. *Plumbers Local 195 (Stone & Webster Engineering)*, 237 NLRB 931 (1978); *Plastic Film Products*, 232 NLRB 722 (1977); see also *Boilermakers Local 374 (Phillips Getchow Co.)*, 316 NLRB 994 (1995). Because the identical language of entitlement is continued in usage for oral argument, I interpret the current rule to allow oral argument as a matter of right.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background and Overview

The seven Unions recognized by NASSCO on behalf of its shipyard employees⁵ have traditionally engaged in coordinated bargaining with NASSCO. Historically, following agreement, separate collective-bargaining contracts were executed for each of the seven bargaining units.⁶ The parties' bargaining relationship has existed in excess of 25 years. The most recent contracts expired on September 30, 1992. Since August 3, 1992, the parties have met over 100 times to engage in bargaining. No contract has yet been reached. However, pursuant to the parties' practice, numerous items have been tentatively agreed upon.⁷

By letter of August 7, 1992, Peter Zschiesche,⁸ chair of the seven union coordinated bargaining committee and business representative of Machinists Local 389, forwarded the seven Unions' first joint noneconomic proposal to Carl Hinrichsen, labor relations manager and chief negotiator for NASSCO. By letters of August 10, 1992, Hinrichsen presented NASSCO's noneconomic proposals to the seven Unions.

During a strike in October 1992, IBEW Local 569 advised Hinrichsen that it would no longer engage in coordinated bargaining with the other Unions but would instead bargain independently. The Unions returned from the strike without reaching a contract settlement. A return to work agreement was executed instead. In February 1993, following the Unions' rejection of NASSCO's last, best and final offer, NASSCO implemented the terms of that offer. Thereafter, the Unions, adopted an "Inside-Game" strategy [which] was calculated to avoid the economic risks to employees (and the perceived institutional risks to the unions of possible decertification) of another forthright strike, but was still aimed at putting enough economic pressure on NASSCO to coax the

⁵According to a union count for purposes of allocating negotiation expenses among the various Unions, approximately 2000 to 2500 employees comprised the seven units. About one-half of the these employees were represented by Iron Workers Local 627. Twenty percent were represented by Machinists Local 389 and another 20 percent, by IBEW Local 569. The remaining 10 percent were represented by Engineers Local 12, Painters Local 333, Carpenters Local 1300, and Teamsters Local 36.

⁶Although three of the 1988-1992 contracts are contained in a single booklet, the parties have historically considered these as three separate contracts.

⁷Consistent with negotiations in 1987 and 1988, the negotiations which began in 1992 incorporated the parties' practice of annotating agreement on specific contract language by placing the initials "T.A." for "tentative agreement" on two copies of the language. All parties understood that a tentative agreement could be withdrawn prior to complete agreement on all items. However, prior to 1994, NASSCO had not withdrawn a tentative agreement. Not all agreements were written. As to items which the Unions viewed as concessionary, although the Unions might agree that these items could be in the company's final offer, the Unions did not tentatively agree in writing.

⁸Zschiesche (pronounced zee she) served as chief negotiator for the Unions from 1987 until November 1995.

company into making a better contract offer than the one it had left on the table as its last offer.⁹

The “Inside-Game” strategy involved “noisy-but-peaceful rallies at shift-change” and “six brief, but calculatedly-disruptive strikes or other job-wobbling actions akin to striking” in March through June 1993.¹⁰

Prior to February 18, 1994, NASSCO had tentatively agreed to include the expired contracts’ “union shop”¹¹ language in any agreement. On February 18, 1994, Hinrichsen proposed a union-security clause which contained a form of “union shop” for current employees and, in addition, capped initiation fees and provided an “agency shop” alternative. The Unions rejected this proposal and it was withdrawn. In late February 1994, the Unions contemplated a ratification vote. Hinrichsen wrote to Zschiesche on February 24, 1994, that he thought the vote might take place around March 12, 1994. On February 25, 1994, NASSCO presented new proposals on union security and yard security. The union-security proposal contained “maintenance of membership” and “financial core” options with a cap on initiation fees. The Unions rejected the union security and yard security proposals. No ratification votes took place in March 1994. In April 1994, the Unions presented a counterproposal which contained “maintenance of membership” and “financial core” options and referenced side letters of agreement on initiation fees. The counterproposal was rejected.

In early May, IBEW Local 569 planned a ratification vote. None of the other Unions made such plans. Prior to this ratification vote, Hinrichsen spoke with IBEW Local 569 Business Representative James Archer and withdrew the February 25 union-security proposal as well as a 1993 comprehensive proposal. IBEW Local 569 voted to ratify subject to agreement on union security, seniority, and stewards. However, no contract has been signed and no unfair labor practice charges are before me on that issue. On May 19, 1994, NASSCO presented the six Unions engaged in coordinated bargaining and IBEW Local 569 with identical union-security proposals providing for annual employee selections as to whether to be a Union member. In September 1994, IBEW Local 569 filed an unfair labor practice charge alleging generally that NASSCO had bargained in bad faith. On November 21, 1994, IBEW Local 569 amended the charge to include the other six Unions. Complaint issued on the amended charge alleging that the May 19, 1994, proposal was regressive and that NASSCO bargained in bad faith as to all seven Unions by proposing and insisting on regressive union-security proposals on and after May 19, 1994. There is no issue regarding timeliness of the charge as to IBEW Local 569. However, the charge was amended to add the six other Unions

⁹These facts are found in the April 22, 1996, decision of Administrative Law Judge Timothy D. Nelson in National Steel and Shipbuilding Co. at p. 5. The parties requested that I take administrative notice of this decision. This case is currently pending before the Board on the Respondent’s exceptions to the decision of the administrative law judge.

¹⁰See at pp. 6–7.

¹¹The terms “union shop,” “financial core,” “agency shop,” and “maintenance of membership” are used in this background section for ease of reference only. Some of the proposals were more complex than these terms would indicate and, accordingly, I have relied on the actual proposals rather than any attempts to characterize them simplistically, in the analysis of this case.

6 months and 2 days after May 19, 1994; that is, 2 days after expiration of the 6-month period set forth in Section 10(b) of the Act.¹² Accordingly, as to the other six Unions, it will be necessary to determine whether these allegations of the complaint are barred by Section 10(b) of the Act. NASSCO also argues that IBEW Local 569 did not have authority to file the amended charge on behalf of the other six Unions. These and other procedural issues raised by NASSCO will be discussed following a recitation of the facts.

In addition, it is undisputed that on August 1, 1995, NASSCO proposed certain yard security language. NASSCO concedes that this was a nonmandatory or permissive subject of bargaining. Each of the seven Unions filed charges alleging, inter alia, that the yard security proposal was not a mandatory subject of bargaining and that NASSCO insisted to impose on inclusion of this language. Complaint issued on these charges and that issue is consolidated herein with the union-security issue.

B. Union Security

1. 1992

Article 4 of the 1988–1992 collective-bargaining agreements contained substantially identical union-security clauses requiring that each employee in the bargaining unit become a member of the Union not later than the 31st day following the effective date of the contract or not later than the 31st day of the beginning of employment, whichever was later, and remain a member in good standing as a condition of continued employment to the extent authorized by Section 8(a)(3).¹³ Hinrichsen and Zschiesche testified in agreement that in August and September, NASSCO indicated that when a comprehensive agreement was reached, it would contain the same union-security clause as the expired contracts. Discussions in August and September focused on seniority, paid time for union stewards to conduct union business, health benefits, wages and cost of living allowance, overtime, a successor clause, and pension. Agreement was reached on overtime in 1993.

NASSCO’s last, best and final offer was rejected at an employee ratification vote in late September. Following a strike from October 1–25, the parties agreed to an extension of the 1988–1992 contracts until January 4, 1993, as part of a return to work agreement. Employees returned to work on October 26.

During the strike, IBEW Local 569 withdrew from coordinated bargaining. Withdrawal was confirmed by letter of October 20. However, Archer, IBEW Local 569 business rep-

¹²Sec. 10(b) of the Act provides, in relevant part, “That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge.”

¹³For instance, Iron Workers Local 627’s contract provided,

Each of the Company’s employees included in the bargaining unit . . . shall, as a condition of employment, be or become a member of the Union not later than the thirty-first (31st) day following the effective date of this Agreement, or not later than the thirty-first (31st) day following the beginning of his or her employment, whichever is the later; and each such employee shall, as a condition of continued employment, remain a member of the Union in good standing to the extent authorized by Section 8(a)(3) of the [Act].

All of the 1988–1992 contracts contained similar language.

representative, continued to attend coordinated bargaining sessions as an observer.

2. 1993

The contracts were later extended to February 22, 1993. No further extensions of the contracts occurred. After February 22, 1993, NASSCO continued to deduct union dues and initiation fees but declined to continue deduction of arrearages.¹⁴ Beginning May 1993, NASSCO discontinued deduction of dues.¹⁵ In the meantime, on February 19, NASSCO presented its "Last, Best and Final Offer." This proposal included the union-security language found in the expired 1988-1992 contracts. Each of the Unions presented this offer to its members and a vote was conducted. The proposal was not accepted. NASSCO was informed prior to March 1 that the voting resulted in rejection of the offer. Although the parties have continued bargaining for several years, NASSCO has not made any further movement on wages than what was contained in the February 19 offer.

In March, the International took over negotiations for Iron Workers Local 627. Iron Workers Local 627 remained part of coordinated bargaining on common issues. Douglas J. Ballis, district representative, and Darrell Shelton, general organizer with the International, represented Iron Workers Local 627 at the bargaining table, replacing Iron Workers Local 627 Business Representative Robert Godinez.

During the period from February to November 12, there were no further discussions in coordinated bargaining regarding the issue of union security.¹⁶ On April 27, NASSCO implemented its seniority and evaluation proposals. On appeal of unfair labor practice charges alleging unlawful implementation, the NLRB Office of Appeals found, "Inasmuch as the conditions for bargaining had not changed materially since impasse had been reached, it could not be concluded that the Employer violated the Act, as alleged, when it implemented its proposal."

According to the Unions, in October about 35 items were initialed "T.A." by the parties including plant visitation language. A memorandum from Ballis to Hinrichsen dated October 14 outlined the status of all items indicating whether the subject had been tentatively agreed upon.¹⁷ The parties stipulated that there was a tentative agreement between Iron Workers Local 627 and NASSCO on union security in October 1993. By letter of November 12, Hinrichsen wrote to

¹⁴Hinrichsen wrote to Zschiesche on February 17 that regular monthly dues and uniform initiation fees would be deducted.

¹⁵No mention was made of deduction of initiation fees in NASSCO's letter of May 19, 1993, announcing that it would no longer deduct dues.

¹⁶Zschiesche filed an unfair labor practice charge in Case 21-CA-29405 in early 1993. By letter of August 16, 1993, the Region dismissed this charge and specifically found that the parties were at impasse regarding seniority and employee evaluations when the employer implemented those proposals on April 27, 1993. The appeal from dismissal of this charge was denied. Counsels for the General Counsel and the Respondent stipulated that the parties were at impasse on the issues of seniority and employee evaluations in April 1993. This stipulation was accepted over the objection of counsel for Engineers Local 12.

¹⁷One item, sec. 22 on plant visitation, was omitted from the list. This item had been tentatively agreed on according to Ballis. Hinrichsen's memorandum also indicated that union-security language had been tentatively agreed to with Iron Workers Local 627.

Zschiesche regarding NASSCO's practice of withholding dues during the contract hiatus. Hinrichsen noted that NASSCO's September 30, 1992 comprehensive proposal included union-security language from the expired contracts and stated his belief that the Unions had rejected that proposal. Hinrichsen concluded, As a final note on this subject, we have had a substantial number of questions involving the legal issue of any requirements to join a union. Some employees have talked with the NLRB and found out that our contract language was technically incorrect. Even with the membership requirement in our expired agreement, they would only need to render the uniform periodic dues and fees to the Union. We are presently trying to determine if it is appropriate to more clearly spell out the fact that employees would have one of two options in order to be employed.

1. Become a member of the Union
2. Do not join the Union, but pay the appropriate fees and dues.

Zschiesche testified that he did not share the letter of November 12 with the other Unions because he thought it was responsive to a request he made on behalf of Machinists Local 389 for something in writing on union security to give to his International.

A negotiations update from the seven Unions dated November 19 stated that employees who were not members of the Unions would not get to vote on contract ratification and urged employees, "BE UNION-STAY UNION-KEEP YOUR RIGHT TO VOTE." A flyer from Iron Workers Local 627 dated November 20 announced that its executive board approved an increase in initiation and reinstatement fees to \$400 and urged delinquent members to become current in their dues.

A November 23 counterproposal was presented by the Unions covering various unresolved issues including successor and assigns language, wage scales, pensions, vacations, holidays, arbitration, scope of the agreement, new hire rates, hours of work, overtime, work outside the shipyard, subcontracting and safety, trainee probation and seniority, and firewatch and helper. Some of these issues were ultimately resolved while others remain open to this day including wages, pensions, and new hire rates.

By letter of November 24, Zschiesche wrote Hinrichsen to confirm that union-security provisions would be included in any collective-bargaining agreement signed by the parties. Hinrichsen answered by letter of December 7, noting that he had raised concerns about NASSCO's future staffing capabilities in light of the increase of at least one Union in initiation fees and stating, "that even with some form of union security provision the employees have options that we would want to spell out in the labor agreement." Zschiesche made no response to the December 7 letter nor were the issues raised in the letter discussed in negotiations at that time. However, prior to February 1994, Zschiesche and Hinrichsen discussed union security privately. Zschiesche told Hinrichsen that he understood that Iron Workers Local 627 had a tentative agreement with NASSCO to include the 1988-1992 union-security language in the new contract. Zschiesche told Hinrichsen that his Union was "very concerned [about] the status of our union security clause." Hinrichsen responded that NASSCO had some particular

issues it wanted to address but that overall union security was not a problem at that time.

On December 16, the Unions modified their counter-proposal on subcontracting drug testing originally submitted November 23. This modification was rejected by NASSCO on December 22.

3. 1994

In early 1994, the parties continued negotiations. Specific discussions concerned methods of payment for area stewards and chief stewards, safety representatives (both numbers and method of selection), duration of the agreement, and layoff of trainees. The parties exchanged ideas and proposals on these issues but no agreement was reached. Stewards' pay was especially troublesome. In a letter of December 22, 1993, Zschiesche declared that the Unions could not reach agreement under NASSCO's implemented steward system. Hinrichsen responded on January 10, 1994, stating that he felt the Unions' position was "unfortunate" and rejected the Unions' proposal. On January 11, Hinrichsen rejected the Unions' proposal for cost-of-living increases and requested a 5-year contract duration. On January 13, Machinists Local 389 made various proposals for premium pay, tool allowances, and wage upgrades and also stated a desire to review the requirements for outfitters. A negotiations update from the "Seven Shipyard Unions-NASSCO" dated January 21, stated that negotiations for the following week would include subcontracting and drug testing, odd workweek schedules, impact of national health laws on benefits, cost-of-living increases and duration of the contract.

On February 18, Hinrichsen proposed a union-security provision, in relevant part, as follows:¹⁸

All employees included in the bargaining unit shall, as a condition of employment, be or become a member of the Union not later than the thirty-first (31st) day following the effective date of this Agreement, or not later than the thirty-first (31st) day following the beginning of his or her employment, whichever is later, and each such employee shall, as a condition of continued employment, remain a member of the Union in good standing to the extent authorized by Section 8(a)(3) of the [Act]; provided that no current or future bargaining unit employee shall be required to tender to the Union an initiation fee which is greater than the initiation fee required by the Union as of January 1, 1994 in order to comply with the requirements of this Section. In the alternative such employees may instead tender to the Union an initial service fee and regular monthly service fees as required by law, however no current or future bargaining unit employee shall be required to tender to the union an initial service fee greater than the regular initiation fee required by the union as of January 1, 1994, in order to comply with this section.

The Unions caucused and returned to the table. Zschiesche told Hinrichsen that the major problem with the proposal was that it attempted to negotiate union initiation fees in the body of the contract. He asserted that this was an internal matter

¹⁸This proposal was subject to agreement allowing NASSCO to hire temporary employees to meet peak production needs.

for the Unions. Hinrichsen asked if the Unions were rejecting the proposal and Zschiesche replied affirmatively. Hinrichsen withdrew the proposal and annotated it, "withdrawn as of 2-18-94." Additionally, Iron Workers Local 627 took the position that they already had a tentative agreement regarding union security language.

Hinrichsen wrote to Zschiesche on February 24 that ratification votes on a contract settlement might take place around March 12. Zschiesche agreed that there were few open issues at that time¹⁹ and that ratification votes were being contemplated.²⁰ On February 25, Hinrichsen proposed union-security language, in relevant part as follows:

A. All employees in the bargaining unit who are members of the union or who have previously paid to the union an initiation fee shall as a condition of continued employment be required to tender to the union a monthly service fee in an amount equal the union's regular monthly dues.

B. All employees presently in the bargaining unit or who are hired into the bargaining unit in the future and have not previously paid to the union an initiation fee or initial service fee shall, as a condition of continued employment be required to tender to the union an initial service fee in an amount equal to the union's regular initiation fee in effect on January 1, 1994. Such fees must be paid to the union not later than the thirty-first day (31st) following the effective date of this Agreement or the thirty-first (31st) day following the beginning of his or her employment which ever is later.

Such employees shall as a condition of continued employment be required to tender to the union monthly service fees in an amount equal to the union's regular monthly dues.

The Unions voiced the same objection to this proposal as to the February 18 proposal; i.e., that this was an attempt to negotiate union initiation fees in the body of the contract. In addition, a concern was raised about incorporating financial core options in the body of the contract. Iron Workers Local 627 told Hinrichsen that it already had a tentative agreement with NASSCO incorporating the union-security language from the prior contract. According to Hinrichsen, he told Iron Workers Local 627 that this proposal was for all the Unions. Hinrichsen did not withdraw the February 25 proposal as he had the February 18 proposal.

In the meantime, Hinrichsen wrote to Godinez on March 4 regarding economic items specific to the Iron Workers' contract. The letter indicated that various aspects of the economic proposal had been agreed and some had been withdrawn. Language was proposed as to other items. No discussion regarding union security was contained in the letter and Ballis did not know of any discussion regarding union security since the tentative agreement had been reached.

¹⁹According to Zschiesche, as of March 3, 1994, there were about six open issues including wages, cost of living, successors and assigns, and steward's pay.

²⁰At one point, Machinists Local 389 had scheduled a ratification vote for the first weekend in March. Although Zschiesche agreed that there were many issues which had not been "T.A.-ed," he testified that in the 1988 ratification process, the same situation existed and that the Unions held ratification votes in any event.

On March 7, Zschiesche wrote Hinrichsen that it was not the current intent of Machinists Local 389 to increase its initiation or reinstatement fees. During a later bargaining session, Hinrichsen told the Unions that Zschiesche's letter of March 7, and other similar letters from other Unions did not resolve NASSCO's concerns about initiation fees. At about this same time, Hinrichsen learned that Iron Workers Local 627 was not going to implement its increase in initiation fees announced in November 1993.

In March, temporary hires were required by NASSCO to complete a sealift conversion project. A proposed temporary hire letter of agreement dated March 9, dealt, *inter alia*, with temporary hires and union security. As revised on March 14, the parties reached agreement regarding temporary hires. The agreement required that temporary employees, "be required to pay a monthly service fee to the union in an amount equal to the union's regular monthly dues." In addition, on March 17, the parties reached agreement on inclusion of a memorandum of understanding regarding seniority in the contracts. Hinrichsen wrote to Zschiesche on March 10, that a complete contract document for use at ratification meetings should be prepared by March 15.²¹ However, by letter of March 18, Hinrichsen stated to Zschiesche that because of disagreement "on certain major issues" the final offer could not be reduced to writing.

On March 17, Zschiesche and Ballis met with NASSCO President Dick Vortman and Vice President of Finance Fred Hallett. Zschiesche testified that the purpose of this meeting was to, "get some understanding on the union security issue and what we viewed as the institutional limits on addressing the issue of initiation fees in the body of the contract." The February 25 proposal was used as a basis for discussions. No agreement was reached.

A seniority subcommittee met over a period of several months in late 1993 and early 1994. Ballis and Zschiesche testified that a working agreement was reached with NASSCO Vice President Hallett in February or March 1994. They further testified that the agreement was verbal and the parties agreed to take the working agreement to the full negotiations as part of NASSCO's proposal with a recommendation from the Unions to approve it.²² There is no dispute that this working agreement was not initialed "T.A." in tentative agreement. In fact, on May 10, the subcommittee agreement was set forth in a letter of agreement.

By letter of March 24, Zschiesche wrote to Hinrichsen on behalf of the seven Unions stating that a caucus had led to tentative approval of several NASSCO proposals on hours of work, overtime, and trainee seniority for layoffs. Zschiesche also set forth new proposals for temporary hires, promotions, parking, and trolley reimbursement citing lack of movement on prior approaches to these issues. Finally, regarding

²¹ At about this same time IBEW International Representative Robbins stated that he would not let the local sign an agreement that froze initiation fees. Hinrichsen testified that he thereafter sent a proposal to IBEW Local 569 to take care of this problem. Archer denied ever seeing the proposal. It is unnecessary to resolve whether Archer saw it. I credit Hinrichsen that the proposal was sent. Similarly, Hinrichsen testified he received a fax proposal dated April 20 from IBEW Local 569 regarding union security. Archer denied that he sent it or, in fact, had ever seen it. I credit Hinrichsen that he received this fax.

²² Hallett did not testify.

NASSCO's proposal on an insurance requirement for business representatives, Zschiesche stated that because the parties had already agreed to contract language on visitation rights, this proposal, "was inappropriate and not bargaining in good faith at this point in our negotiations."²³ A meeting held on March 28 failed to yield agreement, new proposals, or progress on union security. At this time, however, Zschiesche shared Hinrichsen's optimism, as stated in a letter of March 31, that the parties would reach agreement.

By letter of April 29, Hinrichsen advised Godinez, business agent of Iron Workers Local 627, that after 16 months of negotiations, NASSCO was no longer willing to agree to prior contract union-security language and, accordingly, had made the two February proposals. In that same letter, which was read aloud at negotiations on April 29, Hinrichsen withdrew the prior tentative agreement with Iron Workers Local 627 and withdrew the February 25 proposal regarding union security so that NASSCO could review its position on union security. Zschiesche responded by letter of May 2, stating that he and the other Unions had not seen the Godinez letter and were not aware of it prior to it being sent. Zschiesche noted that Hinrichsen had not withdrawn the previous proposal on union security as to Unions other than Iron Workers Local 627 and stated that the issue of a tentative agreement with Iron Workers Local 627 on union security was a matter of individual bargaining with Iron Workers Local 627 and should not affect further negotiations with the six remaining Unions on that issue.²⁴

In addition, on April 29, the Unions made a counter-proposal regarding union security as follows:

A. All employees in the bargaining unit who are members of the Union or who have previously paid to the Union an initiation fee shall as a condition of continued employment be required to tender to the Union *monthly Union dues or a monthly service fee in an amount equal to the Union's monthly dues and maintain their financial responsibilities as or the same as Union members in accordance with the [Act]*.

B. All *other* employees presently in the bargaining unit or who are hired into the bargaining unit *during the life of this Agreement* shall, as a condition of continued employment be required to tender to the Union *an initiation fee or an initial service fee, in an amount equal to the Union's regular initiation fees, subject to the separate Letter on initiation fees*. Such fees must be paid to the Union not later than the thirty-first (31st) day following the effective date of this Agreement or the thirty-first (31st) day following the beginning of his or her employment whichever is later. These employees shall also, as a condition of continued employment, be required to tender to the Union *its monthly Union dues or monthly service fees in an amount equal to the Union's regular monthly dues and maintain their financial responsibilities as or the same as Union members in accordance with the [Act]*.

²³ This letter was admitted by stipulation of the parties as to authenticity only. I find that it is relevant as part of the ongoing negotiation correspondence between Zschiesche and Hinrichsen.

²⁴ This letter was admitted by stipulation of the parties as to authenticity only. I find that it is relevant as part of the ongoing negotiation correspondence between Zschiesche and Hinrichsen.

C. Failure of any employee to satisfy the financial obligations provided for in this Article may upon written request by the Union result in the termination of such employee. However, if payment of such fees is made within three (3) days of the date the employee is notified, the Company will not be obligated to discharge such employee.

The General Counsel introduced a document titled, "Thoughts on Union Situation" dated May 3, 1994. Hinrichsen testified that the initials RHV on this document indicated it was authored by Richard Vortman, the CEO of NASSCO. Hinrichsen recalled receiving this document through interoffice mail. He and Vortman may have discussed the materials set forth. One of the concerns set forth in the document is that employees may be deceived by traditional union-security language, such as that in the expired contracts, into thinking that they have to join the Union. Vortman's notes also reflect, "On the other hand, if [employees] do not want to belong to the [Union], [NASSCO] does not want to force them to belong." The memorandum notes Vortman's belief that his prior assumption that employees want to be union members can no longer be taken for granted due to, "more and more [employees] telling company they do not want union; Union rallies have very small attendance—Primarily stewards, etc. At least that number of [employees] have told management do not want to belong." Vortman noted that "U. leaders" made statements that without checkoff, less than half employees were voluntarily paying dues. Vortman concluded that several options for union security should be considered to alleviate these concerns. Hinrichsen testified that he did not specifically raise all of these concerns at the bargaining table. He stated at the table, rather, that NASSCO was concerned about the cost of becoming a Union member in order to work for NASSCO.

By letters of May 4, Hinrichsen advised Zschiesche and Archer that the Unions' April 29 counterproposal on union security was "unacceptable." Hinrichsen concluded that, "in view of the fact that the parties have rejected each others' proposals, the Company is reviewing its position on this issue and we will be preparing a new proposal on this issue within the next several days."

Thereafter, Hinrichsen heard a rumor that IBEW Local 569 was planning a ratification vote. Hinrichsen wrote to Archer on May 6, that many issues were unresolved and expressly withdrew NASSCO's prior union-security proposal as well as the February 23, 1993 comprehensive proposal. Hinrichsen hand delivered this letter. The ratification vote was conducted as scheduled and by letter of May 10, Archer informed Hinrichsen that IBEW Local 569 had ratified, "those changes to our Agreement that were tentatively approved between our respective negotiating committees," and had "granted full authority to our negotiating committee to execute a full collective bargaining agreement . . . once we have reached agreement on the final language for union security, the new seniority system and the stewards' clauses."²⁵

As previously mentioned a letter of agreement dated May 10 dealt with the issue of "Employee Seniority, Performance

Review, Ability and Communication System." Zschiesche testified that there was complete agreement on the new language as embodied in the May 10 letter of agreement.²⁶ As previously stated, I credit Zschiesche's testimony on this issue.

By letters of May 19, Hinrichsen wrote Ballis, Archer and Zschiesche with a new recognition clause, a new union-security proposal, and a dues and initiation fee checkoff authorization form. In relevant part, the union-security proposal stated,

All employees employed on the effective date of this Agreement, shall, within thirty calendar (30) days of the effective date, make a written election informing the Employer and the Union whether or not the employee wishes to become and/or remain a member of the Union in good standing as a condition of continued employment. All employees hired or recalled after the effective date of this Agreement shall, within (30) calendar days after their dates of hire or recall as applicable, make a written election informing the Employer and the Union whether the employee wishes to become and/or remain a member of the Union in good standing as a condition of continued employment.

A. Employees who make a written valid election to become and/or remain members of the Union in good standing as a condition of continued employment shall be required to maintain such membership as a condition of continued employment. Such written election to become and/or remain a member of the Union in good standing shall expire on February 1st of each year of the collective bargaining agreement or the expiration of the collective bargaining agreement, whichever shall occur first, unless the employee notifies the Company and the Union in writing between January 1st and January 31st of each year of the collective bargaining agreement that he or she wishes to remain a member of the Union in good standing.

B. For the purpose of this Article, membership in good standing shall consist of payment of initiation fees and monthly dues uniformly required by the Union as a condition of acquiring and retaining membership and which are in accordance with the provisions of the [Act].

C. Employees shall be advised in writing by both the Employer and the Union of their rights by the following notice:

- Employees of NASSCO have the right to choose whether or not they wish to become and/or remain a member of the Union as a condition of continued employment. Employees who choose to become and/or remain members of the Union as a condition of employment will be required to pay to the Union initiation fees and monthly dues uniformly required by the Union as a condition of acquiring and retaining membership and which are in accordance with the [Act]. This obligation will expire on February 1st of each year of the collective bargaining agreement unless you affirmatively elect in writing to extend your requirement to pay such dues and fees as a condition of your employment. This choice must be made between January 1st and January

²⁵This communication was not offered to prove the truth of the matters asserted therein. There are no allegations herein regarding execution or failure to execute a collective-bargaining agreement with IBEW Local 569.

²⁶Zschiesche noted that three items were modified at a later date.

31st of each year of the collective bargaining agreement.

. . . .

E. An employee who fails to file a timely election required under this Article shall be deemed to have rejected, withdrawn or terminated his or her membership.

Also included in this proposal was an indemnity provision not relevant herein.²⁷ By letter of June 20, Zschiesche stated to Hinrichsen that the Unions were reviewing the May 19, "open shop" proposal. Zschiesche further stated that, "We and our members agree that [the] discussions [we began in February up until your May 19 proposal] were and remain the basis of reaching a new Labor Agreement."²⁸ Hinrichsen responded by letter of June 24, stating that he thought the Unions had rejected the May 19 proposal, and in view of this rejection, it was now up to the Unions to counter on that subject.

Thereafter, Zschiesche requested a meeting with NASSCO CEO Dick Vortman to discuss union security. Zschiesche wanted several of the International union representatives to be present at such a meeting. By letter of July 8, Hinrichsen wrote that, "we do not believe such a meeting would be beneficial or fruitful." Once again, Hinrichsen invited the Unions to counter the May 19 proposal.

On July 28, the Unions submitted a counterproposal that the parties return to the company's union-security proposal of February 25 as a basis for further discussion on that issue. At a negotiation session in the summer, Hinrichsen asked, "If we could solve the question of union security could we get a contract based on what's on the table?" Zschiesche testified that the Unions caucused and returned. Each union representative replied in the affirmative to the question. Hinrichsen testified to the contrary that following the caucus, the various representatives responded with further questions and pessimism that there were many items to discuss. This is one of a very few credibility resolutions which must be made as between Zschiesche and Hinrichsen. I found both witnesses to be credible. They displayed intelligence and thoughtfulness throughout their testimony. Both withstood extremely strenuous cross-examination with equanimity. Logic, however, requires that I credit Hinrichsen in this instance. If, indeed, the Unions responded affirmatively, one would expect that there would have been a concern on their part to work out union security alone and dispense with negotiations on all other subjects. This did not occur. Rather, the parties continued to discuss all open items and there is no evidence that the Unions objected.

²⁷ Zschiesche recalled that Hinrichsen hand delivered the May 19 proposal to him. By letter of May 23, Zschiesche requested that, "inasmuch as the latest draft of proposed contract language . . . uses a hand-typed facsimile of our previous Agreement," the Unions propose that any language from the previous Agreement not identified as a change be considered a typographical error. By letter of May 24, Hinrichsen stated that he had just reviewed Zschiesche's letter of May 23, relating to the contract package and was unable to agree to Zschiesche's proposal. These letters do not reflect any concession made by Zschiesche regarding union security.

²⁸ This communication was not offered to prove the truth of the matters asserted therein. There is no charge before me regarding failure to execute a collective-bargaining agreement pursuant to this ratification vote.

Nevertheless, I find that NASSCO was well aware that if union security could be settled, all other issues would likely be resolved. Zschiesche testified regarding a meeting away from the bargaining table in the summer of 1994 with Hallett and Vortman. Zschiesche told them that if an agreement could be reached on union security, "we would have a collective bargaining agreement based on the terms and conditions presently on the table." No specific response was made by Hallett and Vortman, according to Zschiesche. In addition, according to Ballis, he and Shelton met with Hinrichsen regarding the May 19 proposal sometime during the summer and told him that if they had their old union-security language, all other open items were minor.

Petitions were circulated by Machinists Local 389 and Iron Workers Local 627 during the summer. In early September, Archer showed NASSCO Vice President Hallett a petition signed by 1170 employees stating they wanted contracts which required payment of dues and fees as a condition of continued employment. Hallett was not given an opportunity to authenticate the signatures.

On September 1, IBEW Local 569 filed an unfair labor practice charge in Case 21-CA-30245 (now Case 31-CA-21861) alleging, inter alia, that NASSCO bargained in bad faith. The charge was amended on November 21 to include the other six Unions.

By letter of September 12 from Hinrichsen to Zschiesche the subject of an employee vote on "closed shop" versus "open shop" was broached as a follow up to Archer's discussion with Hallett about the petition. Hinrichsen proposed that if a majority of employees in the seven units wanted "closed shop," the parties would sign an agreement containing a "Union Shop" provision and if a majority voted for "open shop," the parties would, "agree to sign the Agreement with the Open Shop provision currently in the Company's proposal."²⁹ Zschiesche responded to Hinrichsen on behalf of Machinists Local 389 on September 20 stating that he had forwarded the proposal to a vice president of the Union for further study.³⁰ Zschiesche also responded on behalf of the coordinated bargaining committee stating that he had distributed Hinrichsen's letter to the other Unions for study and comment.

On October 31, the Unions proposed that NASSCO offer voluntary dues deduction for those employees who submitted a proper authorization card pending negotiation of a different method.³¹ The Unions also stated that they had questions about the vote on union security proposed by NASSCO. At negotiations on that or a later date, the parties discussed these questions and NASSCO provided information on its proposal. Zschiesche testified that Hinrichsen stated that NASSCO's proposal for the vote was a working document. The parties specifically discussed whether union members or all employees would vote and what opportunities the Unions would have to address the electorate.

²⁹ Zschiesche understood this to be a reference to the May 19 proposal and Hinrichsen intended that the language be construed to reference the May 19 proposal.

³⁰ This letter was admitted by stipulation as to authenticity. I find that it is a relevant document.

³¹ Zschiesche testified that he thought NASSCO rejected the Unions' proposal on voluntary dues deduction. He thought he received a letter in November or December stating this rejection.

4. 1995

The parties stipulated that between November 10, 1994, and July 19, 1995, no meetings between NASSCO and the seven Unions took place through no wrong of any party. By letters of July 7 and 11, to Archer and Zschiesche, respectively, Hinrichsen withdrew NASSCO's May 19, 1994 union-security proposal in compliance with the informal settlement agreement in Case 21-CA-30245 (later renumbered Case 31-CA-21861).³² IBEW Local 569 rejoined coordinated bargaining in July. Ken Gentle, business representative for IBEW Local 569, confirmed this by letter of July 18 to Hinrichsen.³³ At a negotiation session on July 19, Zschiesche read from a list which he had prepared in advance of the meeting outlining open issues which needed to be discussed. Hinrichsen wrote to Zschiesche on July 21 confirming that IBEW Local 569 had rejoined coordinated bargaining and listing 12 open items including union security.³⁴ Although Zschiesche testified that Hinrichsen's letter accurately reflected the list which Zschiesche utilized at the July 19 negotiation session, Zschiesche was uncertain whether the issue of yard security was discussed in addition to the list of open issues.

Zschiesche was cross-examined extensively about what, if any, progress had been made between 1992 and 1994 which could be considered "progress" in negotiations or a break in the impasse which existed in 1993. He testified that even though many items were not initialed "T.A.," there nevertheless was movement on many issues including indemnity, area stewards pay, and safety representatives.

By memorandum of July 26, the seven Unions presented proposals on various issues. The union-security language which the Unions proposed was the language from the 1988-1992 agreements. Bargaining notes from the negotiations of July 26 indicate that the Unions believed that extensive discussion regarding seniority was required. However, as Zschiesche noted, the 19-page memorandum of agreement had been jointly agreed to which dealt with all seniority issues except the method for layoff of trainees. The Unions tentatively agreed to a tuition reimbursement proposal but would not agree to the medical program proposal. Many other items were discussed.³⁵ Hinrichsen stated in a letter to Zschiesche dated July 27 that the company was reviewing

³²The letter also stated that in February 1994, the Unions rejected two union security proposals made by NASSCO. Zschiesche disagreed, testifying that the Unions rejected the February 18 proposal but neither rejected nor accepted the February 25 proposal. Zschiesche testified that the Unions voiced objections to the February 25 proposal.

³³This letter was admitted by stipulation as to authenticity. I find that it is a relevant document.

³⁴These issues, as reflected in Hinrichsen's letter were (1) the preamble, (2) union security, (3) wages, cost of living and job premiums, (4) hours of work, (6) shop stewards and chief shop stewards pay, (7) seniority, (8) union safety representatives, (9) successor clause, (10) duration of agreement, (11) pension, and (12) trainee issues. Zschiesche maintained three versions of this list for various purposes. Yard security was written in at the bottom of one of these lists. Visitation rights were also included. As to visitation rights and yard security, Zschiesche annotated the lists to indicate that these were permissive subjects of bargaining.

³⁵These notes were authored by C. J. Gannon of NASSCO. Gannon works with Hinrichsen. Counsel for the General Counsel offered the notes in evidence without objection.

the Unions' proposal on union security. At negotiations on July 27, the parties tentatively agreed to a successor clause. Many other items remained open at this time including five wage issues. By letter of August 1, Hinrichsen wrote Zschiesche stating, "After careful consideration the Company cannot accept the Union proposal that would require the Company to force employees to become Union members or at least pay dues and fees to the Union as a condition of employment at NASSCO." The new proposals from NASSCO, presented at negotiation on August 1, were as follows:

UNION SECURITY PROPOSAL OPTIONS

(Select Option A or Option B)

Option A

The Company is willing to agree to the union security language contained in the Collective Bargaining Agreement (Article 4, Section 1) that expired on September 30, 1992 under the following conditions:

1. All bargaining unit employees will be allowed to vote on the single issue of whether or not the new labor agreement(s) should contain the old union security language that requires all bargaining unit employees to pay dues and fees to the Union as a condition of employment.

2. The vote will take place at the shipyard on a mutually agreeable date and time and will be by written secret ballot.

3. The vote will be conducted by an independent neutral party such as the Federal Mediation and Conciliation Service or the state mediation service.

4. The votes of all seven bargaining units will be pooled.

5. If more than 50% of the employees in the seven bargaining units vote to have the new labor agreement contain the same union security provisions as contained in the expired agreements, the Company will agree to include such language in all Collective Bargaining Agreements.

6. If 50% or less of the employees in the seven bargaining units vote for mandatory union membership as a condition of continued employment, the Union(s) agree that the new labor agreement(s) will not require union membership or payment of dues as a condition of employment.

Option B

Section 1

All bargaining unit employees employed on the effective date of this Agreement, shall, within thirty calendar (30) days of said effective date, make a written election informing the Employer and the Union whether or not the employee wishes to become and/or remain a member of the Union in good standing as a condition of continued employment. All employees hired or recalled after the effective date of this Agreement shall, within (30) calendar days after their dates of hire or recall, as applicable, make a written election informing the Employer and the Union whether the employee wishes to become and/or remain a member of the Union in good standing as a condition of continued employment.

A. Employees who make a written valid election to become and/or remain members of the Union in good standing as a condition of continued employment shall be required to maintain such membership as a condition of continued employment. Such written election to become and/or remain a member of the Union in good standing shall continue in effect for a period of two years following the date such election is made and for successive periods of two years or the expiration of the Collective Bargaining Agreement, whichever shall occur first, unless said employee notifies the Company in writing within the thirty (30) calendar day period just prior to the end of such two year period that he or she no longer wishes to remain a member of the Union in good standing as a condition of continued employment.

B. For the purpose of this Article, membership in good standing shall consist of payment of initiation fees and monthly dues uniformly required by the Union as a condition of acquiring and retaining membership and which are in accordance with the provisions of the National Labor Relations Act as amended.

C. Employees shall be advised in writing by either the Employer and the Union of their rights by the following notice:

- Employees of NASSCO have the right to choose whether or not they wish to become and/or remain a member of the Union as a condition of continued employment. Employees who choose to become and/or remain members of the Union as a condition of employment will be required to pay to the Union initiation fees and monthly dues uniformly required by the Union as a condition of acquiring and retaining membership and which are in accordance with the National Labor Relations Act as amended. This obligation will continue for two year periods following the date you elected to become a member of the Union or until the expiration of the Collective Bargaining Agreement, whichever shall occur first unless you notify the Company in writing within the thirty (30) calendar day period just prior to the end of the two year period mentioned above that you no longer wish to remain a member in good standing.

E. Any employee who fails to file a timely notice in writing that they no longer wish to remain a member in good standing will be required to continue their union membership in good standing until the next term period that would permit the employee to elect not to be a union member or until the expiration of the Collective Bargaining Agreement, whichever shall occur first.

Option B of the August 1 proposal was substantially identical to the May 19, 1994, proposal.³⁶ Ultimately, the informal settlement agreement involving the May 19, 1994, proposal was set aside and this litigation ensued. On August 2,

³⁶ A draft of similar language dated June 30, 1995, and annotated, "revised," was admitted in evidence without objection. Zschiesche stated that he did not see this language until August 1995. Hinrichsen testified that he did not give the June 30, 1995 "revised" draft to the Unions. He explained that it was a working draft provided to counsel for the General Counsel pursuant to subpoena.

1995, the parties met for negotiation.³⁷ Zschiesche told Hinrichsen that he considered NASSCO's August 1 union security proposal a regressive proposal. Zschiesche proposed that the parties establish a subcommittee to deal with union security. Although NASSCO did not believe union security could be resolved by subcommittee, a union subcommittee on union security, including Ballis, Gentil, and Zschiesche met with Hinrichsen four to six times.

On August 10, NASSCO modified option B as follows:

Employees who elect to become a union member will be required to remain a union member for a period of two (2) years. If at the end of such two (2) year period the employee elects to remain a union member such employee will be required to remain a union member for the remainder of the Collective Bargaining Agreement.

By letters of August 23 and 24, Hinrichsen told Ballis, as Union cochairman of coordinated bargaining at that time,³⁸ that NASSCO believed the union-security issue could best be resolved by use of option A in the August 1 proposal. Ballis replied by letter of August 25, that the Unions did not believe that the August 1 proposal was in compliance with the NLRB settlement agreement. In addition, the Unions proposed that NASSCO present a final offer including "union shop" and submit it for a vote of all employees. By letter of August 23, Hinrichsen rejected this approach because there were unresolved issues such as seniority, pay rates, COLA, steward, and length of the agreement. In addition, Hinrichsen rejected the idea of combining the union-security vote with a vote on other contract items because NASSCO would not know whether union security was a cause for particular votes. On August 31, Hinrichsen stated in a letter to Zschiesche that NASSCO was unwilling to agree to the Unions' proposal to return to the 1988-1992 union-security language.

C. Yard Security

The consolidated complaint alleges that since on or about August 1, 1995, NASSCO insisted as a condition of reaching any collective-bargaining agreement that the Unions include the following yard security provision in their contracts:

(A) The parties hereto recognize that the nature of the work performed at the Company's plant and the identity of the Company's primary customer require that security and order be maintained at and about the Company's premises at all times. Accordingly, the parties hereto agree that neither the Union nor members of the Bargaining Unit shall engage in any leafleting, rallies, use of bullhorns or other amplification devices, picketing or other demonstrations, for any cause or reason whatsoever, on the Company's premises.

³⁷ The notes of Steve Workman, industrial relations representative of NASSCO, were offered by counsel for the General Counsel. Respondent stipulated to the authenticity of the notes but not their accuracy or relevance. Workman was not called by any party to testify.

³⁸ Zschiesche was not involved in negotiations during the later half of August 1995.

(B) The restrictions set forth in subsection (A) above shall apply at all times of the day, including before shift, lunch periods, and after shift.

(C) For purposes of the restrictions set forth above, the Company's premises shall be defined as all areas west of the westernmost curb line of Harbor Drive, including all of the Companies' premises both inside and outside of the fenced perimeter of the Yard.

The consolidated complaint further alleges that the subject of yard security as set forth in the proposal is not a mandatory subject of bargaining but that NASSCO nevertheless bargained to impasse in support of this proposal on or about August 31, 1995. NASSCO agrees that it proposed the language above but asserts that an impasse had existed since October 2, 1992.

As mentioned above, in late February 1994, the Unions were considering holding ratification votes. Hinrichsen wrote to Zschiesche on February 24, 1994, that ratification votes on a contract settlement might take place around March 12, 1994. NASSCO's initial proposal to all Unions regarding yard security was presented on February 25, 1994, and was identical to the August 1, 1995, proposal quoted above. The Unions reacted "negatively" to the proposal and all parties agreed to consult with counsel regarding the proposal. Specifically, the Unions voiced concern regarding surveillance and eavesdropping on Union activity. The Unions were also concerned that the proposal incorporated public as well as private property. Hinrichsen told the Unions that the proposal was not meant to cover public property. In March 1994, Hinrichsen also added a paragraph D to the proposal which basically incorporated Section 7 of the Act.

By letter of July 28, 1994, Zschiesche proposed that NASSCO withdraw its May 19, 1994, yard security proposal and use existing rules which apply to all employees.

There were three bargaining sessions in July 1995 held on July 19, 26, and 27. In July 1995, Zschiesche told Hinrichsen that he believed that yard security was a permissive subject of bargaining. Zschiesche explained that this was the official position of the seven Unions pursuant to instructions from their respective International Unions. Thereafter, the seven Unions refused to bargain about yard security, although Zschiesche did not recall making a statement to Hinrichsen that they were refusing to bargain over the subject. He recalled that the official position taken was that the subject was permissive. The Unions took this position regarding NASSCO's indemnity proposal regarding plant visitation as well. By letter of August 1, 1995, Hinrichsen enclosed NASSCO's position on yard security which was, "The company believes that its proposal with respect to yard security is an appropriate subject of bargaining. Our proposal remains as is except that we are withdrawing paragraph D from our proposal." At negotiations the following day, Zschiesche stated that the yard security proposal constituted a permissive subject of bargaining. Respondent concedes that the proposal is a "nonmandatory" or "permissive" subject of bargaining.

III. ANALYSIS

A. Are Certain Allegations in the Amended Complaint Regarding Union Security Time Barred?

On September 1, 1994, IBEW Local 569 filed a charge in Case 21-CA-30245 (renumbered Case 31-CA-21861) against NASSCO alleging violations of Section 8(a)(1) and (5), as follows:

During the past 6-month period, [NASSCO] has failed and refused to bargain collectively and in good faith with the Charging Party by engaging in a course of conduct calculated to avoid reaching agreement.

By the above and other acts, [NASSCO] has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

At the time IBEW Local 569 filed this charge, it was not engaged in coordinated bargaining with the other six shipyard Unions. However, Archer attended the coordinated bargaining sessions and he received the same union-security proposals as did the other Unions. On November 21, 1994, Archer amended the charge to allege,

Since on or about May 1, 1994, [NASSCO] has failed and refused to bargain collectively and in good faith with [the seven shipyard Unions] by making regressive contract proposal for the purpose of frustrating collective bargaining and avoiding reaching agreement.

Prior to filing this amended charge, Archer had received authorization from the other six Unions to add their names to the charge. The complaint allegation based on this charge is as follows:

Since on or about May 19, 1994, [NASSCO] has presented and insisted on regressive collective-bargaining proposals on the subject of union security, which proposals were calculated to frustrate bargaining and avoid reaching agreement with the Unions.

Amendment of the charge occurred 6 months and 2 days after May 19, 1994, and, accordingly, was outside the 6-month period set forth in Section 10(b) of the Act. Nevertheless, an untimely allegation which is factually and legally related to the allegation in the timely charge is not time barred if it satisfies the "closely related" test. As set forth in *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988), the test has three factors, as follows:

First, we shall look at whether the otherwise untimely allegations are of the same class as the violations alleged in the pending timely charge. This means that the allegations must all involve the same legal theory and usually the same section of the Act (e.g., 8(a)(3) reprisals against union activity). Second, we shall look at whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the pending timely charge. This means that the allegations must involve similar conduct, usu-

ally during the same time period with a similar object (e.g., terminations during the same few months directed at stopping the same union organizing campaign). Finally, we may look at whether a respondent would raise the same or similar defenses to both allegations, and thus whether a reasonable respondent would have preserved similar evidence and prepared a similar case in defending against the otherwise untimely allegations as it would in defending against the allegations in the timely pending charge.

I find that the “closely related” test has been satisfied. The untimely allegation of bargaining in bad faith with the six Unions other than IBEW Local 569 is of the same class as the violation alleged with regard to IBEW Local 569 in that both involve Section 8(a)(1) and (5) of the Act and the specific allegation of engaging in a course of conduct calculated to avoid reaching agreement. In addition, parallel factual situations are involved in that both the allegations regarding IBEW Local 569 and the allegations involving the other six Unions arise from the same negotiation meetings and the same bargaining proposals. IBEW Local 569 took the same position regarding these proposals as taken by the other six Unions. Similarly, NASSCO has raised the same defenses, preserved the same evidence, and prepared the same case in defending against the allegations as to the six Unions as it used in defending the allegation as to IBEW Local 569.³⁹

B. Did NASSCO Bargain in Bad Faith by Presenting and Insisting on Regressive Union-Security Proposals Which were Calculated to Frustrate Bargaining and Avoid Reaching Agreement?

Section 8(a)(5) provides that it shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees. “To bargain collectively” is defined in Section 8(d) as:

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, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

Good faith, “presupposes a desire to reach ultimate agreement. . . . It requires active participation in the deliberations so as to indicate a present intention to find a basis for agreement.” *NLRB v. Insurance Agents’ Union*, 361 U.S. 477, 485 (1960).

³⁹A question and answer offer of proof presented by NASSCO sought to show the method by which IBEW Local 569 obtained permission from each of the other Unions to include them in the scope of the unfair labor practice charge. It also sought to prove involvement of regional office personnel in the process of amending the charge. I reserved ruling on this offer of proof but now reject it because I find this evidence is not relevant to the inquiry as set forth above.

When bargaining began in 1992, NASSCO agreed to include the expired contracts’ “union shop” language in any agreements reached. It withdrew this agreement no later than February 18, 1994. Withdrawal of the tentative agreement to include “union shop” language is not alleged as violative of the Act. All parties agree that the ground rules allowed withdrawal from a tentative agreement prior to full agreement being reached.⁴⁰ NASSCO proposed thereafter (1) on February 18, 1994, a combination of a form of “union shop” for current employees, a cap on initiation fees, and “agency shop” options for future employees which is not alleged to violate the Act; (2) on February 25, 1994, a combination of “maintenance of membership” and “financial core” options which is not alleged to violate the Act; and (3) on May 19, 1994, options for annual employee selections regarding Union membership which is alleged to violate the Act. Each of these proposals was more regressive than its predecessor as NASSCO readily admits. However, absent other evidence of bad-faith, regressive contract proposals are not violative of the Act. See, e.g., *I. Bachall Industries*, 287 NLRB 1257 (1988), enf. denied sub. nom. *Teamsters Local 75 v. NLRB*, 866 F.2d 1537 (D.C. Cir. 1989); *Challenge-Cook Bros.*, 288 NLRB 387 (1988); *Hamady Bros. Food Markets*, 275 NLRB 1335 (1985).

The May 19 proposal cannot be considered in a vacuum. Rather, the totality of circumstances must be examined in order to decide if the particular facts of this case indicate that NASSCO made the May 19 proposal in order to frustrate bargaining and avoid reaching agreement.⁴¹ Having examined these circumstances at length, I find that NASSCO did not bargain in bad faith based on the following facts in particular.

1. Changed circumstances: NASSCO hired approximately 600 bargaining unit employees between September 30, 1992, and May 1, 1994. By the summer of 1995, this number had risen to 1800. These employees, although members of the bargaining units, were not subject to checkoff of union dues and fees because NASSCO quit enforcing checkoff in May 1993. Some of these employees questioned the “union shop” language of the expired agreements and raised objections to the payment of initiation fees to the Unions. As a consequence, on November 12, 1993, Hinrichsen wrote Zschiesche that questions had been raised “involving the legal issue of any requirements to join a union.” Hinrichsen concluded that NASSCO was studying this issue to determine if it might be, “appropriate to more clearly spell out the fact that employees would have one or two options in order to be employed. 1. Become a member of the Union. 2. Do not join the Union, but pay the appropriate fees and dues.” Later that month, the seven Unions stated in a negotiations update that only union members would be allowed to vote on contract ratification and urged employees to stay Union. The following day, Machinists Local 389 announced that its executive board had voted to increase initiation fees from \$200 to \$400. In response to a letter from Zschiesche dated November 24 asking Hinrichsen to confirm that union

⁴⁰Moreover, the withdrawal occurred more than 6 months prior to IBEW Local 569 filing its original charge in this case.

⁴¹See, e.g., *NLRB v. American National Insurance Co.*, 343 U.S. 395, 410 (1952) (the meaning of good faith may be derived only from application to the particular facts of a particular case).

security would be included in a final contract, Hinrichsen stated that he had concerns about NASSCO's future staffing capabilities in light of the increase of at least one union in initiation fees. He concluded that he wanted to spell out employee options in any labor agreement. In addition, NASSCO had successfully survived a 3-week strike in October 1992, implementation of its final offer in February 1993 after it was rejected by the Unions, and six other brief but disruptive strikes or job-wobbling actions akin to strikes in March through June 1993. Based on these facts, I find objective, intervening changes of circumstances caused NASSCO to reexamine its position regarding union-security language as well as its relative negotiating strength.

2. Exchange of proposals: Discussions about union-security options began in November 1993 and continued through 1995. After Hinrichsen alerted Zschiesche to NASSCO's concerns about financial core membership and staffing in November and December 1993, four written proposals and one "working document" were exchanged and various positions were taken at negotiations and subcommittee meetings regarding union security. As a review of these exchanges reveals, the situation was fluid with proposals and movement on both sides. Moreover, after its first three proposals, which I have labeled "regressive," NASSCO proposed an election to let employees make the decision. The election proposal was made shortly after IBEW Local 569 filed its unfair labor practice charge but before it amended the charge.

The first written proposal, presented on February 18, contained traditional "union shop" language but placed a cap on initiation fees and set forth alternatives utilizing the terms, "initial service fee" and "regular monthly service fee." The Unions rejected this proposal because it attempted to negotiate union initiation fees in the body of the contract. This proposal is not alleged to violate the Act. The second NASSCO proposal was dated February 25. It contained a form of "maintenance of membership" for employees who were union members or who had paid an initiation fee to the Union, and a form of "agency shop" with a cap on initiation fees for those employees who had not previously paid initiation fees or initial service fees. The Unions stated the same objection to this proposal as to the February 18 proposal. The February 25 proposal is not alleged to be violative of the Act. Using the February 25 proposal as a base, on April 29, the Unions proposed a form of "maintenance of membership" and a form of "agency shop" with a cap on initiation fees set forth in a separate letter of agreement. The Unions viewed the February 25 proposal as a basis for agreement in their later correspondence. NASSCO rejected the Unions' April 29 counterproposal and on May 19, introduced the proposal which is at issue. Although Zschiesche stated that the Unions were studying this proposal, he also noted that the Unions believed that the February through May 18 discussions were the basis for reaching a new agreement. Hinrichsen responded stating he believed the Unions had rejected the May 19 proposal and should offer a counter. On July 28, the Unions submitted a counterproposal seeking to return to NASSCO's February 25 proposal as a basis for reaching agreement.

On September 12, after being shown a copy of the petition signed by 1170 employees, NASSCO proposed an election to be conducted by a third party on union security. The election, which was dependent on reaching agreement on all

other items, would pool the votes of all seven units, with the following options:

Closed Shop: I want the new Labor Agreement to require all bargaining unit employees to pay union dues and initiation fees to the Union as a condition of employment.

Open Shop: I want the new Labor Agreement to permit each individual bargaining unit employee the right to voluntarily choose for themselves if they want to be a Union member, and pay union dues and initiation fees to the Union as a condition of employment.

This proposal is not alleged to be violative as I understand the pleadings.⁴² Although Zschiesche responded that he had distributed this proposal for study and comment, no specific acceptance or rejection occurred and thereafter the Unions proposed a voluntary dues deduction for employees who submitted a proper authorization card. In addition, at further meetings in late 1994, the parties continued to explore NASSCO's proposal for an election. Specifically, they discussed whether all employees or only union members would vote and what opportunities the Unions would have to address the electorate. Through no fault of any party, no discussions occurred from November 20, 1994, through July 19, 1995. When the issue of union-security was discussed on July 26, 1995, the Unions proposed the old contract language while NASSCO introduced option A (an election to be conducted in all seven units by a neutral party to determine if a majority of employees want the new labor agreement to contain the expired contracts' union-security language) or option B (annual employee elections identical to the May 19 proposal). Based on the fluidity of these exchanges, I am unable to conclude that NASSCO's union-security proposals were calculated to frustrate bargaining and avoid reaching agreement with the Unions.

3. Other open issues: In opening and closing arguments, counsel for the General Counsel characterized the May 19, 1994, proposal on union security as a bombshell which was submitted for the sole purpose of frustrating ratification vote on a complete contract package. To be sure, Zschiesche and Hinrichsen corresponded in March 1994 about scheduling ratification votes. Although Hinrichsen thought a final document might be prepared by March 15, he later wrote that disagreement "on certain major issues" rendered reduction of a final offer to writing impossible. Significantly, I note that Zschiesche and Hinrichsen were considering this ratification vote after both the February 18 and 25 proposals on union security. Zschiesche agreed with Hinrichsen's assessment of March 31 that the parties would reach agreement. However, at this time the parties had reached no agreement on wages

⁴² In closing argument, counsel for the General Counsel characterized this proposal as self-serving and devoid of concession because employees always had the right to deauthorize by filing a petition with the NLRB. I agree that the timing of this proposal indicates that it may have been made, in part, in response to unfair labor practice allegations. I also agree that 30 percent of employees in any bargaining unit could petition to vote to deauthorize pursuant to Sec. 9(e). However, I disagree that the proposal was devoid of any concession. In the coordinated bargaining setting herein, a single vote of all employees to determine the scope of union security might be viewed as a concession and was certainly unavailable pursuant to Sec. 9(e).

(and there had been no progress on wages since 1993), cost of living increase,⁴³ successors and assigns, stewards' pay, contract duration, temporary hires, promotions, parking and trolley reimbursement. Although IBEW Local 569 held a ratification vote on May 10, there was no final agreement ratified and no unfair labor practice allegation is involved in failure to execute a contract at that time. None of the other Unions conducted ratification votes. Accordingly, I am unable to conclude that the May 19 proposal was offered for the purpose of preventing a final agreement from being ratified.

4. Compromise produced agreement on other issues: In March 1994, NASSCO and the seven Unions reached agreement on temporary hires requiring that these employees be required to pay a monthly service fee to the Union in an amount equal to the Union's regular monthly dues. In addition, Zschiesche wrote on March 24 that the Unions had tentatively approved NASSCO's proposals on hours of work, overtime, and trainee seniority for layoffs. A May 10 letter of agreement on seniority, performance review, ability and communication system was agreed upon in principle.

Based on a totality of the circumstances as set forth above, I find that NASSCO's actions on and after May 19, 1994, with regard to union security do not support a finding of bad faith bargaining. In particular, the changed circumstances of weathering the strike and job actions as well as the new hires questioning traditional union security requirements permitted modification of prior union-security proposals. See, e.g., *Aero Alloys*, 289 NLRB 497 (1988); *Olin Corp.*, 248 NLRB 1137, 1141 (1980); see generally *Hendrick Mfg. Co.*, 287 NLRB 310, 324 (1987); *Indiana Desk Co.*, 276 NLRB 1429, 1445 (1985); *Hickinbotham Bros. Ltd.*, 254 NLRB 96, 102-103 (1981). As Administrative Law Judge Robbins stated in *Hickinbotham*:

It is immaterial whether the Union, the General Counsel, or I find these reasons totally persuasive. What is important, and I so find, is that these reasons are not so illogical as to warrant an inference that by reverting to these proposals Respondent has evinced an intent not to reach agreement and to produce a stalemate in order to frustrate bargaining.

Cf. *Curtin Matheson Scientific*, 287 NLRB 350, 354 (1987) (offer which is not expressly withdrawn remains viable even if previously rejected).

Similarly, the reasons advanced by Respondent in this case for presenting its May 19 proposal are not so illogical as to warrant an inference of an attempt to produce a stalemate. Moreover, the evidence does not support a finding that the May 19 proposal was an attempt to thwart near agreement on a full contract. Rather, the parties were exchanging proposals on many other items which were open at the time. The "ratification" vote of IBEW Local 569 cannot be viewed as an indication that agreement on a full contract was

⁴³In rebuttal testimony, Ballis stated that the Unions acknowledged in 1994 (he could not remember the specific month) that the wage and COLA proposals might be all that NASSCO could afford and the Unions would accept that there was no more money. This testimony falls short of indicating agreement had been reached on wages and COLA. Moreover, Zschiesche, the chief negotiator, did not testify in accord.

imminent. In fact, no contract was ratified by that vote, as evidenced by Archer's letter to Hinrichsen following the vote.

Finally, after presenting the May 19 proposal, Respondent suggested another method of resolving the union-security issue. This was under discussion as well as the Unions' proposal that NASSCO offer voluntary dues deductions when a hiatus in negotiations occurred. Thereafter, NASSCO withdrew the May 19 proposal as part of a settlement agreement. At negotiations in August 1995, NASSCO reintroduced the May 19 proposal as an option. Because I do not find the initial introduction of this proposal unlawful, I do not find its reintroduction unlawful.

C. Did NASSCO Insist as a Condition of Reaching Any Agreement That its August 1, 1995, Yard Security Proposal be Included?

The duty to bargain in good faith is limited to wages, hours, and other terms and conditions of employment. As to other matters, the parties are free to bargain or not bargain. Insistence on inclusion of nonmandatory or permissive subjects constitutes a refusal to bargain over mandatory subjects of bargaining. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

All parties agree that the yard security proposal of August 1, 1995, was a permissive subject of bargaining. However, there is no evidence that NASSCO insisted that this proposal be included in any final agreement. In response to the Unions' position that the yard security proposal was permissive, Hinrichsen responded that NASSCO believed it was an appropriate subject for bargaining. There is no evidence that Hinrichsen said that yard security was required in any contract NASSCO might sign. He simply stated that it was an appropriate subject for bargaining. Accordingly, I grant Respondent's motion to dismiss this allegation.

CONCLUSIONS OF LAW

1. National Steel and Shipbuilding Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood of Electrical Workers, Local Union No. 569, AFL-CIO; International Association of Machinists and Aerospace Workers, Local Lodge 389, District Lodge 94, AFL-CIO; International Union of Operating Engineers, Local 12, AFL-CIO; International Brotherhood of Painters and Allied Trades, Southern California Painters and Allied Trades District Council No. 36, Local No. 333, AFL-CIO; Shipwrights, Boatbuilders and Helpers, Carpenters Local 1300, affiliated with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO; Shopmen's Local Union No. 627 affiliated with the International Association of Bridge, Structural, and Ornamental Iron Workers, AFL-CIO; Building, Material, Construction, Professional and Technical Teamsters, Local Union No. 36, International Brotherhood of Teamsters, are labor organizations within the meaning of Section 2(5) of the Act.

3. The General Counsel has failed to prove the allegations in the consolidated complaint that the Respondent has violated Section 8(a)(1) and (5) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴⁴

⁴⁴If 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

ORDER

The consolidated complaint is dismissed in its entirety.

_____ adopted by the Board and all objections to them shall be deemed waived for all purposes.