

Bryant & Stratton Business Institute and Local 2294, United Automobile Aerospace and Agricultural Implement Workers of America. Cases 3–CA–19749, 3–CA–19767, 3–CA–20132, and 3–CA–20132–2

March 31, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On February 13, 1998, Administrative Law Judge Steven Fish issued the attached decision. The Respondent filed exceptions and a supporting brief, the Acting General Counsel filed cross-exceptions and a supporting brief, and the Acting General Counsel, the Respondent, and the Charging Party filed answering briefs.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order as modified.³

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² In concluding that the Respondent violated Sec. 8(a)(5) and (1) by discontinuing the termination/retirement bonus, the judge found, inter alia, that even if the parties had reached impasse over the elimination of the bonus in 1992, the Respondent's many serious and unremedied unfair labor practices precluded a valid impasse at that time. In adopting this finding, we note that the Second Circuit similarly held, in extending the Union's certification year, that "any bargaining in the period immediately following Bryant's [1989–1991] unfair labor practices did not occur in a context free from the influences of its unremedied unfair labor practices." *Bryant & Stratton Business Institute v. NLRB*, 140 F.3d 169, 186–187 (2d Cir. 1998), enfg. 321 NLRB 1007 (1996) (*Bryant & Stratton I*), and 323 NLRB 410 (1997) (*Bryant & Stratton II*). We find it unnecessary to pass on the judge's alternative findings that the declaration of impasse in 1992 was premature in any event and that, even if a valid impasse had been reached in 1992, the Union's June 11, 1992 proposals were sufficient to break the impasse.

³ The General Counsel has excepted to the judge's failure to order the Respondent to send to the Board's Regional Office a copy of the records necessary to determine the backpay owed (the "backpay records"), and to include electronic copies of the backpay records, where the records are already maintained in such form, within the scope of the records preservation and production order. We find that electronic copies of the relevant records, where such already exist, are encompassed within the Board's traditional remedial language. See generally Fed. Rule Civ. Proc. 34 (definition of "document" includes data compilations). See also *Bills v. Kennecott Corp.*, 108 F.R.D. 459 (D. Utah 1985) (requesting party need not accept only data that exists in traditional forms, but may discover the same information when stored in electronic form in a computer); *National Union Electric Corp. v. Matsushita Electric Industrial Co.*, 494 F.Supp. 1257 (E.D. Pa. 1980) (same). Moreover, the Respondent has not established that it would be prejudiced in any way by a requirement that it produce electronic copies of these documents. Accordingly, and to clarify any ambiguity with respect to this matter, we have modified the recommended Order to

The judge found, inter alia, that the Respondent violated Section 8(a)(5) and (1) of the Act by conditioning a 1995 merit wage increase on the Union's waiving its right to file unfair labor practice charges with respect to the amount of individual increases.⁴ We affirm that finding for the reasons that follow.

Prior to the Union's selection as bargaining representative in 1989, the Respondent granted merit increases to unit employees annually unless economic conditions were adverse. The Respondent unlawfully discontinued these increases in 1989 after the employees chose to be represented by the Union.⁵ As a result of the Respondent's unlawful actions, employees received no merit increases from 1989 until after the Respondent's unlawful withdrawal of recognition in 1996. In 1992, the Respondent granted employees a 3-percent across-the-board wage increase. In 1994, the Respondent distributed a \$50,000 bonus pool among the unit employees, with the amount given to individual employees set by the Respondent at its discretion. Although aware of the 1992 and 1994 increases, the Union did not object to them or file unfair labor practice charges concerning the Respondent's unilateral actions.

In October 1994, at about the same time as the bonus distribution, the Union wrote to the Respondent and requested that it provide all unit employees a wage increase, since they had received only one increase in base wages since 1989 (the 1992 across-the-board increase). The Union's letter further stated, "Should you agree with this request, the UAW will not file an unfair labor practice charge claiming that the wage increase amounts to a unilateral change. However, we will retain our right to negotiate fair and equitable wages in our ongoing collective bargaining efforts."

provide for the production of electronic copies of the specified backpay records if they are stored in electronic form.

With respect to the General Counsel's proposed requirement that the Respondent submit copies of the necessary backpay records at the Board's Regional Office, however, we find that this litigation does not satisfactorily present the question of whether a respondent should be ordered to provide copies of its records in this manner. We accordingly decline to order the Respondent to do so in connection with this case.

⁴ We agree with the judge that, in light of the Respondent's serious unremedied unfair labor practices at the time, there is no merit to the Respondent's contention that it lawfully withheld the 1995 merit wage increase because the parties had reached impasse over the issue in 1992. As noted above, our finding in this regard is consistent with the Second Circuit's decision in *Bryant & Stratton*, supra, 140 F.3d at 186–187. In such circumstances, we do not pass on the judge's alternative findings, regarding this violation, that the declaration of impasse in 1992 was premature in any event and that, even if a valid impasse had been reached in 1992, the Union's June 11, 1992 proposals were sufficient to break the impasse.

In adopting the judge's finding that the Respondent's November 1, 1995 memorandum to employees concerning the 1995 denial of a merit wage increase violated Sec. 8(a)(1), we do not rely on the judge's analysis at Sec. VI,B, par. 16.

⁵ *Bryant & Stratton Business Institute v. NLRB*, supra, 140 F.3d at 181–182.

The Respondent did not reply to the Union's letter for 11 months. In September 1995,⁶ the Respondent advised the Union that it was "considering" providing unit employees with a merit increase that would average 3.25-percent effective in the October quarter, an amount "consistent with the increases awarded to other [unrepresented] Bryant & Stratton employees in 1995." The Respondent also stated that it assumed "that your letter means that the UAW has no objections to the merit increases that would be awarded in the October [1995] quarter." On September 29, the Union replied that, while it would not file charges over the implementation of a wage increase program, "we are not waiving our right to bargain over any individual increases (including the amounts) you may grant or not grant to any particular faculty member."

Also on September 29, the Respondent stated that it was not willing to grant the wage increase unless the Union also waived its right "to negotiate changes in the individual allocations of the merit increases." On October 4, the Respondent demanded that the Union agree to its terms or else "Bryant & Stratton will *not* implement the proposed increase and faculty salaries will continue at the current level for the foreseeable future. With your unambiguous statement of no objection, we are prepared to proceed with immediate implementation." (Emphasis in original.)

The Union replied on October 6 that it wished to reserve the right to protest in the event that an employee's increase was "arbitrary and discriminatory" but that it would not protest the granting of a wage increase despite the fact that the parties were not at impasse and negotiations had not concluded. Accordingly, the Union requested that the Respondent specify the amount of the proposed merit increase for each unit employee.

On October 18, the Respondent stated that it would not give employees the increase unless the Union "clearly and unambiguously indicates that litigation will *not* result." (Emphasis in original.) The Respondent provided information on the method it proposed to use to determine merit increase amounts but declined to specify the amounts it planned to give employees on the grounds that "[n]o individual decisions have yet been made." The Union responded on October 25 that it was "prepared to waive its right to file unfair labor practice charges involving any aspect of the school's plan for the implementation of a merit increase program, as long as the employer is willing to provide some mechanism for assuring that the merit increases are not arbitrary." In this regard, the Union proposed that any disputes be subject to review through a grievance-arbitration procedure.

The Respondent never replied to the Union's offer of a grievance-arbitration procedure, but instead issued a memorandum, dated November 1, to its employees ad-

vising them that it had sought approval from the Union to give employees a wage increase, but the Union had refused to do so and that it therefore would not give employees the wage increase. The memorandum stated that the Union sought to retain the right-to-pass judgment on the amount of each employee's increase and had proposed that increases be subject to review through a grievance-arbitration process. The Respondent's memorandum stated that it had "no interest in permitting the determination of your increase to be controlled by an outsider, be it the UAW or an arbitrator We will not be providing the merit increase because of the condition your collective bargaining representative has imposed on us."

The Respondent notes that unions may waive their statutory right to bargain over wages, and asserts that it was therefore entitled to withhold the wage increase unless the Union did so in this case. We reject this contention.⁷

The correspondence between the parties set forth above demonstrates the Respondent's willingness to grant a merit increase only if the Union agreed not to file unfair labor practice charges concerning any aspect of the increase. The Respondent's demand that the Union waive its right to file unfair labor practice charges concerning the subject matter of the wage increase was a nonmandatory subject of bargaining. *Laredo Packing Co.*, 254 NLRB 1, 18-19 (1981); accord: *Reichhold Chemicals*, 288 NLRB 69, 71-72 (1988), *enfd.* in pertinent part 906 F.2d 719 (D.C. Cir. 1990), *cert. denied* 498 U.S. 1053 (1991). Thus, while the Respondent was entitled to seek such a waiver in good-faith negotiations, it could not lawfully condition agreement on a wage increase on the Union's consent to such a waiver. *Laredo Packing* at 19; see also *Ellicott Development Square*, 320

⁷ The Respondent also asserts that its conduct with respect to the 1995 merit increase merely represented a lawful attempt to "reach a settlement" so the faculty could receive an increase in wages. We reject the Respondent's characterization of its conduct in this respect as a good-faith effort to reach a "settlement." In making this argument, the Respondent ignores the fact that, as noted above, it was obligated to provide a merit increase to employees in 1995, because annual merit increases were an established term and condition of employment at the time of the Union's selection as bargaining representative in 1989. *Bryant & Stratton Business Institute v. NLRB*, *supra*, 140 F.3d at 181-182. Thus, the Respondent, in effect, withheld an established term and condition of employment, which it was legally obligated to provide regardless of the Union's actions, because the Union would not waive its right to file unfair labor practice charges.

Even apart from the Respondent's prior unfair labor practices, the Respondent did not engage in good-faith bargaining before refusing to proceed with the merit increase. To the contrary, it is undisputed that the Respondent never replied to the Union concerning its October 25 proposal that disputes be resolved through a grievance-arbitration procedure before telling employees that it had rejected the proposal. As the judge found, the Respondent's failure to communicate its position to the Union first constituted unlawful direct dealing. See *Ad Art, Inc.*, 290 NLRB 590, 605-606 (1988). We find that its unlawful actions in this regard belie its claim to have sought in good faith to achieve a "settlement."

⁶ All dates hereafter are in 1995.

NLRB 762, 772 (1996), *enfd.* 104 F.3d 354 (2d Cir. 1996) (table).

In addition, the Respondent refused, without explanation, the Union's request that the Respondent provide it with the specific amounts of each employee's proposed increase before proceeding; instead, the Respondent declared it would grant the increase only if the Union agreed not to file charges over the treatment of individual employees before the amounts were determined.⁸ Finally, the Respondent's bad faith is further demonstrated by its subsequent actions in unlawfully blaming the Union for its own decision not to give employees a merit increase. *Alachua Nursing Center*, 318 NLRB 1020, 1031 (1995).

Under all of the foregoing circumstances, we find that the Respondent, by conditioning the 1995 merit wage increase on the Union's waiver of the right to file unfair labor practice charges over discrimination in the amount of an employee's increase, violated Section 8(a)(5) and (1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Bryant & Stratton Business Institute, Buffalo, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

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

"(h) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

Michael Israel, Esq., for the General Counsel.

Robert S. Gilmore and James Ryzdel, Esqs. (Jones, Day, Reavis & Pogue), of Cleveland, Ohio, for the Respondent.

Jennifer R. Swig, Esq. (Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, LLP), of Buffalo, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN FISH, Administrative Law Judge. Pursuant to charges and amended charges filed by Local 2294, United Automobile, Aerospace and Agricultural Implement Workers of America (the Union or the Charging Party), the Regional

Director for Region 3 issued an order consolidating cases, consolidated complaint, and notice of hearing on October 23, 1996, alleging that Bryant & Stratton Business Institute (Respondent) violated Section 8(a)(1), (3), and (5) of the Act.

On December 4, 1996, the General Counsel filed a Motion for Partial Summary Judgment with the Board. On April 8, 1997, the Board granted the General Counsel's motion and remanded the remaining allegations in the complaint for hearing.

The hearing was conducted before me on September 24 and 25, 1997, in Buffalo, New York. Briefs have been filed by all parties and have been carefully considered. Based on the entire record,¹ I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent, a corporation with offices and places of business in Buffalo, New York, as well as other locations within New York State, is engaged in the business of providing education in business and technical subjects. During the 12-month period preceding the issuance of the complaint, Respondent derived gross revenues in excess of \$1 million and purchased and received at its various New York State facilities products, goods, and materials valued in excess of \$50,000 directly from points outside the State of New York.

Respondent admits, and I so find, that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act. It is also admitted and I so find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. PRIOR RELATED CASE *BRYANT & STRATTON INSTITUTE*, 321 NLRB 1007

On August 26, 1996, the Board issued a Decision and Order in the above-entitled case affirming with a few minor modifications, the decision of Administrative Law Judge Kleiman, that Respondent committed numerous violations of Section 8(a)(1), (3), (4), and (5) of the Act.

More specifically, it was found that Respondent violated Section 8(a)(1) of the Act by threatening employees with discipline if they engaged in protected activities, and Section 8(a)(1) and (3) of the Act by unlawfully issuing warning notices to eight employees, substandard evaluations to three employees, and by reducing an employee from full-time to a part-time instructor, because of the employees' union activities.

It was found by the Board that Respondent committed a number of violations of Section 8(a)(1) and (5) of the Act, including, *inter alia*, the failure to provide the Union with requested information concerning salaries, wage increases, job evaluation plans, part-time faculty and a facility evaluation plan; making unilateral changes absent a valid impasse, by discontinuing its policy of annual wage increases and reviews as of November 1989,² changing from a 4 to a 5-day teaching

¹ While every apparent or nonapparent conflict in the evidence may not have been specifically resolved below, my findings are based on my examination of the entire record, my observation of the witnesses' demeanor while testifying, and my evaluation of the reliability of their testimony. Therefore, any testimony in the record which is inconsistent with my findings, I hereby discredit.

² With respect to this allegation, the administrative law judge had found that Respondent's conduct was also violative of Sec. 8(a)(1) and (3) of the Act. The Board found it unnecessary to pass on that finding

⁸ We agree with the judge that the Union's concern that increases would be awarded in a discriminatory fashion was well founded in light of the Respondent's prior unfair labor practices, including unlawfully giving poor evaluations to union supporters. See *Bryant & Stratton I*, *supra*, 321 NLRB at 1032-1034.

schedule at its downtown Buffalo facility, changing its instructor. Compensation plan to eliminate extra compensation for extra class sections and class preparations, changing its academic calendar, increasing the 1992 summer quarter and requiring instructors to teach classes the first 2 days of examination week, changing its policy regarding the ending of classes, and changing its policy regarding facility attending skills improvement classes. The Board also found that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to meet at reasonable times for contract negotiations, and by refusing to bargain collectively in good faith with the Union between the period of January 1990 and March 13, 1991.³

The Board ordered Respondent to cease and desist from engaging in the unlawful conduct found, and affirmatively to furnish the information requested by the Union; rescind the warning notices and unlawful evaluations issued to the employees discriminated against by Respondent, rescind the unilateral changes that it made, including the discontinuance of its annual wage reviews; make whole the employees that Respondent discriminated against, as well as the employees who suffered losses as a result of Respondent's discontinuance of its annual wage reviews and increases and other unlawful unilateral changes that it made; and to bargain collectively in good faith with the Union.

In connection with the latter requirement, the Board specifically discussed and affirmed the administrative law judge's extension of the certification year "to allow the Union a reasonable time for good-faith bargaining free from the influences of the unfair labor practices previously committed by Respondent." *Id.* at 1007 fn. 5.

The Board considered and rejected Respondent's assertion that the Regional Director's dismissal of a charge in Case 3-CA-17199 established that an extension of the certification year was not an appropriate remedy, since the Regional Director's dismissal of letter concluded that a valid impasse had been reached on or about June 12, 1992. The Board found no merit to Respondent's assertion that the Regional Director's implicit finding that the parties engaged in good-faith bargaining as of June 12, 1992, obviated the need for an extension of the certification year, since it is well established that the General Counsel's exercise of his prosecutorial discretion not to issue a complaint is not binding on the Board in its disposition of a separate related case. *R.E. Dietz Co.*, 311 NLRB 1259, 1265 (1993).

The administrative law judge made a number of factual findings and conclusions that the Board did not modify, which are pertinent to an analysis of the instant matter. Thus he credited and relied on the testimony of Kevin Crosby and John Burke two former employees of Respondent, who held apparent managerial positions at the time of their employment, concerning their conversations with James Pautler, Respondent's institute director. Thus, Pautler informed both of them that the primary reason that Respondent suspended the salary review process and froze wages were to use the issue of wage increases as leverage in negotiations with the Union, to contribute to faculty dissatisfaction with the Union and frustration with the collective-bargaining process, particularly among newer faculty with the hope and expectation that such faculty dissatisfaction and

frustration would lead to a recertification petition against the Union.

Pautler also told Burke that Respondent was in no hurry to move negotiations along or reach agreement, since time was on its side, because the longer it took, "the more likely the people be to throw out the Union." Pautler added that these views were held by Respondent's owner Bryant Prentice III, as well as other of its high officials.

In crediting the testimony of Crosby and Burke as related above, the administrative law judge relied in part on an adverse inference drawn against Respondent based on its failure to call Prentice as a witness concerning his antiunion animus.

The judge also concluded that Respondent's established practice was to conduct faculty reviews and grant increases in July of each year if its downtown Buffalo campus, and at its other campuses on an individual faculty member's anniversary dates. Further he found that the Union had during negotiations, urged Respondent to continue its customary practice of conducting these reviews and granting such increases even though bargaining was still in process. However, Respondent did not do so, and notified its employees by memo of January 25, 1990, that it was putting monetary reviews on hold "pending the outcome of negotiations." Thus, for the years 1990 and 1991 and in 1992 up to the prior hearing, Respondent did not conduct its normal practice of conducting reviews and granting increases, which as noted the Board concluded was violative of Section 8(a)(1) and (5) of the Act.

The judge also made findings concerning the various bargaining sessions conducted by the parties in assessing the allegation of surface bargaining. In that connection he noted that the issue of a union-security clause came up frequently during negotiations, and that Respondent consistently rejected the Union's demand for a union-security clause. Respondent asserted that it wanted union membership to be voluntary, felt that such a clause would inhibit Respondent from obtaining the best qualified teachers. It also added as an additional reason for rejecting this demand, that the Union won the election by such a small margin, and Respondent felt that the Union lacked substantial support faculty members.

However, Respondent's chief negotiator, James Rydzal testified at that hearing that Respondent had not ruled out the possibility of agreeing to some type of union-security clause. This position was also reiterated in Respondent's brief to the administrative law judge.

The judge, however, apparently rejected Rydzal's testimony in this regard, and relying on the testimony of Respondent's official Ley that no alternatives to Union's security proposal was discussed among Respondent's bargaining committee prior March 12, 1991,⁴ relied in part on Respondent's bargaining over the union-security clause to find bad-faith bargaining.⁵

⁴ The administrative law judge made some reference to counterproposal made by Respondent with respect to union security subsequent to March 12, 1991, but the decision does not detail the specifics or the date of this counterproposal. I suspect that the administrative law judge may have been referring to the conversations between Rydzal and Union Official Thomas O'Donnell on this subject described more fully below.

⁵ While the Board found it unnecessary to rely on the evidence of Respondent's bargaining regarding a union-security clause in upholding the administrative law judges' surface bargaining conclusion, it did not modify or disavow any of the administrative law judge's factual findings with respect to that issue.

of the administrative law judge because it would not materially affect the remedy.

³ The unit involved includes full-time faculty employed at two locations in Buffalo, one in Lackawanna, and one in Clarence, New York.

The issue of seniority also received some attention from the administrative law judge. Essentially Respondent's position throughout the negotiations was to totally reject the use of seniority in any respect. In fact it made a specific proposal at one session that read, "Seniority shall not be a factor in making class assignments or for any other purpose."

While Rydzal testified that Respondent had not ruled out the possibility of accepting some type of seniority principles, the administrative law judge again relied on Ley's testimony that Respondent was unable to come up with a proposal that would be compatible with Respondent's workplace, and concluded that its proposal on seniority was "disingenuous" and an indicium of bad faith.⁶

Additionally, the judge found that during the bargaining sessions through March 12, 1991, the parties bargained only on noneconomic issues, and the parties had agreed to tackle noneconomic issues first. However, on the 10th bargaining session on October 4, 1990, Rydzal asked when the Union would be presenting its economic proposals. O'Donnell replied that the parties had agreed to settle the noneconomic issues first and that some of these still remained unresolved. Rydzal replied that Respondent had very little movement left on noneconomic issues and that the parties were close to an impasse on negotiations. O'Donnell disagreed and stated that a number of issues were not fully discussed, the parties were far from reaching impasse, and that the Union had given new proposals to Respondent at that very meeting. O'Donnell added that if Respondent had an economic proposal to make, the Union would review and discuss it. Rydzal replied that Respondent would submit such a proposal.

However, Respondent did not submit such an economic proposal at any of the next several sessions. At the meeting of February 12, 1991, Rydzal asserted that the parties had gone for enough on noneconomic issues and requested the Union's economic proposals. The Union responded that noneconomic issues still remain unresolved.

At the meeting of March 12, 1991, after additional bargaining on noneconomic issues, Respondent refused to agree to further bargaining meetings unless the Union presented it with the Union's economic proposals. The complaint alleged surface bargaining by Respondent through the meeting of March 12, 1991. The administrative law judge permitted testimony concerning subsequent meetings, which included six sessions and two private meetings between Rydzal and O'Donnell. However, in making his decision, the judge concluded that the meetings subsequent to March 12, 1991, were irrelevant to a determination of the surface bargaining allegation and did not consider such evidence. He relied on several factors in finding such a violation, including the aforementioned testimony of Crosby and Burke concerning Respondent's bargaining strategy to undermine the Union and lead to a recertification, highlighting Respondent's unilateral suspension of faculty review wage increases, which he found to be intended to achieve these goals.

The judge also relied on Respondent's failure to meet at reasonable times, its failure to provide relevant information to the Union, and the other unilateral charges that Respondent made without consulting the Union.

Accordingly, based on the above reasons, the administrative law judge concluded and the Board agreed that Respondent

bargained in bad faith with the Union between January 1990 and March 12, 1991.

III. BRYANT & STRATTON II, 323 NLRB 410

As noted above, the Board on April 8, 1997, issued a decision in 323 NLRB 410 (*Bryant & Stratton II*), wherein it granted General Counsel's Motion for Partial Summary Judgment. It found that Respondent had unlawfully withdrawn recognition from the Union on April 19, 1996, and since May 31, 1996 unlawfully refused to supply information to the Union, in violation of Section 8(a)(1) and (5) of the Act.

The Board noted therein that in the previous case discussed above (*Bryant & Stratton*), it found that Respondent had "committed numerous serious unfair labor practices, including failing to bargain in good-faith from January 22, 1990, through March 12, 1991." The decision also provided for a 1-year extension of the Union's certification year to allow for a reasonable time for bargaining free from the influences of the unfair labor practices committed by Respondent.

Further the Board concluded that since Respondent had not complied with the Board's Order, its withdrawal of recognition, as well as the refusal to supply information was unlawful. The Board in its remedy section ordered Respondent to bargain on request with the Union, and that it shall construe the initial period of the certification as beginning on the date that Respondent complies with this Order. The Board added a footnote to that remedy, (id. At 411 fn. 4.) as follows:

⁴ Alternatively, we reaffirm our prior Decision and Order and find that a 1-year extension of the Union's certification year from the date the Respondent begins compliance with this Order is necessary for the reasons stated therein. *Bryant & Stratton Business Institute*, 321 NLRB 1007 fn. 5 (1996). In this regard, the Respondent withdrew recognition without complying with the Board's prior Order and engaging in good faith bargaining.

Bryant & Stratton I and *Bryant & Stratton II* were consolidated for enforcement, and oral argument was held before the Second Circuit Court of Appeals. To date no decision has been issued by the court.

IV. THE SERVICE OF THE CHARGES

A. Facts

Respondent has denied that the charges filed by the Union in Cases 3-CA-19749 and 3-CA-19767 were served on it on November 22 and December 1, 1995, as alleged in the complaint.

The charge in Case 3-CA-19749 was filed on November 22, 1995, and alleges that Respondent violated Section 8(a)(1), (3), and (5) of the Act by withholding a wage increase from its employees and placing the onus on the Union for its failure to grant such an increase. The record with regard to such charge includes the charge which was addressed to Respondent at its address at 633 Delaware Avenue, in Buffalo, as well as the standard form letter which accompanies the charge, dated November 22, 1995, and addressed to Respondent, Attorney Bryant H. Prentice, CEO. On the second page of this letter an affidavit of service signed by an agent of the Region certified that the charge was mailed by certified mail to Respondent on November 22, 1995. The record does not include the green return receipt card for this charge. Respondent offered no testimony from any witness or any other evidence as to when it received

⁶ The Board made reference to this finding in its decision, thereby affirming this conclusion.

this charge or when it received notice of the charge. Prentice was not called as a witness, and while Rydzel testified concerning his first knowledge of the charge in Case 3-CA-19767, he offered no testimony concerning the receipt of the charge in Case 3-CA-19749.

The charge in Case 3-CA-19767 was filed on November 30, 1995, and alleges that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally changing its policy regarding termination retirement bonus without negotiating with the Union. This charge was also addressed to Respondent at its Delaware Avenue location, and was also mailed by certified mail to Respondent along with an accompanying charge letter on December 1, 1995, also to the attention of Bryant Prentice. The record also contains an affidavit of service that the charge was mailed on December 1, as well as a green card from the Post Office, dated December 5, 1995, which contains a signature of the addressee.

As noted Prentice did not testify and no other official or employee of Respondent testified concerning the receipt or nonreceipt of this charge. However, Rydzel testified that his first notification of the charge was sometime in the spring of 1996 when his associate Gilmore received a call from the Region asking for Respondent's position statement on the charge, which was then 4 or 5 months old. At that time according to Rydzel, the Region sent him a copy of the charge which was the first time that he saw a copy of this charge. He further testified that at that time he had discussions with Respondent's officials concerning the issue of the retirement bonus in connection with the Board's investigation and the preparation of a position statement.

The charge in Case 3-CA-20132 was filed on June 24, 1996, and served by regular mail on Respondent at the same Delaware Avenue address to the attention of Prentice. Similarly the charge in Case 3-CA-10132-2 was filed on July 29, 1996, and served in the same fashion to the same address.

Respondent admits that it received the charges in Cases 3-CA-20132 and 3-CA-20132-2. Finally, the amended charge in Case 3-CA-10232-2 was filed on October 3, 1995, and mailed to Respondent on October 7, 1995, at an address at 40 North Street, Buffalo, New York. Respondent also admits that it received this amended charge.

B. Analysis

Turning first to the charge in Case 3-CA-19767, since General Counsel has produced the signed return Post Office receipt, as well as an affidavit of service, this evidence is sufficient to constitute proof of service. Section 102.111 of the Board's Rules and Regulations.

Moreover, although Respondent's attorney testified that *he* (emphasis added) did not receive notice of this charge until the spring of 1996, no officer, official, representative, or other agent of Respondent was called as a witness to testify under oath that Respondent failed to receive this charge on or about December 1, 1995, as alleged in the complaint. *Electrical Workers IBEW Local 11 (Anco Electrical Contractors)*, 273 NLRB 183, 191 (1984). Similarly, no witness was called by Respondent to testify as to Respondent's procedure with respect to receipt of registered mail. *General Marine Transport Co.*, 238 NLRB 1372, 1376 fn. 11 (1978), enf. denied on other grounds, but affirmed in pertinent part 619 F.2d 180, 186 fn. 7 (2d Cir. 1980). In that connection, I note that Prentice, Respondent's official to whose attention the charge letter was ad-

ressed failed to testify. I deem it appropriate to draw an adverse inference from Respondent's failure to call him to testify on this subject, and conclude that his testimony would have been unfavorable to Respondent in this area. *Bryant & Stratton I*, supra at 1020; *International Automated Machines, Inc.*, 285 NLRB 1122, 1123 (1987).

Finally, I note that Respondent admitted that it received other documents such as the charges in Cases 3-CA-10132 and 3-CA-20132-2, which were mailed to the same address (633 Delaware Avenue) and directed to the attention of Prentice. *Dix Construction, Inc.*, 304 NLRB 1133 fn. 1 (1991).

Accordingly, based on the above analysis and authorities, I conclude that service of the charge in Case 3-CA-19767 has been established and that Respondent received the charge on/about December 5, 1995.

With respect to the charge in Case 3-CA-19749, I find for essentially the same reasons that service has been established. While the General Counsel has not been able to produce the signed Post Office receipt as he did with respect to the charge in Case 3-CA-19767, this defect is not fatal in view of the other factors discussed above. *Dix*, supra; *Anco*, supra; *General Marine*, supra.

Thus with respect to this charge, once again Respondent produced no witness to testify as to whether it received this charge, nor to its procedures for receipt of certified mail. It is once again appropriate to draw on adverse inference against Respondent for its failure to call Prentice as a witness on the issue, and I conclude that his testimony would be unfavorable to Respondent concerning receipt of this charge. Finally, Respondent admitted that it received subsequent charges mailed to the same address, and a signed return receipt from the Post Office with respect to the charge filed in Case 3-CA-19767 establishes that such a charge was received a mere 1 week later at the same address.

Therefore, I also conclude based on the foregoing, that service of the charge in Case 3-CA-19749 has been established as well, and that Respondent received the charge shortly after November 22, 1995.

V. THE TERMINATION OR RETIREMENT BONUS

A. Facts

Prior to the Union's certification Respondent provided its employees several benefits, including a defined pension plan and a 401(k) plan. The pension plan had been frozen by Respondent sometime in 1989, which meant that no further contributions were being made on behalf of employees. The 401(k) plan was an account set up by Respondent into which employees could make deferred salary contributions, but which did not include a matching contribution by Respondent.

These benefits are set forth in Respondent's employee manual entitled "Working with Bryant & Stratton," along with another benefit which is described as follows:

In addition to the benefits provided under the Retirement Plan, employees terminating their service after twenty (20) years or longer will receive a termination bonus from Bryant & Stratton equal to sixty (60) working days salary at their current rate of pay.

This bonus was referred to during the negotiations, and at the trial by various witnesses as a "termination bonus," "retirement bonus," or "pension bonus." It is undisputed that the parties were talking about the same bonus, although they would use

different terminologies. I shall for the most part use the phrase "termination bonus," since this is the term used by Respondent in its own manual, and because this description more accurately describes the benefit, which is admittedly payable to any employee who leaves Respondent's employ (after 20 years of service) whether or not they retire.

Jean Whitney was employed by Respondent as an instructor at its Buffalo campus from July 1, 1974, until April 1, 1995, when she retired. On or about March 22, 1995, Whitney spoke to William Schatt, director of the Buffalo campus, and asked about her termination bonus. Schatt informed her that she was not eligible for the bonus, and that only two faculty members, Carolyn Merlino and Sharon Murphy, were eligible for the bonus, because they had been "grandfathered."

Whitney then contacted her academic dean, Boxbeck, about the matter, and she referred her to John Mitchell, Respondent's director of human resources. She asked him about her eligibility for the termination bonus, as well about the status of her medical insurance and accrued pension. Mitchell replied that he did not know anything about the termination bonus, and that he would get back to her with an answer to all her questions, including her inquiry concerning the termination bonus.

Since Whitney had received no response from Mitchell as of April 26, 1995, she wrote a letter on that day to O'Donnell inquiring whether she was entitled to the termination bonus. The letter adds, "I have looked through various communications from the UAW and Bryant and Stratton. I have not found anything to indicate that this bonus was revoked." Shortly thereafter, O'Donnell and Whitney spoke on the phone, and she told him that she had asked Mitchell about her entitlement to the termination bonus and had still not received an answer to her inquiry. O'Donnell advised Whitney that he felt that she was entitled to the termination bonus because she had been employed by Respondent for 21 years, and suggested that she send Mitchell a letter requesting an answer concerning this bonus.⁷ A few days later, Whitney received a letter from Mitchell dated May 1, 1995, responding to her earlier inquiry about her pension and medical benefits, but making no mention of the bonus issue.

Thus on May 10, 1995, Whitney wrote a letter to Mitchell asking about information concerning her entitlement to the termination bonus.

By letter dated July 12, 1995, Mitchell informed Whitney that she was not eligible to receive the bonus because the "Retirement Bonus Plan was changed in November 1991. Any employee who reached their 20-year anniversary after that date was no longer eligible to receive the Retirement Bonus."

Whitney forwarded a copy of Mitchell's letter to O'Donnell on October 3, 1995, along with a letter of her own. O'Donnell phoned Whitney on receipt of these documents and advised her that he disagreed with Respondent's position and intended to file unfair labor practice charges. O'Donnell testified that his receipt of the July 12, 1995 letter in October 1995 was his first notification that Respondent had eliminated the termination bonus.

⁷ During this conversation, Whitney testified that she "believed" that she told O'Donnell that she had previously been informed by Schatt that she was not eligible for the bonus. O'Donnell testified that Whitney told her only about a conversation with Mitchell, and did not tell him that she had been advised by any official of Respondent that she was not eligible for the bonus.

Respondent makes several contentions with respect to this allegation, including the contention that Section 10(b) of the Act bars consideration of this issue. Its principal argument is that the Union was put on notice during the negotiations that it intended to eliminate the termination bonus as part of its proposal to implement its revised 401(k) plan. Therefore, Respondent asserts that when it implemented the 401(k) plan after it declared impasse in June 20, 1992, the Union knew or should have known that the termination bonus had been eliminated at that time. Accordingly, it asserts that the 10(b) period began to run in June 1992, and that the charge was therefore untimely filed.

Alternatively, Respondent contends that even apart from the 10(b) issue, that its implementation of the decision to eliminate the termination bonus was effectuated in June 1992 pursuant to a good-faith impasse, and therefore was not violative of the Act.

Respondent presented several witnesses, plus a number of items of documentary evidence in support of its contentions in this regard. Mitchell testified that after Whitney made her inquiry of him concerning her entitlement to the bonus he investigated the claim by looking over past records and discussing the matter with Schatt and John Staschak, Respondent's vice president and regional manager. According to Mitchell, as a result of his investigation, "it came to my attention that the retirement bonus had a limited time frame and at the time in question when Jean Whitney contacted me it was (no) longer part of the retirement package or the termination package."

According to Mitchell, he also discussed the issue with Respondent's attorney, Rydzek and James Ley, another official of Respondent, and was informed by these individuals that the bonus had been eliminated on/or about June 1992 when Respondent declared an impasse in bargaining. Mitchell also asserts that some of the people with whom he consulted also told him that Respondent's position was that those employees who had 20 years of service as of June 1992 would be eligible for the bonus, regardless of when they left Respondent's employ. He could not recall specifically who informed him of this "grandfathering" decision.

Mitchell further explained that the decision to insert November 1991 in his letter to Whitney, as the eligibility date for receipt of the bonus was solely his, and was based on his misperception that Respondent's manual which was revised and issued to employees in November 1991 and which did not contain this bonus, applied to bargaining unit employees. However, Mitchell conceded that he sent this letter to Whitney after having spoken to all of his colleagues and Rydzek, and that he made no effort to correct the letter even after being informed that he was mistaken in selecting November 1991 as the eligibility date.

John Staschak testified that he presented Respondent's proposal for an enhanced 401(k) plan at a bargaining session on July 26, 1991, and that Respondent's position is that the retirement bonus was eliminated, because the enhanced 401(k) plan, which was implemented in June 1992, was the sole retirement benefit program for Respondent's employees. In that regard, the document submitted to the Union at the session entitled "Bryant & Stratton Business Institute, Inc. Retirement/401(k) Plans. The document reflects that Respondent "maintains a defined benefit plan (pension plan) which is currently frozen relative to new participants and additional benefit accruals." It

adds that the pension plan was frozen due to new tax laws that were enacted.

After further reflecting that Respondent maintains a basic 401(k) plan which allows employees to defer pretax earnings, the document states as follows:

In order to best serve the retirement needs of our employees and reduce skyrocketing compliance costs of multiple retirement/savings plans, the Bryant & Stratton 401(k) Plan will be enhanced and become the sole retirement program for all employees of Bryant & Stratton Business Institute, Inc. and its subsidiaries. The defined benefit pension plan will be terminated. The A.P.A. 401(k) Plan will be merged into the enhanced Bryant & Stratton Plan.

The document then goes on to describe the specifics of the new 401(k) plan, such as eligibility, contributions, employer match, profit sharing, vesting, withdrawal, and loans. The document makes no reference to the retirement bonus or to the termination bonus. Staschak conceded that although the document specifically states that the defined pension plan would be terminated as a result of the new enhanced 401(k) plan, there is no reference to the elimination of the bonus. He had no explanation for this omission. Staschak also admitted that there was no discussion or mention of the bonus during this bargaining session when he presented Respondent's proposal. Although he recalled that there were questions about and a general discussion of the proposal, he did not recall the Union making any response at that session to his presentation.

Staschak also testified that Respondent in June 1992 implemented the enhanced 401(k) plan as part of its flex plan, and his view that this included the elimination of the retirement bonus. However, he could not recall when and how the decision was made to "grandfather" employees who had worked for Respondent for 20 years of service as of June 1992, although he did confirm that such a decision was made for nonunit employees with November of 1991 as the eligibility date. Moreover, although Staschak stated that for the unit employees, the decision to "grandfather" employees was made through the bargaining process, he was not present at any bargaining session when this subject was discussed.

Additionally, Staschak did not supply any testimony in corroboration of Mitchell's testimony, that in 1995, Staschak informed Mitchell that the retirement bonus had been eliminated as of June 1992 due to the impasse, and that employees with 20 years of service of that date would be "grandfathered" and entitled to the bonus.

Rydzel was Respondent's final witness and provided testimony concerning the bonus issue as well as the issue of impasse. As noted above, Administrative Law Judge Kleiman made findings concerning the bargaining between the parties through March 12, 1991, and concluded that Respondent had engaged in surface bargaining during that period of time. While he permitted testimony concerning seven bargaining sessions between July 26, 1991, and January 8, 1992, as well as two private meetings between Rydzel and O'Donnell, he made no findings with respect to these events and concluded that they were not relevant to his determination that bad-faith bargaining by Respondent had been established through March 12, 1991.

Rydzel, in the instant matter, provided testimony concerning some of these meetings, as well as concerning events subsequent to the close of the prior hearing which was March 30, 1992. Rydzel testified that at the July 26, 1991 meeting, after

Staschak made his presentation concerning Respondent's proposal for an enhanced 401(k) plan, Staschak left the session. The Union subsequently asked Respondent for a calculation as to how it calculated the retirement bonus.

At the bargaining session of August 12, 1991, Respondent presented the Union with such a calculation as requested. At that time Rydzel informed the Union, however, that Respondent proposed to delete this benefit from any future contract, a position that Respondent maintained throughout negotiations. O'Donnell, on behalf of the Union, proposed that the benefit be maintained.

Rydzel testified further that when he informed O'Donnell that Respondent proposed to delete this bonus, he also specifically told O'Donnell that the "401(k) takes its place." O'Donnell emphatically denied that Rydzel ever informed him that Respondent's 401(k) plan would take the place of or result in the elimination of the termination or retirement bonus.

Towards the end of that meeting the discussion turned to wage increases. Respondent's position had been previously and continued to be that it wanted the sole authority to grant discretionary merit increases to employees. The Union had always rejected that approach and requested a step system of wage increases based on seniority and length of service and across-the-board increases. At this meeting, O'Donnell informed Rydzel that the Union would be willing to agree to Respondent's idea of merit pay or discretionary bonuses, which Respondent need not justify to anyone, but only if Respondent also agreed to the Union's across-the-board wage proposals based on seniority and credentials. Rydzel rejected O'Donnell's proposal in this regard.

Additionally during an off the record meeting between Rydzel and O'Donnell on October 11, 1991, Rydzel informed O'Donnell that the "pension bonus would no longer exist. Not many ready to retire anyway." The record does not reflect the context of Rydzel's statement to O'Donnell, nor what discussion preceded or followed these remarks.

Rydzel also testified that at a meeting on December 9, 1991, Respondent furnished the Union written wage and benefit proposals.⁸ The wage proposal consisted of four parts. They were a 3-percent across-the-board increase, a 3-percent one-time bonus to provide for retroactivity, another 3-percent increase because of the additional time required by faculty to be spent on campus, and a discretionary bonus pool which will be solely up to Respondent's discretion as to amount and timing.

Respondent's benefit proposal consisted of 11 benefits including a 401(k) plan which stated, "Company plan as proposed on July 26." No reference was made to the retirement or termination bonus in this document.

In December 1991, Respondent announced to the Union that due to changes in curriculum as well as declining enrollment it was going to be necessary to lay off a number of faculty employees. The parties bargained about this subject from December through March. In fact, according to Rydzel, the parties spent a "good amount of time" during their negotiation sessions during these months discussing the layoff issue and possible severance for employees. The meetings of March 10 and 13 were spent almost entirely on the severance and layoff issues, and the parties reached agreement on these issues on March 13.

⁸ According to Rydzel the wage proposal was similar to a proposal that it presented to the Union at an earlier meeting with only a slight modification with respect to the amount of money in the bonus pool.

During these meetings, the Union's position was that Respondent should pay severance to the employees who were to be laid off, and also the termination bonus to those employees who were eligible.⁹ Respondent continually insisted that the severance package was separate from any retirement or termination bonus, and that employees could receive one or the other but not both. Since the severance package was higher than the termination bonus, the Union agreed to the severance proposal without the termination bonus for any employees. A total of 17 employees were laid off and received severance pay as a result of the negotiations.

At the March 10, 1992 meeting, the Union submitted a proposal to Respondent which was not discussed until the parties met in April, since as noted the March meetings were devoted almost entirely to the layoff and severance issues. The proposal consisted of three pages. The first benefit is entitled *Pension 401(k)*. Under that section the first sentence reads, "reinstate the frozen Pension and Supplement with Company's modified 401(k) proposal, retroactive to 11/21/89."

After skipping a line, another sentence reads, "Continue Current Retirement Bonus."

The document then goes on to list and describe the Union's proposals on a number of subjects, including medical insurance, vacations, holidays, jury duty, sick leave as well as other benefits, and concludes with a benefit entitled EMPLOYEE TERMINATION and reads as follows: "Employees terminating their services after 20 years or longer will receive a termination bonus equal to 60 working days' salary of their current rate of pay."

O'Donnell admitted that his proposals to continue the current retirement bonus and the "employee termination" benefit that he proposed were one and the same, and that he was not asking for two separate benefits. When asked why he put the same benefit in two different places, he replied, "I guess to emphasize it. I really don't know."

The next meeting between the parties was April 13, 1992. At this session the Union's proposal of March 3, 1992, was discussed and Respondent gave its position on each of these items. Respondent continued to reject the Union's proposal to continue the retirement or termination bonus and to reinstate the frozen pension plan.

Rydzel testified that when he, on behalf of Respondent, again rejected the Union's proposal to continue the bonus, he also repeated that the 401(k) plan was to replace everything as far as retirement and future planning are concerned. Additionally Rydzel asserts that he mentioned that just as it did with nonunion people, Respondent would provide this benefit for employees with 20 years on the date of the agreement. O'Donnell emphatically denied that Rydzel, at this or any other meeting, told him that Respondent was willing to provide the bonus to employees who had already reached 20 years of service or any words to that effect.

In this connection, Rydzel testified that sometime prior to the April 12 meeting Respondent had decided to continue the bonus for those who already had 20 years as it had done with its salaried employees.¹⁰

Rydzel adds that there was no discussion that he was involved with concerning a specific date for eligibility for the bonus until after he became aware of Whitney's charge in the spring of 1996. Rydzel also denies that he spoke to Mitchell about Whitney's entitlement to the bonus prior to Respondent's initial decision to deny it to her in 1995.

The parties also discussed extensively Respondent's proposal for a flex plan at this meeting. This proposal, which had been introduced and discussed previously by Respondent, was slightly modified on April 13. This plan was essentially a cafeteria plan wherein Respondent would allocate a certain amount of money to each employee and the employee would decide on what benefits he wished to spend it on, such as medical coverage. If the employees do not use any of these dollars, they can either keep the amount left over or invest in Respondent's 401(k) plan. At the end of this meeting, Rydzel told O'Donnell there wasn't really a lot of movement left on Respondent's part and that it needed something from the Union to move the bargaining along, or "we were going to have a problem."

The parties next met on May 18, 1992. Rydzel repeated what he had said at the last session that there wasn't a lot of movement left on its part and it needed something from the Union to move bargaining along. The parties talked at length about the faculty guide, but the Union had no further response on the issues of the 401(k), flex plan, economics, seniority, or Union shop. Rydzel informed the Union that Respondent wanted to implement the faculty guide and flex plan effective for the July quarter and needed time to do so, so the Union had better show some movement. O'Donnell replied that he had some movement to make, but requested a recess from 6:30 p.m. for 90 minutes so he could put together a proposal. Rydzel responded that the Union had Respondent's proposal for weeks, and Respondent was not going to sit around while the Union was doing something it should have done prior to the meeting. Rydzel added that in Respondent's view, the parties were at impasse, and if O'Donnell wanted to break it, let him know, but he better do it quickly, because Respondent needed lead time to make changes for the July quarter.

Rydzel subsequent sent a letter dated May 20, 1992, to the Union summarizing the meeting¹¹ and repeating that he declared impasse at that time, that the Union had disputed his declaration, but made no new proposals as requested by Respondent.

The letter concludes by stating that Respondent is considering implementing portions of its proposal for the July quarter, and if the Union intends to break the impasse it should do so promptly.

O'Donnell wrote back by letter of May 28, 1992, wherein he stated that the Union considered Respondent's assertion of impasse to be premature and requested another meeting in order to present a complete proposal. O'Donnell noted that Rydzel had refused to set up another meeting date on May 18, 1992, when it also refused to give the Union time that evening to present a proposal. The letter also asked for some information on costs that it had orally requested on May 18, 1992, to which Rydzel responded that all information requests must be in writing.

⁹ At the time there were three faculty members who had been employed for 20 years and would have been eligible for such a bonus.

¹⁰ At the time there were three faculty members who had been employed for 20 years and would have been eligible for such a bonus.

¹¹ Rydzel noted specifically that the Union had made a representation as early as December 1991, that it had "some flexibility" on union shop, and that 6 months later, the Union had shown no flexibility and has not changed its position on that issue.

Respondent did not reply to the Union’s letter until a letter from Rydzal dated June 12, 1992. After furnishing the Union the information that it had requested, Rydzal asserted that the parties were still at impasse, and the Union had still not shown any movement. Thus Respondent intends to proceed with implementation of the faculty guide and the related 3-percent wage increase effective with the July quarter, and the flex plan shortly after that.

Further, Rydzal stated that the Union should move promptly to make whatever movement it intends to make, so Respondent can determine whether a bargaining session would be productive.

Meanwhile, on June 11, 1992, Ley issued a memo to faculty and staff entitled update union/company negotiations. The memo reflects that since the Union had not made substantial movement in several key areas for a long period of time, Respondent declared an impasse on May 18, 1992.¹² The memo also asserts that since that time the Union has made no proposals. Thus no further bargaining sessions will be scheduled until a “material modified proposal” is received from the Union. Further, the memo states that Respondent will begin preparations to implement some of its proposals, and mentions the faculty guide which is scheduled for implementation for the July quarter. Attached to the memo was a one-page document entitled, “Summary of Principal Bargaining Issues.” It states as follows:

Summary of Principal Bargaining Issues

COMPANY POSITION	UNION POSITION
1. No union shop—no union membership required to keep faculty position.	1. Union shop—all must join union (and pay dues) or be fired.
2. Seniority is not a factor in making employment decisions.	2. Seniority shall determine class assignments and layoffs.
3. Across the board wage increases totaling as much as 9 percent plus merit increases of at least \$100,000.	3. Percentage wage increases plus a stop system based on seniority and degrees.
4. Bryant Flex Plan and the 401(k) with Company matching contributions.	4. Old pension plan plus the new 401(k) with Company matching, old Blue Shield plan, currently at full company payment.
5. On the Faculty Guide, the Union rejects many major principles, including faculty administrative time.	

On June 11, 1992, O’Donnell sent a letter to Rydzal, which apparently was received by Rydzal, after he sent his letter dated June 12. O’Donnell asserted that Rydzal had not responded to his May 28 letter, which O’Donnell found puzzling since Re-

spondent was refusing to meet. Nonetheless, O’Donnell enclosed what he characterized as “counter proposals on major issues,” and asked for dates to meet for a bargaining session to discuss the proposals. The correspondence consisted of a detailed “Union proposal” for the faculty guide, plus new proposals in several areas.

The first new proposal by the Union was a change in contract duration from a 3-year contract to a 1-year contract. While Respondent’s position prior thereto had also been for a 3-year contract, Rydzal had suggested in August 1991 to O’Donnell that a 1-year agreement might be agreeable to Respondent, and O’Donnell rejected that possibility at that time.

Second, the Union made a new proposal on wage increases. This proposal consisted of withdrawing its proposal on wages based on credentials and length of service. Indeed, Rydzal had testified that one of the principal factors that led him to declare an impasse was the Union’s continued insistence on wages based on a civil service step system with increases based on length of service and credentials, which was inconsistent with Respondent’s desire to grant wage increases based on merit with such a determination made by Respondent only.

Additionally, the Union proposed a 6-percent increase in salary, which was consistent with Respondent’s previous proposal of a 3-percent wage increase, plus an additional 3 percent with implementation of the faculty guide. It also asked for a \$2750 retroactive increase to all employees except for recent hires.¹³ Finally, on wages the Union proposed a bonus pool of \$50,000 “based on evaluation to be determined by a Union Management Committee.” This proposal also represented movement towards Respondent’s previous offer of a discretionary bonus pool of \$50,000 initially and an additional \$50,000 to be paid within 1 year, albeit it still provided for some union involvement in such a bonus, which was inconsistent with Respondent’s position.

With respect to pension/401(k), the Union withdrew its proposal to reinstate the frozen pension plan and accepted the 401(k) plan proposed by Respondent with several modifications, including requirements that Respondent contributes regardless of member contributions, union representation on a board of administration and immediate participation.

In that connection, O’Donnell testified that this represented a significant concession by the Union, since it prior thereto strongly insisted on continuation of the pension plan that Respondent had previously frozen, and that this issue “was near and dear to all of the faculty.”¹⁴

The Union also proposed to continue the “current Retirement/Termination bonus,” which was not a change from its prior position.

The Union also withdrew its previous proposal for a union shop and substituted an agency-shop clause with accompanying language. Previously the Union had insisted on a union-shop clause with Respondent adamantly rejecting same and stating that it would not force their faculty to become a member with the alternative of discharge if they did not.

O’Donnell also testified that in an off record discussion sometime in December 1991 that Rydzal suggested to him the possibility of an agency shop instead of a union shop. Accord-

¹² In that connection, the memo stated that although “O’Donnell had indicated on several occasions that they would consider movement on seniority and Union shop, the Union had not changed its initial position originally taken some 27 months ago.”

¹³ In that connection, Respondent’s last proposal called for an increase to provide for retroactivity of an additional 3 percent.

¹⁴ Indeed when Rydzal testified as to his reasons for declaring impasse on May 18, 1992, he referred to the fact that the Union’s position prior to that date had been that they wanted the pension plan to be continued along with the 401(k) plan.

ing to O'Donnell, Rydzel told him at that time that "I think that the Company could accept it." Rydzel recalls the conversation, but his recollection is somewhat different. Rydzel admits that he floated the idea to O'Donnell of an agency shop, but claims that he coupled the suggestion with a maintenance of membership requirement as well. Additionally, Rydzel denies telling O'Donnell that Respondent would accept an agency shop, and to the contrary asserts that he told O'Donnell that he had no authority to agree to it, but that we were merely "brainstorming." In any event, both parties agree that O'Donnell rejected Rydzel's suggestion at that time.

The Union also, as noted, presented a detailed proposed new "Faculty Guide." According to O'Donnell this proposal represented further concessions by the Union, and some agreements to prior portions of Respondent's proposed faculty guide. However, the Union's proposal did not address in any way Respondent's concern over administrative time. In that connection, Rydzel testified that one of the purposes of the new faculty guide was to increase the time that faculty spends on campus and its consequent interplay with students. The Union had, according to Rydzel, resisted this concept and took the position that the faculty's responsibility ended after they finished teaching their class. Indeed, as noted, part of the reason for an additional 3-percent wage increase proposal by Respondent was to compensate for additional time that the faculty guide required faculty to be on campus.

As to medical coverage, the Union agreed to the Blue Cross Plan that Respondent had proposed in its flex-plan, but continued to maintain its prior position that Respondent continue to pay premiums and maintain current dental, group insurance, and disability insurance coverage.¹⁵

Finally, the union seniority proposal demanded that seniority shall accumulate from date of hire and that faculty will maintain full-time status based on qualifications, credentials, and seniority. While this proposal did not represent a change from the Union's prior proposal with respect to seniority, in O'Donnell's view, his previous concession to allow wage increases without consideration of seniority to be a significant change in its prior position that seniority was a significant factor in determining wage increases.

Rydzel sent a letter to O'Donnell dated June 22, in response. The letter states that although the Union's proposals do reflect some movement, as position in many other key areas has not appreciably changed. Thus Rydzel asserts that Respondent sees no reason to delay implementation of the Hems discussed in a previous letter, "particularly since the implementation of the faculty guide was substantially completed before receipt of your letter." However, Rydzel indicated that Respondent was willing to meet to discuss the Union's proposals and advised that he would get back to the Union with regard to dates.

The letter also made comments on the Union's proposals, essentially asserting that on union shop, seniority, faculty guide, and medical coverage, these proposals constitute little or no movement. The letter added that while it was willing to meet in an attempt to reach a resolution, its position remains that the Union's proposals did not break the existing impasse.

¹⁵ Respondent's flex-plan proposal also required it to contribute to the flex-plan, and it did not require employees to contribute to the plan. However, according to O'Donnell the amount that Respondent proposed to contribute into the plan would not be sufficient to permit employees to obtain adequate medical coverage.

Rydzel also testified why he did not believe that the Union had made significant movement so that the impasse was broken. He asserted initially that by the time Respondent received the Union's proposals, Respondent had already proceeded to implement the faculty guide and the flex-plan. Thus the Union's proposals were "too late in the game."

Rydzel, while indicating some specific areas where the Union had made no significant movement, such as administrative time, the concept of a flex-plan and seniority, admitted that the Union's prior demand that wage increases based in part on seniority, which it did withdraw in its June proposals, had been "a significant stumbling block" during negotiations.

O'Donnell responded by letter of June 25, 1992, wherein he asked for various items of information, including "proposals etc., that you claim we are at impasse and that you are unilaterally implementing." Rydzel replied by letter of July 29, 1992, which provided the information requested. According to the letter, the Respondent implemented the flex-plan which "is the plan described in documents which we gave to you in April. It included the 401(k) plan." Additionally the letter mentions that the faculty guide has been implemented, which includes a 3-percent across-the-board salary increase as a result of administrative time. The letter does not provide an effective date for any of these changes.¹⁶ Finally the letter confirms that a bargaining session has been scheduled for August 3, 1992.

The parties met as scheduled on August 3, 1992. No new proposals were submitted by either side. The meeting lasted about 45 minutes. The parties did discuss the Union's proposals, but Rydzel continued to take the position that he did not believe that impasse had been broken. O'Donnell disagreed, and insisted that the Union had made significant and substantial moves. Rydzel ended the meeting by informing O'Donnell that if he had some more movement to show, to break the problem, he would let the Respondent know. There were no further bargaining sessions or any additional contacts between the parties concerning negotiations.

According to Rydzel, Respondent implemented the faculty guide along with an accompanying 3-percent across-the-board increase, plus the flex-plan and 401(k) plan, effective July 1, 1992.¹⁷

Carolyn Merlino was an instructor employed by Respondent at the Buffalo campus from October 1971 until she resigned on June 29, 1997. She did not retire at the time of her resignation, and did not begin collecting retirement benefits from Respondent.

Merlino received a termination bonus from Respondent following her resignation.

B. Analysis

The 10(b) period commences only when a party has clear and unequivocal notice that the Act has been violated, *Carrier Corp.*, 319 NLRB 184, 190 (1995); *Leach Corp.*, 312 NLRB 990, 991 (1993); or where a party in the exercise of reasonable diligence should have been aware that there has been a violation of the Act (i.e., constructive notice); *Carrier*, supra; *Mine*

¹⁶ However, the letter attached a memo to employees dated July 28, 1992, which states that the faculty guide was implemented at the start of the July quarter, but that several changes which had been agreed to at the bargaining table due to an oversight had been omitted from the final text. The changes were set forth in the memo.

¹⁷ Staschak testified that Respondent implemented the flex-plan and the enhanced 401(k) plan in the summer of 1992.

Workers District 12, 315 NLRB 1052 (1994); *Moeller Bros. Body Shop*, 306 NLRB 191, 192–193 (1992). The burden of showing such clear and unequivocal notice or lack of diligence is on the party raising the affirmative defense of Section 10(b); *Carrier*, supra; *Leach*, supra.

Respondent makes two alternative contentions in an attempt to meet its burden of proof in this regard. First, it contends that the Union knew or should have known from the bargaining sessions, that Respondent's 401(k)/flex-plan implemented in June 1992, included the elimination of the retirement or termination bonus. Alternatively, it asserts that since Whitney was informed by Respondent in March 1995 that she was not entitled to the bonus, and that she thereafter informed O'Donnell of this fact prior to May 10, 1995, that these operative dates for notice to the Union, establish that the charge which was not served until December 1, 1995, was untimely.

I shall deal with these contentions in order. I do not believe that Respondent has adduced sufficiently credible or probative evidence that the Union had either actual or constructive notice that Respondent implemented the elimination of the bonus in the summer of 1992. Indeed, in my judgment, Respondent has not even established that in fact, it had made a decision at that time to eliminate the bonus.

In that connection, I do not credit the contrived and unconvincing testimony of Rydzal, that he specifically informed O'Donnell at one or more meetings,¹⁸ that the 401(k) plan that Respondent was proposing would replace the retirement bonus or that Respondent would "grandfather" those employees with 20 years of experience.

In addition to comparative demeanor considerations vis a vis O'Donnell, I also rely on a number of other factors in making my credibility resolution, particularly the lack of any documentary support¹⁹ for Rydzal's testimony, as well as the lack of any corroboration by any other witness.

Respondent relies primarily on the fact that Respondent consistently proposed during bargaining and the Union consistently opposed that the retirement bonus be eliminated as well as the fact that the document presented by Respondent to the Union specifically stated that the 401(k) plan would be the "sole retirement program" for all its employees.

However, although Respondent is correct that it had consistently proposed during bargaining, elimination of this bonus, I do not believe that the evidence supports Respondent's further contention that this position either directly or indirectly indicated to the Union that when it implemented the 401(k) plan in 1992, it also implemented the elimination of the bonus.

I note initially in this regard that Respondent's own handbook, describes the bonus as "in addition to the benefits provided under the Retirement Plan." The testimony of Mitchell, Respondent's human resources director, further reinforces the conclusion that I believe the record amply supports. Both the

Union and Respondent considered the termination bonus to be a separate issue from the 401(k) plan that Respondent was proposing. Thus, Mitchell testified that after receiving Whitney's inquiry about the bonus, and discussing the matter with his colleagues and his attorney he realized that the bonus was no "longer part of the retirement package or [emphasis added] termination package.

I find it quite significant that Mitchell's testimony that he was informed in the spring of 1995 by his colleagues and his attorney that Respondent had implemented the elimination of the bonus when it declared impasse and implemented the 401(k) plan in the summer of 1992 was not corroborated by any witness. Thus, Schatt and Ley, both of whom Mitchell asserted that he talked to about the issue, did not testify. Staschak, who also was allegedly spoken to by Mitchell, did testify, but did not corroborate Mitchell concerning their alleged conversations in 1995. I find it appropriate to draw an adverse inference from such failures of corroboration, and find that their testimony would be adverse to Respondent on these issues. *United Parcel Service Corp.*, 321 NLRB 300 fn. 1, 308, 309 fn. 21 (1996); *Kut Rate Kid & Shop Kwik*, 246 NLRB 107, 121 (1979) (adverse inference proper where witness testifies, but not as to precise issue in question). Moreover, Rydzal specifically contradicted Mitchell's testimony, and denied that he spoke to Mitchell about Whitney's situation in 1995, and asserts that he became involved only after he was notified of the charge in 1996.

This evidence alone would tend to show that Respondent had not as it contends, implemented the elimination of the bonus, but an examination of several documents from Respondent reinforces such a conclusion. Thus, the very document that Respondent relies on which does state that the 401(k) plan will be the "sole retirement" program for its employees, substantially undermines its position. The document in question, the 401(k) highlights, which was presented to the Union by Staschak at the July 26, 1991 meeting, reflects that Respondent "maintains a defined benefit pension plan which is currently frozen," as well as a basic 401(k) plan. It then makes the statement referred to by Respondent. Nowhere in this document is there any mention of the bonus, either as constituting part of Respondent's retirement program, or as being eliminated by the enhanced 401(k) plan. More importantly, the document specifically states that the "defined benefit pension plan will be terminated" when the new 401(k) plan is implemented, and makes no reference to a similar result with respect to the bonus. Staschak had no explanation for this omission when he was asked.

Additionally, I rely on Ley's June 11, 1992 memo to the faculty which reports on the negotiations and Respondent's plan to implement "some of its proposals." The memo refers only to Respondent's intent to implement the faculty guide, and then goes on to summarize the principal bargaining issues and the respective positions of the parties on these issues. In that regard, the memo refers to Respondent's position on the issue of flex-plan/401(k) as "Bryant flex-plan and the 401(k) with Company matching contributions." As the Union's position on this subject, Ley mentions the "old pension plan plus new 401(k) with Company matching," and the Union's position on medical coverage. No reference or mention of the bonus was made by Ley in this section of the memo, or anywhere else in the memo.

¹⁸ In this regard while on direct testimony Rydzal asserted that he told this to O'Donnell at the August 12, 1991 session, Rydzal significantly expanded that testimony later on in his testimony by claiming that he so informed O'Donnell at least three quarters of the time that the subject of the bonus was mentioned. I view Rydzal's brazen attempt to embellish his prior limited testimony as a poor reflection on his credibility.

¹⁹ As will be discussed more fully below, several documents from Respondent's officials do not support Rydzal's testimony and more significantly, establish that Respondent had not decided to implement the elimination of the bonus in 1992.

This clearly demonstrates that Respondent did not consider the bonus to be part of its 401(k) plan or its retirement package.²⁰

Finally, I also note Rydzal's letter to O'Donnell dated July 24, 1992, wherein he responds to O'Donnell's request for information as to what proposals Respondent is "unilaterally implementing." Rydzal makes no reference in his response to the bonus, and states that Respondent was implementing the flex-plan which includes the 401(k) plan as described in documents given to the Union previously. As noted above, the documents involved which described the enhanced 401(k) plan not only made no reference to the bonus, but specifically stated the pension would be eliminated by the enhanced 401(k) plan.

Lastly, I note Mitchell's contrived and implausible testimony that the decision to make reference to November 1991 as the eligibility date for the bonus in Respondent's July 1995 letter to Whitney was solely made by him and was his error. Since Mitchell claimed that he had spoken to a number of Respondent's officials prior thereto (including its attorney), I find it highly unlikely that he would write such a letter without the approval of other of Respondent's representatives.

Accordingly, based on the foregoing evidence, I am not convinced that Respondent intended to implement the elimination of the bonus in 1992, and conclude that it considered the bonus as a separate issue from the 401(k) plan, or at best had simply not thought about the bonus when it implemented the 401(k) plan.

Thus when Whitney inquired about the bonus in March 1995, it had to scramble around to find the appropriate position to take. While Schatt did inform Whitney that he did not believe that Whitney was entitled to the bonus, he did not testify, so Respondent has not established his basis for that conclusion. Once more on adverse inference is appropriate for Respondent's failure to call Schatt, which leads to the conclusion which I draw, that Schatt's position was based on the same admittedly erroneous statement in Mitchell's letter to Whitney, that she was not entitled to the bonus because the benefit was eliminated for all employees in November 1991, except for those employees with 20 years of service at that time.

Therefore, since Respondent has not established that it knew in 1992 that the bonus had been eliminated, it certainly has not established that the Union knew or should have known that the implementation of the 401(k) plan also meant elimination of the bonus, or that Respondent had violated the Act by unilaterally eliminating such a bonus at that time.

With respect to Respondent's alternative contention, that the Union knew or should have known of Respondent's unilateral action in March or May 1995, it is once again necessary to resolve an issue of credibility. Thus I do not credit Whitney's equivocal testimony that she "believed" that she informed O'Donnell about her conversation with Schatt, and credit O'Donnell's denial that she never so informed him. In that regard I note that in Whitney's letters to O'Donnell she made no reference to her conversation with Schatt, and stressed her discussions with Mitchell and the fact that she had not received an answer from Mitchell concerning her request. I find it unlikely that Whitney would have informed O'Donnell about her discussion with Schatt, since she apparently disregarded Schatt's assertion to her, and at her Dean's suggestion went to

Mitchell, Respondent's official more likely to have a definitive answer to her inquiry.²¹

As for the admitted notification of Whitney by Schatt, the Union is not automatically chargeable with the knowledge of an employee that her bonus had been eliminated. *Nursing Center at Vineland*, 318 NLRB 337, 338-339 (1995). Moreover, even if the Union knew about Schatt's statement to Whitney in March or May 1995, notice of an intent to commit an unlawful unilateral implementation does not trigger the 10(b) period with respect to the unlawful act itself. *Carrier*, supra at 191; *Howard Electrical Mechanical, Inc.*, 293 NLRB 472, 475 (1989). See also *Randolph Children's Home*, 309 NLRB 341, 344 (1992) (notice of unilateral change of work rule not transmitted to the Union in clear and unambiguous terms).

Here, Respondent had clearly not made a decision as to Whitney's inquiry until Mitchell's letter to her in July 1995. While Schatt may have informed Whitney in March that he did not believe that she was eligible to receive the bonus, this can reasonably be construed as a mere intent to commit an unfair labor practice, since no final decision had been made. I again emphasize that Mitchell as the human resources director was Respondent's official most closely involved with benefit eligibility, and since it took him several months to respond to Whitney's inquiry, it is apparent that Respondent made no final decision to deny her the bonus until July 1995.

I therefore find that Respondent has not met its burden of establishing that the Union received either actual or constructive notice of Respondent's unilateral elimination of the termination of the bonus prior to October 1995, when O'Donnell received notice of Respondent's July 1995 letter. Accordingly, its 10(b) defense is rejected.²²

Apart from the 10(b) issue, Respondent alternatively argues that it did not violate the Act when it eliminated the bonus, because it reached a valid impasse in bargaining with the Union in the summer of 1992, and that its elimination of the bonus was part of its implementation of the enhanced 401(k) plan at that time.

However this defense suffers from several significant defects, and must be rejected. Initially, as I have concluded above, Respondent has failed to establish that its decision to implement the elimination of the termination was based on its decision to declare impasse in 1992 and to implement its 401(k) plan. Rather, as I have concluded above, Respondent did not eliminate the bonus until 1995 when it denied Whitney's request under the erroneous assumption that its 1991 elimination of the bonus for nonunit employees applied to bargaining unit employees as well. Thus, Respondent's defense fails for this reason alone.

However, even were I to find that Respondent had established that its implementation of the elimination of the bonus was part of its 401(k) plan and was effectuated in the summer of 1992 when it declared impasse, Respondent's defense would still not be valid.

While I agree with Respondent's position that the fact that there were unremedied unfair labor practices at the time of the impasse, does not automatically preclude it from bargaining to a good-faith impasse, *Litton Systems, Inc.*, 300 NLRB 324, 333

²⁰ I once again note the failure of Respondent to call Ley as a witness to explain this memo, which warrants an adverse inference that his testimony on this issue would be adverse to Respondent.

²¹ I note that Mitchell was Respondent's human resources director, who is presumably most familiar with its benefits policies.

²² Even if July 1995, when Whitney received Mitchell's letter is considered notification to the Union, the charge which was served on December 1, 1995, would still be timely.

(1990); see also the judges's decision in *Lunsford Plumbing, Inc.*, 254 NLRB 1360, 1366 (1981), *enfd.* 684 F.2d 1033 (D.C. Cir. 1982), I also agree with the General Counsel and the Charging Party that here the serious unremedied unfair labor practices committed by Respondent precluded the possibility of a valid impasse as of the summer of 1992. *Frontier Hotel & Casino*, 323 NLRB 815, 817-818 (1997); *CJC Holdings, Inc.*, 320 NLRB 1041, 1045 (1996); see also *La Porte Transit Co.*, 286 NLRB 132, 133 (1987), *enfd.* 888 F.2d 1182, 1186-1187 (7th Cir. 1989).

In my view the Board has in effect made such a determination in *Bryant & Stratton II* wherein it noted that Respondent had in *Bryant & Stratton I* "committed numerous serious unfair labor practices," sufficient to preclude Respondent from withdrawing recognition from the Union on April 19, 1996. The Board specifically stated therein that Respondent had withdrawn recognition "without complying with the Board's prior Order and engaging in good-faith bargaining, as well as concluding that the Union was entitled to a reasonable period of time for good-faith bargaining" free from the influences of unfair labor practices previously committed by the Respondent. In my view, implicit is the Board's findings set forth above is the conclusion that the "serious and numerous" unremedied unfair labor practices committed by Respondent preclude the possibility of a valid good-faith impasse.

In that regard, Respondent argues correctly that there has been no findings and the complaint here does not allege "Surface" bad-faith bargaining between March 1991 and June 1992. However, there was a prior finding of bad-faith bargaining through March 1991, and many of the positions taken by Respondent both before and after that date did not substantially change. In that regard I note that one of the factors relied upon by the administrative law judge and not disturbed by the Board in finding bad-faith bargaining was Respondent's submission of "disingenuous" proposals with respect to seniority. Rydzal testified that one of the key issues separating the parties which allegedly led to the impasse was the issue of seniority. Moreover it appears that Respondent's position with regard to seniority, which the administrative law judge relied upon in part to establish bad faith, did not change during the subsequent bargaining. Thus it is clear that the prior bad-faith bargaining of Respondent was likely to have contributed to the alleged deadlock in negotiations. *Cf. Litton, supra.*

Additionally, I note that the administrative law judge placed substantial reliance on Respondent's unlawful unilateral suspension of faculty review wage increases, which he found to have been attributed to the Union's certification by Respondent, and indicative of bad-faith bargaining. This unlawful withholding of wage increases had not been remedied by the summer of 1992, over 2-1/2 years had elapsed since the last such increase had been granted, which included at least two such yearly increases that employees had not received due to Respondent's unlawful action. I conclude that the failure of employees to receive such increases had to have undermined the Union's bargaining position and was a significant stumbling block that prevented the parties from reaching agreement. Indeed according to Rydzal, the issue of wages was one of the principal issues which caused the alleged impasse, and it is likely that had the employees received these increases as they should have, the gap between the parties may have narrowed. Indeed one of Respondent's own proposals called for a retroactive increase, presumably to make up for the prior unlawfully with-

held increases, which would not have been necessary had Respondent complied with the law and granted the increases as it had in the past.

Accordingly, I conclude, based on the above analysis, that serious unremedied unfair labor practices of Respondent contributed to the alleged deadlock in negotiations, and precluded the possibility of a valid impasse in the summer of 1992.

Moreover, I also conclude in agreement with the position of the General Counsel and the Charging Party that even apart from the unfair labor practices, Respondent's declaration of impasse was premature, and that alternatively if it existed it was broken by the Union's proposals submitted on June 11.

A genuine impasse in negotiations exists when the parties are warranted in assuming that further bargaining would be futile, *Larsdale, Inc.*, 310 NLRB 1317, 1318 (1993), or when there is "no realistic possibility that continuation of discussion at that time would have been fruitful." *Wycoff Steel, Inc.*, 303 NLRB 517, 523 (1991); *NLRB v. WPIX Inc.*, 906 F.2d 898, 901 (2d Cir. 1990). "Both parties must believe that they are at the end of their rope." *Larsdale, supra*, citing *PRO Recording Co.*, 280 NLRB 615, 635 (1986), *enfd.* 836 F.2d 289 (7th Cir. 1987); *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1186 (5th Cir. 1982).

In applying these principles to the facts at hand, Respondent argues that by May 1992, the parties had exhausted their efforts to reach agreement on major issues separating them over a 2-1/2 year period. However, Respondent conveniently ignores the fact that it has been found to have bargained in bad-faith through March 1991. Thus for purposes of assessing impasse one must consider that "bargaining began anew" at bargaining sessions subsequent to that time. *WPIX, supra* at 901.

Subsequent to March 1991 there were several bargaining sessions, but a number of them did not deal with bargaining issues for a new contract, but were primarily concerned with negotiating severance and layoff issues. Moreover, the Union submitted a comprehensive written proposal at the March 10 meeting, which was not discussed until the next meeting on April 13, this resulted in a discussion of this proposal for the first time, as well as a modified version of Respondent's flexplan which was presented at that meeting.

It was at the very next meeting May 18, 1992, when Respondent by Rydzal declared impasse. In my view, Respondent has not established that at that time further bargaining would have been futile. *Larsdale, supra*; *PRO Recording, supra*. Most importantly, the Union when presented with Respondent's declaration of impasse, vigorously protested, claimed that it had movement to make, and requested some time to prepare and submit new proposals. Respondent however declined the Union's offer, and refused to wait an hour and a half for the Union to present its proposal.²³ Thus, it is absolutely clear that the Union did not believe on May 18, 1992, that bargaining prospects could no longer be fruitful. *Huck Mfg. Co., supra* at 1186; *PRO Recording, supra* at 640; *Larsdale, supra*, and that therefore there was no contemporaneous understanding by both parties that they had reached impasse. *Wycoff, supra* at 523.

Accordingly, I conclude that Respondent's declaration of impasse on May 18, 1992, was premature.

²³ I note in this regard that this is the same Respondent who has been found by the Board to have violated its duty to meet with the Union at reasonable times. Moreover, not only did Respondent refuse to wait for the Union to prepare new proposals, it also refused to set up a new meeting at that time.

Moreover, even if it was appropriate to find that a valid impasse had been established as of May 18, 1992, I agree with the General Counsel and the Charging Party that such an impasse would have been broken by the submission of the Union's new proposals in June 1992.

Respondent makes two arguments concerning the Union's June proposals, neither of which has any merit. First it contends that they were "too late," since by the time Respondent received them on June 16, 1992, it had advised the faculty of its intent to implement the faculty guide by the July quarter, and had "substantially completed the implementation process." However, the evidence does not support Respondent's assertions. Indeed, while the memo to employees does state that it "intends" to implement the faculty guide by the July quarter, it did not say that the guide was implemented immediately. Moreover, the memo did not indicate that it was implementing the 401(k) or the flex-plan, which allegedly encompassed the elimination of the bonus. Respondent's statement in its brief that it had "substantially complicated the implementation process" by June 11 or 16 is not supported by any record evidence. While Respondent's officials did inform the Union that it needed "time" before July 1, 1992, to implement the programs, no evidence was presented by Respondent as to what steps it took prior to July 1 to implement anything. Since admittedly, the 401(k) did not become effective until July 1, 1992, the Union's proposals were not too late to break the impasse.

Respondent also argues that these proposals of the Union were merely "window dressing," and made no significant movement on the key issues separating the parties. I disagree. While Respondent does point to several areas of disagreement between the parties even after the new proposals, that is not determinative. "Anything that creates a new possibility of fruitful discussion (even if it does not create likelihood of agreement) breaks an impasse." *Gulf States Mfg. Co. v. NLRB*, 704 F.2d 1390, 1399 (5th Cir. 1983); *PRO Recording*, supra at 636 and 640.

Here the Union made a substantial effort to bridge the gap in the parties' bargaining positions, which demanded testing by further bargaining before Respondent made any unilateral changes. *Serramonte Oldsmobile, Inc.*, 318 NLRB 80, 98 (1995). Thus the Union's new proposal made significant movement²⁴ in several areas that Rydzal had asserted had caused the alleged impasse. These changes included a new proposal on wage increases which included withdrawing the Union's prior insistence on wages being determined by credentials and length of service, which Rydzal conceded was one of the principal factors that led him to declare impasse, since such proposals were inconsistent with Respondent's desire to grant wage increases based solely on its determination of merit. Moreover, the Union's new wage proposal made movement towards Respondent's prior positions on the amount of increases and on the creation of a bonus pool.

Also significant was the Union's withdrawal of its previous demand that Respondent reinstate its previously frozen pension

plan,²⁵ as well as its proposal to accept the 401(k) plan proposed by Respondent, albeit with several modifications.

Finally, the Union substituted an agency shop proposal for its previous demand for a union-shop clause. In that regard, I note that Rydzal had at a previous off-the-record meeting suggested the possibility of an agency shop clause, but O'Donnell rejected the idea at that time. Further, in Ley's memo to the faculty on June 11, 1992, he made the point in supporting Respondent's decision to declare impasse, that the Union had indicated on several occasions that it would consider movement on seniority and union shop, but had not changed its position since bargaining again. Therefore the Union's demonstrating movement on union shop as well as seniority in its June proposals, was responsive to areas of obvious concern to Respondent.

Accordingly, based on the foregoing analysis and authorities, I conclude that Respondent has not established the existence of a good-faith impasse on May 18, 1992, and that any possible impasse was clearly broken by the Union's proposals of June 11, 1992. Therefore, I find that Respondent has violated Section 8(a)(1) and (5) of the Act by unilaterally eliminating the termination bonus for its bargaining unit employees.

VI. THE WITHHOLDING OF A MERIT WAGE INCREASE AND ALLEGED DIRECT DEALING

A. FACTS

As noted above, the Board found in *Bryant & Stratton I* that Respondent had unilaterally withheld granting merit increases in violation of Section 8(a)(1) and (5) of the Act. The administrative law judge's decision, which the Board upheld, dealt with the years 1990, 1991, and part of 1992.

The record also reveals that Respondent did not grant a merit wage increase in 1992, but it did give an across-the-board increase of 3 percent to all employees on/about July 1, 1992, as part of its implementation of the faculty guide.

No mere raise was granted in 1993. However, for the fall term of 1994, Respondent implemented the discretionary bonus portion of its December 9, 1991 proposal. This consisted of a bonus pool of \$50,000 to be distributed to employees solely at Respondent's discretion as to amounts to any specific employee. While Respondent did not notify the Union of this action, it did notify the faculty, who in turn notified the Union. The Union made no objection to these increases, nor did it file any unfair labor practice charges about it. Significantly, the Union was not asked by Respondent to waive its rights to file unfair labor practice charges about this increase, or about how the increases were distributed. Finally, the record contains no evidence that the Union protested any specific amount given or not given to any employee, or that any employee was treated unfairly in the decision as to amounts.

O'Donnell wrote a letter to Rydzal dated October 6, 1994. The letter indicates that Respondent's appeal of Judge Kleiman's decision will obviously delay the implementation of the judge's Order.²⁶ He continues that since the Respondent has only granted one across-the-board increase since 1994, there is unrest among the faculty. Further, he asserts that Respondent's

²⁴ I also note that in Ley's memo to the faculty dated June 11, 1992, Respondent announced that since impasse had been declared on May 18, 1992, no further bargaining sessions will be scheduled until a "material modified proposal" is received from the Union. Since Respondent did agree to meet with the Union after receiving the June proposals, it is clear that Respondent considered the proposals to be "material modified proposals" from the Union.

²⁵ I note that Rydzal had made specific reference to the Union's insistence on continuation of the pension plan as one of the factors that led him to declare impasse.

²⁶ The judge's decision was issued in June 1994.

promise of a discretionary bonus has yet to become a reality,²⁷ and will not be an increase in base wages.

Therefore, O'Donnell requests that Respondent grant a "substantial" and "equitable" wage increase to all full-time faculty, and promises not to file an unfair labor practice charge claiming that the increase amounts to a unilateral change. However, the letter further states that "we will retain our rights to negotiate fair and equitable wages in our ongoing collective-bargaining efforts."

O'Donnell received no response to his letter until September 18, 1995, when Rydzal sent him a letter. This letter advised that Respondent was considering providing a merit salary increase effective the start of the October 1995 quarter. He explained that the increases would be discretionary, based on performance, and would vary from individual to individual. The average increase would be 3.25 percent which was consistent with increases given to other of Respondent's employees in 1995.

The letter notes further that the increase "is consistent with your request in your letters to me of October 6, 1994 In that letter you stated that if Bryant & Stratton granted a wage increase, the UAW would not file an unfair labor practice charge over such action. We assume that your letter means that the UAW has no objections to the merit increases that would be awarded in the October quarter."

O'Donnell responded by fax and letter of September 29, 1995, wherein he clarified his prior letter by stating that since the Union did not want salary increases to be delayed pending bargaining, it offered not to file unfair labor practice charges against Respondent for implementing a wage increase despite the fact that negotiations were ongoing. However, O'Donnell added that "we are not waiving our right to bargain over any individual increases (including the amounts) you may grant to any particular faculty member."

Rydzal responded by fax the same day. He asserts that O'Donnell's position was ambiguous, since it appears to urge Respondent to proceed and then reserved the right to complain about it. Rydzal then repeated that Respondent was prepared to give a merit increase averaging 3.25 percent as described in his prior letter, but it was not prepared to allow the Union to "negotiate changes in the individual allocations of the merit increases. If you are not prepared to agree to this concept, then we are not prepared to go forward with the increase."

O'Donnell replied by letter of October 6, 1995. It states that the Union has consistently suggested that Respondent not delay wage increases and was prepared to waive any protest over timing even though there was no impasse. However, O'Donnell added that it was not willing to give Respondent "carte blanche to ignore its obligations under the National Labor Relations Act and engage in arbitrary and discriminatory conduct, vis a vis, individual numbers." The letter also asked for details of the planned increase, including the amounts planned for each individual.

Rydzal responded by letter of October 18, 1995. It asserts that the UAW can permit the wage increase to go into effect or it can block it. It adds that Respondent has no interest in litigating the question, and if the Union wishes to object to a merit increase it can do so, and if so, there will be no merit increase.

Rydzal also attached a summary of the criteria that Respondent will use to determine individual performance and states that the range of increases will probably be from 2 to 6 percent with the average of 3.25 percent. The letter repeats that Respondent will not grant the increases if litigation is the outcome, and that the Union should "tell us clearly and unambiguously by October 25 whether or not you are blocking the increase."

By letter of October 25, 1995, O'Donnell responded. He again requested that Respondent proceed with the wage increase, which he characterized as long overdue. O'Donnell added that the Union is prepared to waive as right to file unfair labor practice charges involving any aspect of Respondent's plan, as long as Respondent provides some mechanism for assuring that merit increases are not arbitrary. In that regard, the Union proposed that the merit increase program be subject to review through a grievance-arbitration procedure.

Respondent did not reply to this letter of O'Donnell, and instead issued a memo to employees, announcing that it would not be providing the merit increase and giving its reasons for doing so. The memo reads as follows:

Over the last six weeks, Bryant & Stratton has unsuccessfully sought approval from your collective bargaining representative (UAW) to implement a merit salary increase. We asked the UAW to simply and unambiguously tell us they had no objection to the wage increase. The UAW has repeatedly refused to tell us that and so we cannot go forward. We know that the UAW has misrepresented this situation to you and we wanted you to know all the facts.

The merit salary increase would have been a follow up to the 1992 faculty wage increase and the 1994 faculty performance bonus payment acknowledging the faculty's role in the success of the college.

The merit increases, which would have totaled 3.25 percent of the existing full-time faculty payroll, would have ranged from 2 percent to 6 percent individually. The actual percentage would have been based on an individual assessment by local campus administration based upon student course evaluations, classroom observations and faculty responsibilities under the faculty guide. An analogous assessment process was utilized a year ago in determining your individual share of the \$50,000 faculty bonus pool. The above method of administering the merit increase has been provided to the UAW.

During the course of bargaining to impasse, more than three years ago, the UAW agreed to the concept of a merit increase related to performance determined by management. Now, your collective bargaining representative wishes to retain the right to pass judgment on the amount of your individual increase. The last correspondence, from the UAW, proposed that each merit increase be subject to review through a grievance arbitration procedure.

Bryant & Stratton, as with all its associates, is prepared to have you individually discuss with your dean your performance review and how your increase was determined. We have no interest in permitting the determination of your increase to be controlled by an outsider, be it the UAW or an arbitrator, neither of whom are familiar with our faculty, our students, or our operations. This would invalidate the concept of merit. Our administration of last year's performance bonus award had no such condition

²⁷ This statement suggests that the bonus increase discussed above had not been implemented as of October 4, 1994. Although the record indicates that it was implemented in the fall of 1994, the precise date of implementation has not been established.

and to our knowledge there was a consensus that it was fair and equitable. We will not be providing the merit increase because of the condition your collective bargaining representative has imposed upon us. This did not have to be the outcome.

On the copy of the memo which was given to employee Richard W. Takowski, a handwritten sentence was written and signed by Lam Morton the institute director. The words were, "Dick, we will set aside some time later this week to answer questions and further discuss—Lam."

Notwithstanding this "invitation" by Morton to Witakowski, no such discussion or meeting ever took place.

Upon finding out about this memo to the faculty, O'Donnell prepared and distributed his own letter to the employees dated November 15, 1995. The letter essentially sets forth the Union's position on the increases, and is forth below:

For over a year, the UAW has been on record telling Bryant & Stratton not to delay well-deserved salary increases for faculty. Recently, Bryant & Stratton began a letter writing game asking the UAW to waive its right to file any unfair labor practices over its undisclosed merit increase plan. Copies of our additional responses are attached. The UAW has absolutely no objections to salary increases for faculty. *Apparently, what Bryant & Stratton really wants is the UAW to waive its right and obligation to represent any faculty member who believes that a merit increase was improper or inadequate.* The UAW cannot and will not waive its legal obligation to act as the bargaining representative for the faculty. Apparently Bryant & Stratton must have been planning some rather arbitrary or discriminatory increases, since they are not confident that a neutral arbitrator would have approved individual amounts. For that matter, despite over 6 weeks of letter writing, Bryant & Stratton refused to disclose or try to justify the individual increases they were planning to make.

Fortunately, Bryant & Stratton was dumb enough to admit in writing that the only reason it is not implementing the merit increase program is because the UAW refused to waive its representation rights. This is a clear unfair labor practice under the National Labor Relations Act. We are filing a charge with the NLRB charging Bryant & Stratton with bad faith bargaining. As a result of our charge, we anticipate that an NLRB complaint should be issued against Bryant & Stratton in the near future ordering Bryant & Stratton to make all affected faculty whole for any lost moneys and to start to bargain in good faith on this issue with the UAW.

We will be scheduling a meeting in the very near future to discuss this and other issues. UAW Regional Director Tom Fricano will be present to answer questions and to hear your comments. As soon as we have a firm date, you will be contacted.

The meeting set forth at the end of this letter was held on December 11, 1995. At that time O'Donnell explained to the employees the Union's position that it could not waive its rights to protect employees from arbitrary treatment, and if it did it could subject them to a charge that it breached the Union's duty of fair representation. According to O'Donnell, notwithstanding the Union's explanations in writing and at the meeting, a number of employees expressed to him that they were upset about

not getting their raise and that they blamed the Union for that result.

Staschak furnished testimony as to why Respondent decided to issue its November 1, 1995 memo to employees. He asserts that he had been informed that the Union had been telling employees that Respondent was holding up the wage increase for employees, and he felt it was important to provide Respondent's position as to why it was not going forward with the increases.

Staschak also explained his reference in the memo to discussing with the Dean employees performance review and how increases were determined. According to Staschak, it is normal practice for employees to meet with their immediate supervisors to discuss performance issues as well as why they were given particular increases.

Respondent did not implement the proposed wage increase program in 1995, but after it withdrew recognition from the Union in April 1996, Respondent implemented the program that it had proposed in 1995.

B. Analysis

As noted above, the Board in *Bryant & Stratton*, I concluded that Respondent had violated Section 8(a)(1) and (5) of the Act by unilaterally freezing its policy of an annual merit wage review. *Daily News of Los Angeles*, 315 NLRB 1236 (1994), enf'd. 73 F.3d 406 (D.C. Cir. 1996).

Since that decision was based on a finding that Respondent had previously established a practice of granting annual merit increases to its employees, its failure to do so in 1995 is similarly violative of the Act. Respondent argues in this regard that 1995 is no different from 1994 or 1996 or any other year since 1990, and that therefore the General Counsel's argument is better served for the remedy phase of *Bryant & Stratton I*.

However, I would note that here Respondent was prepared to grant a particular merit increase program, and failed to do so because the Union failed to waive its right to file unfair labor practice charges. Thus as will be discussed below, the appropriate remedy for the violation is impacted, I deem it essential to decide the matter in this proceeding.

Respondent also contends, as it did in connection with the termination bonus, that the failure to grant the 1995 increases is not unlawful, because of the impasse that it reached in 1992. Thus according to Respondent, once it reached impasse in 1992, and granted a 3-percent increase in 1992 as a result of such impasse (as well as its 1994 merit increase). The prior established pattern of wage increases as found in the prior case no longer existed.

However, this contention of Respondent must be rejected for the reasons discussed above with respect to the termination bonus (i.e., the outstanding serious unfair labor practices precluded a valid impasse, Respondent's declaration of impasse was premature, and in any event was broken by the Union's June 11 proposals). Accordingly this defense must fail.

Respondent's conduct here is violative of Section 8(a)(1) and (5) of the Act for the additional reason that it conditioned granting the wage increase to employees upon the Union waiving its statutory rights to file unfair labor practice charges over the individual decisions made by Respondent to grant increases to employees. Such a condition by Respondent is violative of Section 8(a)(1) and (5) of the Act. *Ellicott Square Court Corp.*, 320 NLRB 762, 772 (1996); *Caribe Staple Co.*, 313 NLRB

877, 890 (1994); and *Athey Products Corp.*, 303 NLRB 92, 95–97 (1991).

Accordingly, I conclude that Respondent has violated Section 8(a)(1) and (5) of the Act by failing to grant a merit increase to its employees on/or about November 1, 1995.

The General Counsel also alleges that Respondent's decision to withhold this increase in 1995 was violative of Section 8(a)(1) and (3) of the Act. I note that the administrative law judge had found such a violation in *Bryant & Stratton I*, but the Board concluded that it was unnecessary to pass upon that finding since that finding would not materially affect the remedy.

I see no reason not to follow the Board's action in this regard, since in my view the remedy would not be materially affected by a finding that the failure to implement the increase was also violative of Section 8(a)(3) of the Act. I therefore shall make no finding or reach any conclusion concerning this allegation of the complaint.

However, the complaint does contain two other allegations related to the wage increase, which do require analysis. First, it is alleged that Respondent by its November 1, 1995 memo to employees undermined and blamed the Union for the failure of unit employees to receive a merit pay increase in violation of the Act.

Respondent argues on the other hand that the communication was a factual, noncoercive statement of its position in bargaining with the Union, and therefore not violative of the Act. *Praff & Whitney*, 789 F.2d 121, 134 (2d Cir.1986); *Huck Mfg. v. NLRB*, 693 F.2d 1176, 1182 (5th Cir.1982).

I am in agreement with the General Counsel and the Charging Party that this communication is violative of Section 8(a)(1) of the Act. In my view Respondent's communication was neither factual nor noncoercive.

Since I have concluded that Respondent's decision not to grant the increase was violative of Section 8(a)(1) and (5) of the Act, Respondent's placing the blame on the Union for its own unlawful failure to follow its prior practices is coercive and violative of Section 8(a)(1) of the Act. *Lamont's Apparel, Inc.*, 317 NLRB 286, 288 (1995); *Harrison Ready Mix Concrete Co.*, 316 NLRB 242 (1995); *LAM Packaging*, 308 NLRB 829, 833 (1992); see also *Alachua Nursing Center*, 318 NLRB 1020, 1031 (1995).

Moreover, I note that the memo conveniently and significantly ignores the reason that the Union would not "unambiguously" consent to the increase, Respondent's demand which I have found to be unlawful, that the Union waive its rights to file future unfair labor practices concerning the issue. I note in this connection that Respondent referred to the Union's last proposal (which was merely a counteroffer to Respondent's demand for a waiver of the filing of unfair labor practices), that each increase be subject to review through a grievance-arbitration procedure. It further asserted that its administration of "last year's performance bonus award had no such condition and to our knowledge there was a consensus that it was fair and equitable."

I find these comments disingenuous and misleading. Thus the only reason that the Union proposed the grievance-arbitration review was in response to Respondent's own unlawful demand that the Union forgo future unfair labor practices. Thus it was not the "Union's condition" that prevented the granting of the increase, but Respondent's unlawful condition, which it totally failed to mention in the memo.

Moreover, the comment that its administration of last year's bonus was fair and equitable, and its argument that the Union did not protest these increases, only serves to reinforce the bad faith of Respondent's insistence on a waiver of future charges concerning the increases. Thus since the Union did not file any charges concerning the 1994 administration of the bonus,²⁸ which presumably were distributed fairly, why would Respondent believe that the Union would be likely to file such charges in 1995, unless such charges were warranted. Therefore, as long as Respondent intended to administer the bonus fairly, as it did in 1994, I conclude that it had no reasonable basis to fear that the Union would file charges concerning that matter. Rather, it appears to me that Respondent knew that the Union would not and could not agree to such an unlawful condition, and it imposed that condition in order to blame the Union for the failure of the employees to receive the increase and to cause the employees to disaffect from the Union.

Respondent's position in this regard is even more egregious in view of the fact that in *Bryant & Stratton I*, the Board concluded that Respondent had violated Section 8(a)(1) and (3) of the Act by discriminatorily issuing standard evaluations to three employees because of their union activities, as well as several other 8(a)(3) violations. This demonstrates that Respondent has discriminated against employees because of their union activities, and I note that evaluations by supervisors of employees has a direct relation to the awarding of merit increases. Therefore it was certainly reasonable for the Union to be wary of waiving their rights to file future unfair labor practice charges concerning Respondent's administration of the bonus program, and unreasonable for Respondent to insist that the Union waive such rights, before it grants a wage increase that it was lawfully required to give in the first place.

Accordingly, I conclude that by its November 1, 1995 letter, Respondent has unlawfully blamed the Union for its own unlawful failure to grant an increase, and undermined the Union's status among its employees.

The complaint also alleges and the General Counsel and the Charging Party argue, that this same memo also constitutes unlawful direct dealing in violation of Section 8(a)(1) of the Act. I agree.

I note particularly that when Respondent distributed its November 1, 1995 memo to employees, it had not responded to the Union's counteroffer of a grievance procedure to substitute for waiving the Union's rights to file future unfair labor practice charges. In fact Respondent never responded to that offer, and never even informed the Union that it had made a final decision not to grant the increase. Instead, Respondent chose to communicate this decision directly to its employees, which included arguments never presented to the Union, such as that arbitrator would not be sufficiently familiar with Respondent's operations to properly evaluate mere increases. This conduct demonstrates that Respondent was ignoring its obligation to deal with Union on matters encompassing the bargaining relationship, and undercuts the ability of the Union to function as a representative. *Master Plastering Co.*, 314 NLRB 349, 351 (1994). Moreover, Respondent's characterization of the Union as an "outsider" and unable to properly evaluate the propriety of individual increases (clearly a bargainable subject), while at

²⁸ It is also significant that the Respondent never demanded that the Union agree not to file unfair labor practice charges in 1994. In fact it never even notified or discussed with the Union that increase.

the same time improperly blaming the Union for the failure of employees to receive the increase, was likely to erode the Union's position and undermine its status as the exclusive bargaining representative of its employees. *Alachua*, supra at 1031; *Fairhaven Properties*, 314 NLRB 763, 767 (1994); *Modern Merchandising, Inc.*, 284 NLRB 1377, 1379 (1987).

I also rely on the specific invitation in the memo to "individually discuss with your dean your performance review and how your increase was determined," as well as Morton's written request to Witakowski to meet and "answer questions and further discuss." While Respondent argues and the record discloses that Respondent ordinarily discusses performance review issues with employees, I do not consider that determinative. Here Respondent had in the same memo announced that it will not be providing the merit increase. Thus there is nothing to discuss with individual employees, except for matters that should be discussed with the Union, such as whether and why the increase was or was not granted, why the Union's proposal for an arbitrator to review merit increases was not acceptable, or other areas concerning the implementation of the merit increase program.

Accordingly, based on the foregoing, I conclude that Respondent has violated Section 8(a)(1) of the Act by dealing directly with employees and bypassing the Union.

VIII. THE 1996 UNILATERAL CHANGES

Following Respondent's withdrawal of recognition on April 19, 1996, Respondent instituted a number of changes in terms and conditions of employment of as unit employees. These changes included the granting of mere pay increases effective April 1, 1996, a change in its faculty performance review and evaluation system, a change in Respondent's sick pay plan which resulted in a reduction in the number of sick days for employees, the implementation of participative career management system, and a profit-sharing plan.

Respondent concedes that these changes in terms and conditions of employment of its employees were effectuated without notification to/or bargaining with the Union. Respondent admits that its sole defense to these allegations is that its withdrawal of recognition from the Union on April 19, 1996, was lawful, and was based on a petition signed by a majority of unit employees.

However, since the Board has already rejected that defense in *Bryant & Stratton II*, in view of the unremedied unfair labor practices of Respondent, I conclude that Respondent has further violated Section 8(a)(1) and (5) of the Act by these unilateral changes.

CONCLUSIONS OF LAW

1. The Respondent, Bryant & Stratton Business Institute, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

3. All full-time faculty, including faculty who are subject area coordinators, employed by the Respondent at 40 North Street and 1028 Main Street in Buffalo, New York, Abbott Road in Lackawanna and 200 Bryant & Stratton Way in Clarence, New York; excluding all part-time faculty, librarians, and all other employees, guards and supervisors as defined in the Act constitute a unit for purposes of collective-bargaining within the meaning of Section 9(b) of the Act.

4. At all times material, the Union has been, and is now, the exclusive bargaining representative of all employees in the appropriate unit for purposes of collective bargaining within the meaning of the Act.

5. By unilaterally withholding annual merit wage increases from its employees, eliminating its payment to employees of a termination bonus, granting a mere pay increase effective April 1, 1996, changing its performance assessment and salary review system for its employees, changing its sick pay plan, implementing a participative career management system, and implementing a profit-sharing plan, Respondent has violated Section 8(a)(1) and (5) of the Act.

6. By informing its employees that the Union was responsible for the unlawful failure of Respondent to grant a merit wage increase to the employees, by undermining the Union's status as collective-bargaining representative of its employees, and by dealing directly with its employees and bypassing the Union concerning their terms and conditions of employment, Respondent has violated Section 8(a)(1) of the Act.

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

THE REMEDY

Having found that Respondent engaged in various unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Since Respondent has already been ordered in *Bryant & Stratton I* to reinstate and implement its monetary review system, it is unnecessary to require Respondent to do so again herein. However, in my view the make-whole remedy with respect to the instant case must be coordinated with the compliance proceedings in *Bryant & Stratton I*. Thus, I shall recommend the standard remedy to make whole the employees for losses by reason of Respondent's unilateral withholding of its annual merit increases, with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The coordination with the compliance stage of *Bryant & Stratton I* is required in my view, since the amounts due employees might differ. As noted above, the prior case concluded that Respondent's established review system consisted of reviews at different times depending on which location the employee worked. On the other hand, the wage increase system that I have found Respondent had unlawfully failed to implement in November 1995 consisted of an identical review program for all employees regardless of their location. Therefore, the computation of backpay for employees would not necessarily be the same, and it would be inappropriate and punitive to require Respondent to grant two increases for the year 1995.²⁹

Therefore, I shall recommend that the employees receive the greater of the amount that they would have received under Respondent's prior system or under the proposed program that Respondent failed to implement in 1995.

I shall also recommend that Respondent restore its prior practice of paying a termination bonus to employees, as well as making whole Whitney and any other employee who failed to receive such a bonus and would have been eligible, by payment of the bonus plus interest, also computed in accord with *New Horizons*, supra.

²⁹ Indeed, the General Counsel concedes that Respondent should be compelled to grant only one increase for the year 1995.

With respect to the various unilateral changes instituted by Respondent subsequent to its unlawful withdrawal of recognition, the record is not clear as to whether these changes were beneficial or detrimental to the employees. In such mixed situations the Board's policy is to "order a return to the status quo with regard to the unfavorable changes, but not to penalize employees by ordering revocation of the favorable changes." *NLRB v. Keystone Steel & Wire*, 653 F.2d 304, 308 (7th Cir. 1981). The decision as to which changes are favorable to the employees shall be made by the employees as expressed through their bargaining representative. *Children's Hospital of San Francisco*, 312 NLRB 920, 931 (1993), aff'd. 87 F.3d 304, 311 (9th Cir. 1996).

Additionally, I find it appropriate to again extend the certification year of the Union, as the Board has done in both *Bryant & Stratton I* and *II*, since Respondent has still not complied with the orders in either of those cases.

Finally, the General Counsel requests an amendment to the standard backpay order requiring Respondent to "provide" to the Board the necessary records, "including an electronic copy of such records it stored in electronic form."

According to the General Counsel, such an order would save the Board considerable time and expense, as well as alleviate efforts of some of Respondent's to frustrate the Board's calculation of appropriate backpay.

In the absence of any record evidence supporting the General Counsel's assertions set forth above, or any notice to the other parties that it would be seeking such a remedy, I find it inappropriate to recommend such an amendment. Moreover, in my view such a departure from standard Board language should come from the Board itself.

Based on these findings of fact and conclusions of law and on the entire record, I issue the following recommended³⁰

ORDER

The Respondent, Bryant & Stratton Business Institute, Buffalo, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Undermining the status of Local 2294, United Automobile Aerospace & Agricultural Implement Workers of America as the collective-bargaining representative of its employees, and informing its employees that the Union was responsible for its unlawful failure to grant a merit wage increase to the employees.

(b) Bypassing the Union or bargaining directly with its employees in the bargaining unit, with respect to wages, hours, and other terms and conditions of employment.

(c) Unilaterally, without notifying or affording the Union an opportunity to bargain, withholding annual merit increases, or eliminating the payment of a termination bonus to its employees.

(d) Unilaterally, without notifying or affording the Union an opportunity to bargain, instituting, and granting a merit pay increase program, changing its performance assessment and salary review system, changing its sick pay plan, implementing

a participative career management system, and implementing a profit-sharing plan.

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

All full-time faculty, including faculty who are subject area coordinators, employed by us at 40 North Street and 1028 Main Street, Buffalo, New York, 1214 Abbott Road, in Lackawanna, New York, and 200 Bryant & Stratton Way, Clarence, New York; excluding all part-time faculty, librarians and all other employees, guards and supervisors as defined in the Act.

(b) Treat the initial year of certification as beginning on the date the Respondent complies with this Order.

(c) Restore its prior practice of paying a termination bonus to its employees.

(d) Make its employees whole, with interest, for all losses suffered by its employees as a result of its unilateral discontinuance of its annual wage reviews and increases, as well as a result of its unilateral elimination of its termination bonus, in the manner set forth in the remedy section of this decision.

(e) If the Union so desires, revoke and cease giving effect to the changes in the aforementioned employees' terms and conditions of employment which were implemented on or after May 3, 1996; and in the event of such revocation, make employees whole, with interest, for any losses they may have suffered as a result of such changes.

(f) Within 14 days after service by the Region, post at its Downtown Buffalo, Eastern Hills, and Southtowns facilities copies of the attached notice marked "Appendix."³¹ Copies of the notice, on forms provided by the Regional Director for Region 3, 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. 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 any of the facilities 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 the Respondent at any time since July 12, 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 that the Respondent has taken to comply.

³⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

³¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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

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

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 undermine the status of Local 2294, United Automobile Aerospace & Agricultural Implement Workers of America as the collective-bargaining representative of our employees, or inform our employees that the Union was responsible for our unlawful failure to grant a merit wage increase to said employees.

WE WILL NOT bypass the Union, or bargain directly with our employees in the bargaining unit, with respect to wages, hours, and other terms and conditions of employment.

WE WILL NOT unilaterally, without notifying or affording the Union an opportunity to bargain, withhold annual merit increases or eliminate the payment of a termination bonus to our employees.

WE WILL NOT unilaterally, without notifying or affording the Union an opportunity to bargain, institute and grant a merit pay increase program, change our performance assessment and salary review system, change our sick pay plan, implement a

participative career management system, or implement a profit-sharing plan.

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

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

All full-time faculty, including faculty who are subject area coordinators, employed by us at 40 North Street and 1028 Main Street, Buffalo, New York, 1214Abbott Road, in Lackawanna, New York, and 200 Bryant & Stratton Way, Clarence, New York; excluding all part-time faculty, librarians and all other employees, guards and supervisors as defined in the Act.

WE WILL treat the initial year of union certification as beginning on the date we comply with the Board's Order.

WE WILL restore our prior practice of paying a termination bonus to our employees.

WE WILL make our employees whole, with interest, for all losses suffered by them as a result of our unilateral discontinuance of our annual wage reviews and increases, as well as a result of our unilateral elimination of our termination bonus.

WE WILL, if the Union so desires, revoke and cease giving effect to the changes in the aforementioned employees' terms and conditions of employment which we implemented on/or after May 3, 1996; and in the event of such revocation, make our employees whole, with interest, for any losses they may have suffered as a result of such changes.

BRYANT & STRATTON BUSINESS INSTITUTE