

Cotter & Company and Teamsters Local Union No. 293, International Brotherhood of Teamsters, AFL-CIO. Cases 8-CA-27692 and 8-CA-28110

July 19, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND BRAME

On April 11, 1997, Administrative Law Judge Steven M. Charno issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs, the Charging Party Union filed an answering brief to the Respondent's exceptions, and the Respondent filed an answering brief to the General Counsel's exceptions and a reply brief to the Union's answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, as modified, to modify the remedy,¹ and to adopt the recommended Order as modified.²

We affirm the judge's findings that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to meet and bargain with the Union, by implementing its last offer, including new work rules, in the absence of a valid bargaining impasse, by bypassing the Union and dealing directly with a unit employee, and by refusing to process employees' grievances. Although we also agree with the judge that the Respondent further violated Section 8(a)(5) and (1) by disciplining employees pursuant to unlawfully implemented work rules, we specifically find that Alejandro Gonzalez' discharge and Adam Csongedi's suspension were unlawful for the reasons stated below. Additionally, for the reasons stated below, we reverse the judge and find that the Respondent did not further violate Section 8(a)(5) and (1) of the Act by terminating dues deductions for the unit employees upon contract expiration.

1. We agree with the judge, for the reasons stated in his decision, that the parties had not bargained to impasse be-

¹ Although the judge provided a make-whole remedy for those unit employees who sustained losses in wages or benefits because the Respondent disciplined them pursuant to unlawfully implemented work rules, he failed to order in his remedy section the reinstatement of discharged employees Alejandro Gonzalez and Richard Martin although he included their reinstatement in his recommended Order. Accordingly, we modify the judge's remedy to direct that the Respondent offer Gonzalez and Martin immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

² The General Counsel has excepted to the judge's failure to include provisions in his recommended Order and notice directing that the Respondent rescind those unilateral changes that benefited the unit employees only on the Union's request and that the Respondent make whole any unit employees who sustained losses in wages or benefits because of the work rules that the Respondent unlawfully implemented. Because we find merit to these exceptions, we shall modify the remedy, Order, and notice accordingly.

fore the Respondent unilaterally implemented changes in the unit employees' terms and conditions of employment. We note, as the judge did, that the Board in *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enfd. sub nom. *AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968), set forth a number of factors for determining whether impasse has been reached:

Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

Another factor that is considered is the parties' demonstrated flexibility and willingness to compromise in an effort to reach agreement. See, e.g., *Wycoff Steel*, 303 NLRB 517, 523 (1991). After considering the relevant factors, the Board will find that an impasse existed at a given time only if there is "no realistic possibility that continuation of discussion at that time would have been fruitful." *AFTRA v. NLRB*, 395 F.2d at 628.

In affirming the judge's finding that impasse was not reached in this case, we emphasize that, until the Respondent abruptly claimed that its "last, best and final offer" was on the table and would be implemented unilaterally if not accepted, both the Respondent and the Union had demonstrated considerable flexibility and willingness to compromise their positions. Thus, as both the judge and our concurring colleague discuss in more detail, there had been movement on both sides concerning important subjects such as wages, benefits, and holidays, and the parties continued making concessions until the Respondent cut short that process.

The Respondent contends, however, that the union negotiators' response to its "last, best and final offer"—that the Respondent was not offering anything that the Union could recommend to the employees—establishes that the parties were at impasse. We are not persuaded. It is a commonplace that experienced negotiators make concessions cautiously and that negative initial reactions are later reconsidered in order to obtain an agreement. See, e.g., *PRC Recording Co.*, 280 NLRB 615, 635 (1986), enfd. 836 F.2d 289 (7th Cir. 1987); *Builders Institute of Westchester County*, 142 NLRB 126, 127 (1963); *Louisville Plate Glass Co.*, 243 NLRB 1175, 1181 (1979), enfd. 657 F.2d 106 (6th Cir. 1981); and *Chicago Typographical Union Local 16 v. Chicago Sun-Times*, 935 F.2d 1501, 1508 (7th Cir. 1991). In the context of these negotiations—where the parties had been confronting difficult issues in a constructive manner—the Respondent's abrupt declaration that its most recent offer was "final" and would be implemented unilaterally if rejected was a surprising development. In that context, we regard the Union's response—that the Re-

spondent was not offering anything that the Union could recommend—as an understandable expression of dissatisfaction with the position just taken by the Respondent. Such a response is not reasonably interpreted as a firm indication of the Union’s unwillingness to negotiate further or make additional concessions.

The record also indicates that the parties did not have a contemporaneous understanding that they were at impasse. Indeed, during the last bargaining sessions, before the Respondent’s presentation of its final offer, the parties had both made several concessions in elements of their proposals and counterproposals in order to facilitate coming to an agreement. Moreover, when the Respondent presented its final offer, the Union’s attorney specifically stated that the parties were not at impasse and that the Respondent would act unlawfully if it implemented the offer.³ Two days later, after the unit employees voted not to vote on the question of ratifying the Respondent’s offer, the Union’s negotiators asked the Respondent’s negotiator to meet and continue bargaining. This conduct indicates that the Union realistically believed that further negotiations might produce agreement. Under these circumstances, an impasse cannot be found, because an impasse can exist only if *both* parties believe that they are “at the end of their rope.” *PRC Recording Co.*, 280 NLRB at 635; *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1186 (5th Cir. 1982) (“[F]or a deadlock to occur, *neither party* must be willing to compromise”); and *Teamsters Local 639 v. NLRB*, 924 F.2d 1078, 1084 (D.C. Cir. 1991).

The Respondent cites *NLRB v. H&H Pretzel Co.*, 831 F.2d 650, 656–657 (6th Cir. 1987), in support of its contention that the parties were at impasse. That case, however, is readily distinguishable from this one. In *H&H Pretzel*, the employer made clear to the union that it had to achieve significant labor cost savings in order to survive; for its part, the union not only had no intention of granting economic concessions but actually was demanding wage increases. The union asked for additional bargaining, but did not offer new proposals or indicate that it would be willing to compromise on any particular issues. In those circumstances, the court agreed with the Board that the union’s expressed willingness to continue negotiations was a “mere token offer,” made simply to delay the inevitable imposition of wage reductions, and that the union actually was unwilling to move from its earlier position.

In this case, by contrast, the record does not justify an inference that both parties were similarly committed to maintaining plainly irreconcilable positions. Rather, until the Respondent’s threat to implement its proposals unilaterally if not accepted, both parties had demonstrated flexibility and willingness to compromise on a number of important issues. The Respondent’s threat of unilateral implementa-

tion was not made at a time when there was no realistic possibility that continuation of discussion would have been fruitful. To the contrary, the Respondent declared that its most recent offer was its “final” offer only 1 day after making its first economic proposal. In that quite different context, it is understandable that the Union did not immediately respond to the Respondent’s threat to implement its proposals unilaterally by offering specific new proposals or concessions. In short, in contrast to *H&H Pretzel*, where the parties clearly were deadlocked, here the Respondent’s declaration of impasse was premature, and the Union’s request for further negotiations a reasonable attempt to reach agreement.

2. Regarding Gonzalez’ discharge and Csongedi’s suspension, the evidence shows that, on January 1, 1992, the Respondent issued work rules for the Cleveland, Ohio distribution center where it employs the unit employees. The second paragraph of this document states as follows:

Participating in any of [11 enumerated] activities will result in disciplinary action, including warnings, suspension or discharge, depending, on management’s discretion, upon the circumstances surrounding the incident, the severity of the misconduct and the offending employee’s past record.

These work rules remained in effect until the Respondent, effective September 22, 1995,⁴ unlawfully changed some of them in the absence of a valid bargaining impasse.

The Respondent, throughout the relevant events here, has utilized a four-step progressive disciplinary system which provides for a verbal warning, a written warning, suspension, and then discharge for successive infractions of its work rules. On October 10, following the Respondent’s unlawful unilateral changes, Gonzalez received a verbal warning for missing scheduled overtime work under Work Rule 5 that the Respondent unlawfully implemented after declaring a bargaining impasse. This verbal warning, as the judge found, therefore violated Section 8(a)(5) and (1) of the Act.

On October 30, the Respondent issued Gonzalez a written warning for being out of his work area under a valid work rule that predated the Respondent’s unlawful unilateral changes. After Gonzalez was unable to work scheduled overtime on December 28, he received a 6-day suspension on January 2, 1996, for violating new Work Rule 5. The Respondent’s discipline again violated Section 8(a)(5) and (1). Thus, the only discipline that the Respondent could have lawfully imposed on Gonzalez for these incidents was a verbal warning to Gonzalez for being out of his work area on October 30.

On December 29, before his suspension, Gonzalez refused direct orders by two supervisors to load two shipments on trucks. Gonzalez walked around the shipping dock for 15 minutes and then went to lunch. After lunch

³ Contrary to our concurring colleague, we find this statement to be clearly relevant to the issue of the parties’ contemporaneous understanding concerning the status of negotiations.

⁴ All dates are in 1995, unless otherwise noted.

ended, Gonzalez reported a back injury and his supervisor drove him to a medical center. On January 12, the Respondent discharged Gonzalez, who had just completed his suspension, because he had violated Work Rules 2 and 4 on December 29, by hampering production and disobeying orders to do his job. Although some discipline was lawful as Gonzalez had violated work rules that preexisted the Respondent's unilateral changes, the judge concluded that the discharge should have been a written warning based on his finding that Gonzalez should have been only at the second step of the progressive disciplinary system.⁵

The evidence concerning the Respondent's discipline of Csongedi establishes that, on December 22, he received a verbal warning for deficient performance as an order filler. The Respondent issued Csongedi a written warning for the same offense on January 19, 1996. Based on these warnings, the Respondent placed Csongedi on probation and assigned him to an in-house quality control check. It is clear, however, that both warnings, as well as Csongedi's probation, violated Section 8(a)(5) because the Respondent disciplined this employee pursuant to an unlawfully implemented work rule, i.e., both warnings and probation were imposed pursuant to a quality standard implemented after the Respondent's declaration of impasse.

About the first week of March 1996, the Respondent assigned Csongedi to work as a quality control checker. The Respondent has a general policy of "salting" orders in order to determine whether quality control checkers will catch specific errors that the Respondent deliberately makes in customers' orders. When Csongedi discovered an error in a salted order on March 6, 1996, he told a fellow employee that he would let the matter slide and not report the errors to supervision as required. Csongedi also failed to report errors in "salted" orders on three other occasions in March. In fact, during the entire time he spent in quality control, Csongedi never reported any errors in the orders he checked. On March 29, 1996, the Respondent gave Csongedi a 2-week suspension for filing falsified reports in violation of Work Rule 11 based on his failure to report the errors and his comments reported to management showing that he was intentionally failing to act. The Respondent's action was consistent with its thinking that Csongedi had progressed to the third step of the disciplinary system.

The judge found that the Respondent had properly disciplined Csongedi under its Work Rule 11. However, because the Respondent's earlier discipline of Csongedi was unlawful, the judge concluded that his suspension should have been a verbal warning under the progressive disciplinary system. The judge therefore found that the Respondent further violated Section 8(a)(5) by suspending Csongedi in these circumstances.

⁵ The Respondent, in contrast, would have viewed "discharge" as being the next step of progressive discipline for Gonzalez after he returned from his suspension.

The Respondent argues, *inter alia*, in its exceptions that Gonzalez' discharge and Csongedi's suspension were lawful because it "was empowered to discharge employees for even one offense for violation of work rules." We find no merit in that argument, which reflects a misapprehension of the legal principles governing discipline alleged to violate Section 8(a)(5).

In *Great Western Produce*, 299 NLRB 1004, 1005 (1990), the Board held that the discipline or discharge of an employee violates Section 8(a)(5) if the employer's unlawfully imposed rules or policies were a factor in the discipline or discharge. The Board noted that the employer may avoid having to reinstate and pay backpay to employees who were subjected to such unlawful discipline if it can show that it would have taken the same action against the employee even in the absence of the unlawful rule or policy. *Id.* at 1006. Normally, such defenses are raised in compliance proceedings; however, when the employer presents its evidence concerning the remedy at the hearing on unfair labor practices, no further litigation is required. *Id.* at 1005 fn. 10 and 1006-1007. See also *Consec Security*, 328 NLRB No. 171, slip op. at 1-2 (1999).

Applying the principles of *Great Western Produce* to the facts of this case, we are satisfied that the General Counsel has established the Respondent's unlawfully imposed rules were a factor in the discharge of Gonzalez and the suspension of Csongedi, and that those disciplinary actions therefore violated Section 8(a)(5). We find that no further litigation is required because the employer has presented its evidence concerning the remedy at the hearing on the unfair labor practices. Considering that evidence, we further find that the Respondent has failed to show that it would have discharged Gonzalez and suspended Csongedi regardless of whether it had previously taken unlawful discipline against them, and that a status quo ante remedy is therefore appropriate.

In finding the 8(a)(5) violation, we agree with the judge that the Respondent's unlawfully promulgated work rules contributed to its decisions to discharge Gonzalez and to suspend Csongedi. Although the judge found that discipline would have been warranted on both occasions, he also found that the discipline of both employees would have been less severe had they not previously been disciplined under the new and unlawful work rules.

The record amply supports the judge's findings. It is undisputed that the Respondent has a progressive disciplinary system that it routinely follows when disciplining employees. And at least some of the discipline that the Respondent issued to Gonzalez and Csongedi was unlawful because it was issued for violations of work rules that the Respondent had unlawfully imposed. It logically follows that the earlier unlawful discipline was a factor in both Gonzalez' discharge and Csongedi's suspension.

The reasonableness of that logical inference is strengthened by the evidence that, under its own work rules, the

Respondent avowedly considers “the offending employee’s past [work] record” before imposing discipline. The record strongly indicates that the Respondent scrupulously followed that policy with regard to both Gonzalez and Csongedi. Thus, under the Respondent’s progressive disciplinary system, suspension is the penalty for a third infraction of work rules, and discharge is the penalty for the fourth infraction. Counting each employee’s two previous unlawful warnings, Gonzalez was at the fourth step in the system when he was discharged and Csongedi was at the third step when he was suspended. We do not think that it was coincidence that, with regard to each employee, the Respondent meted out exactly the discipline called for under its progressive disciplinary policy. Rather, we conclude that the Respondent followed that policy and discharged Gonzalez and suspended Csongedi partly on the basis of their previous unlawful discipline. We therefore find that the General Counsel has established that the previous unlawful discipline was a factor in Gonzalez’ discharge and Csongedi’s suspension, and consequently that those actions violated Section 8(a)(5).

With respect to the appropriate remedy for these violations, we find that the Respondent has failed to demonstrate that it would have discharged Gonzalez for hampering production and disobeying orders to perform his job, and would have suspended Csongedi for falsifying documents, even in the absence of the earlier unlawful discipline. In so reasoning, we do not question the Respondent’s assertion that it had the discretion to bypass progressive discipline and impose more severe discipline on employees, including suspension and discharge, for egregious violations of its work rules.⁶ Rather, we find insufficient evidence to support the Respondent’s contention that it departed from its progressive discipline system in the cases of Gonzalez and Csongedi.

Regarding Gonzalez’ discharge, the Respondent did not present any evidence that it ignored progressive discipline and immediately discharged other employees for infractions similar to Gonzalez’. The Respondent thus has not shown that it would have terminated Gonzalez for that conduct alone.⁷

Regarding Csongedi’s suspension, the Respondent’s warehouse superintendent, Brian Kidd, testified that the Respondent has suspended at least two other employees for

falsifying documents under Work Rule 11, as Csongedi did. However, the Respondent presented no specific evidence regarding those other suspensions, and Kidd later admitted that Csongedi falsified documents in a different manner from the other employees. Consequently, the Respondent has not shown that Csongedi’s infraction was comparable to those for which it previously suspended employees for violating Work Rule 11.

Finally, as we have noted, the Respondent’s stated policy is to consider an employee’s past work record before imposing discipline. The existence of this policy further undercuts the Respondent’s contention that it would have discharged Gonzalez and suspended Csongedi regardless of whether it had previously imposed unlawful discipline against them. For all of these reasons, we find that the Respondent has failed to establish that it would have terminated Gonzalez and suspended Csongedi without regard to its progressive disciplinary system. We therefore find it appropriate to order the Respondent to offer to reinstate Gonzalez, to rescind Csongedi’s suspension, and to make both employees whole for the unlawful actions taken against them.

3. In finding that the Respondent violated Section 8(a)(5) and (1) by ceasing dues deductions on the unit employees’ behalf after the collective-bargaining agreement had expired, the judge ignored well-established Board precedent in *Bethlehem Steel Co.*, 136 NLRB 1500 (1962), enf. denied on other grounds sub nom. *Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964), and its progeny holding that an employer, on contract expiration, can lawfully discontinue the deduction of union dues that had been required under a dues-checkoff provision in the parties’ labor agreement. Furthermore, subsequent to the judge’s decision, the Board reaffirmed this principle in its recent decision in *Hacienda Resort Hotel & Casino*, 331 NLRB No. 89 (2000). In short, an employer’s checkoff obligation does not survive expiration of the collective-bargaining agreement. We therefore dismiss this complaint allegation.

AMENDED CONCLUSIONS OF LAW

Substitute the following for the judge’s Conclusions of Law 3.

“3. By the following acts, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act: (a) refusing to meet and continue to bargain with the Union over the terms and conditions of a collective-bargaining agreement, (b) implementing its last offer absent an impasse in negotiations, (c) implementing new work rules absent an impasse in negotiations, (d) disciplining employees Gonzalez, Dillon, Martin, and Csongedi pursuant to unlawfully implemented work rules, (e) bypassing the Union and dealing directly with a unit employee, and (f) refusing to process employees’ grievances.

⁶ Contrary to the Respondent’s argument, however, the judge’s finding that the Respondent lawfully discharged Michael Hanobik for a “flagrant, insubordinate violation of Respondent’s work rules,” apparently without going through all the steps in its progressive disciplinary policy, does not require a finding that it discharged Gonzalez and suspended Csongedi in the same manner. The Respondent’s action with regard to Hanobik shows only that it *could* impose harsher discipline than would be called for at any given step in the progressive disciplinary policy, not that it did so in the case of either Gonzalez or Csongedi. We also note that no exceptions were filed regarding the judge’s finding that Hanobik’s discharge did not violate the Act, and therefore that finding is not before us.

⁷ See *Great Western Produce*, 299 NLRB at 1007 (employees Steeves and Trujillo).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Cotter & Company, Westlake, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraphs 1(f) and 2(l) from the Order, and reletter subsequent paragraphs accordingly.

2. Substitute the following for paragraph 2(b).

“(b) On the Union’s request, cancel and rescind all terms and conditions of employment, including work rules and quality standards, unilaterally implemented on or after September 1, 1995, but nothing in this Order is to be construed as requiring the Respondent to cancel any unilateral changes that benefited the unit employees without a request from the Union.”

3. Substitute the following for paragraph 2(h).

“(h) Make whole unit employees, including Alejandro Gonzalez, Richard Martin, and Adam Csongedi, for any loss of earnings and other benefits they may have suffered as a result of the Respondent’s unlawful conduct in the manner set forth in the remedy section of the judge’s decision.”

4. Substitute the attached notice for that of the administrative law judge.

MEMBER BRAME, concurring.

I join my colleagues in finding that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to meet and bargain with the Union, by implementing its last offer in the absence of a bargaining impasse, by bypassing the Union and dealing directly with a unit employee, by refusing to process employees’ grievances, and by disciplining employees Adam Csongedi, Matthew Dillon, Alejandro Gonzalez, and Richard Martin pursuant to unlawfully implemented work rules. In doing so, I reject the Respondent’s defense of a valid bargaining impasse for the reasons stated below.

The evidence establishes that the principal issues the parties had to resolve during bargaining concerned the three noneconomic proposals that the Respondent presented at the outset of negotiations, as well as the unit employees’ wages and health care benefits. Regarding the Respondent’s noneconomic proposals, the parties, after eight bargaining sessions, had nearly reached agreement on employee holidays.¹ Furthermore, the Union had agreed to the Respondent’s workweek proposal for employees handling outbound freight traffic and had made significant concessions on this issue for employees who handled inbound traffic. The parties had not yet resolved the Respondent’s proposal to include for the first

¹ Although the Respondent had initially sought to convert six paid holiday to personal days, the Respondent’s final proposal sought to convert only the day after Thanksgiving from a holiday to a personal day.

time a provision in the collective-bargaining agreement requiring employees to work mandatory overtime. Regarding employees’ wages and health care benefits, the parties had substantially narrowed their differences as each side had twice improved their opening offers in their efforts to reach agreement.²

Based on the continuous movement by the parties on issues of importance to both sides during these contract negotiations, I conclude that the bargaining flexibility that the Respondent and the Union demonstrated here provided a basis for further contract negotiations. I do not believe that the parties had reached a contemporaneous understanding that additional bargaining would be futile after the parties had concluded the eighth bargaining session on August 29. It is conceivable that the parties eventually would have reached an agreement on economic subjects and language issues if they had continued to meet and explore further tradeoffs that could have mutually assisted them in resolving their differences. The Respondent, as the asserting party here, had the burden to demonstrate that impasse had occurred.³ I do not find that the Respondent has effectively shown that further movement by either side was an unlikely event in the present case. I do not view as dispositive the evidence that the Respondent’s officials had decided on certain wage levels as a bottom line proposal before negotiations began and therefore included them as part of the Respondent’s “last, best and final offer.” For, in collective bargaining, as Judge Posner has observed, “[a]fter final offers come more offers,” *Chicago Typographical Union Local 16 v. Chicago Sun Times*, 935 F.2d 1501, 1508 (7th Cir. 1991). Accordingly, I find that the Respondent violated Section 8(a)(5) and (1) of the Act by, inter alia, improperly declaring a bargaining impasse and refusing to meet and bargain with the Union.

In reaching this conclusion, however, I do not rely on the judge’s finding that the parties’ negotiations did “not constitute the type of exhaustive negotiations which might prompt a finding of impasse.” The evidence shows that the parties met for between 7 and 8 hours at the first two negotiating sessions and then for significant periods of

² By the last session, the Union had modified its wage stance by proposing hourly wage increases of 60, 70, and 80 cents in successive contract years for employees hired after August 27, 1985 (lower tier), and 50 cents an hour in each year for employees hired on or before that date (top tier). The Union also had lowered its demand for monthly health and welfare payments to \$305 monthly in the first year, \$340 the second year, and \$355 the final year. The Respondent’s “final offer” included pay raises of 25 cents an hour more the first year and 15 cents an hour additional in each of the last 2 contract years for top tier employees, whereas lower tier employees would get raises of 30 cents per hour in each year of the contract, with an extra 5 cents an hour for both tiers if the contract was ratified by August 31, 1995. Regarding health and welfare contributions, the Respondent proposed monthly contributions of \$252, \$260, and \$270 for each employee during the succeeding years of the 3-year agreement.

³ See *North Star Steel Co.*, 305 NLRB 45 (1991), enf. 974 F.2d 68 (8th Cir. 1992).

time during their last six meetings. Thus, although I agree that further bargaining might have benefited the parties' as they endeavored to reach agreement in these circumstances, the judge's characterization of the duration of the parties' negotiations is immaterial to my analysis here.

I also place no reliance on the judge's conclusion that the Respondent's failure to provide requested information to the Union "reinforced" his finding that the parties had not reached a bargaining impasse. Although the Union requested information about the Respondent's workweek schedule proposal at the outset of bargaining and the Respondent did not provide this information until the seventh bargaining session, there is no showing in this record that the Respondent's failure to provide this information at an earlier point in the negotiations hindered bargaining.

In short, I find that no bargaining impasse existed in this case based on the parties' demonstrated flexibility in bargaining and their demonstrated willingness to move off their initial proposals. For these reasons, I join my colleagues and the judge in finding that the Respondent has not met its burden of showing that a valid bargaining impasse existed in this case.⁴

MEMBER FOX, dissenting in part.

I join my colleagues in all respects but one. Unlike them, I would find, for the reasons expressed in Member Liebman's and my dissent in *Hacienda Resort Hotel & Casino*, 331 NLRB No. 89 (2000), that the Respondent violated Section 8(a)(5) of the Act when it unilaterally ceased deducting employees' union dues after the parties' collective-bargaining agreement expired.

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT refuse to meet and bargain in good faith over the terms and conditions of a collective-bargaining agreement with Teamsters Local Union No.

⁴ In so concluding, I stress that the self-serving statements made by the Union's attorney denying the existence of a bargaining impasse have no bearing on my finding.

293, International Brotherhood of Teamsters, AFL-CIO (the Union) as the exclusive bargaining representative of the employees in the following unit:

All employees employed by us only at 26025 First Street, Westlake, Ohio and the vicinity within a radius of fifty (50) miles, as Distribution Experts, Maintenance and Janitors.

WE WILL NOT implement our last offer before the parties have reached a lawful impasse during negotiations and WE WILL NOT implement new work rules and quality standards before the parties have reached an impasse in negotiations.

WE WILL NOT discipline you pursuant to unlawfully implemented work rules.

WE WILL NOT bypass the Union and deal directly with you.

WE WILL NOT unlawfully refuse to process your grievances.

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

WE WILL, on request, bargain in good faith with the Union as your exclusive bargaining representative with respect to the terms of a collective-bargaining agreement and, if an understanding is reached, embody it in a signed agreement.

WE WILL, on the Union's request, cancel and rescind all terms and conditions of employment, including work rules and quality standards, which we unlawfully implemented on or after September 1, 1995, but nothing in this Order is to be construed as requiring us to cancel any unilateral changes that benefited the unit employees without a request from the Union.

WE WILL (a) cancel and rescind Alejandro Gonzalez' October 10, 1995 verbal warning and his January 2, 1996 suspension; and reduce Gonzalez' October 30, 1995 written warning to a verbal warning and his January 12, 1996 discharge to a written warning; (b) cancel and rescind employee Matthew Dillon's October 3, 1995 verbal warning, his November 2, 1995 written warning and his November 7, 1995 suspension; (c) cancel and rescind employee Richard Martin's September 1995 verbal warning; and reduce Martin's November 1995 written warning to a verbal warning, his December 1995 suspension to a written warning and his February 20, 1996 discharge to a suspension; and (d) cancel and rescind employee Adam Csongedi's December 22, 1995 verbal warning, his January 19, 1996 written warning and his January 1996 quality probation; and reduce his March 29, 1996 suspension to a verbal warning.

WE WILL, within 14 days from the date of the Board's Order, offer Alejandro Gonzalez and Richard Martin full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without

prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole any unit employees, including Alejandro Gonzalez, Richard Martin, and Adam Csongedi, for any loss of earnings and other benefits they suffered as a result of our unlawful discipline, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discipline of Alejandro Gonzalez, Matthew Dillon, Richard Martin, and Adam Csongedi and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discipline will not be used against them in any way.

WE WILL process your outstanding and future grievances.

COTTER & COMPANY

Mark F. Neubecker, Esq., for the General Counsel.

Mark V. Webber, Esq. (Goodman, Weiss, Miller & Goldfarb), of Cleveland, Ohio, for the Respondent.

John M. Masters, Esq. (Masters & Associates), of Cleveland, Ohio, for the Charging Party.

DECISION

STEVEN M. CHARNO, Administrative Law Judge. In response to charges timely filed by Teamsters Local Union No. 293, International Brotherhood of Teamsters, AFL-CIO (the Union), a consolidated complaint was issued on May 30, 1996, which alleged that Cotter & Company (Respondent) had violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act), by, inter alia, refusing to bargain in good faith with the Union and by unlawfully disciplining and discharging its employees. Respondent's answer denies the commission of any unfair labor practice.

A hearing was held before me in Cleveland, Ohio, on September 30–October 3, 1996. Simultaneous trial briefs were filed by the General Counsel, Union, and Respondent under extended due date of December 20, 1996, and reply briefs were filed by the Union and Respondent under extended due date of January 10, 1997.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Delaware corporation with a place of business in Westlake, Ohio, is engaged in the manufacture and distribution of hardware to various True Value Hardware stores. Respondent, in the course of its business, annually purchases and receives goods valued in excess of \$50,000 from outside Ohio. It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of the Act.

The Union is admitted to be, and I find is, a labor organization within the meaning of the Act.

II. ALLEGED UNLAWFUL CONDUCT¹

A. Contract Negotiations

The Union represents a unit of warehouse employees, as well as a unit of drivers, at Respondent's Westlake warehouse facility.

¹ Unless otherwise indicated, the findings of fact in this section are based on uncontroverted evidence.

The most recent collective-bargaining agreement between the Union and Respondent covering the warehouse employees² expired on August 31, 1995.³ Prior to that expiration, contract negotiations between the parties took place on eight occasions: July 20 and 21 and August 2, 3, 4, 23, 28, and 29. The Union's negotiating committee was headed by Business Representative Charles Smith and further consisted of Attorney John Masters, Business Representative John Gerard, Stewards Russell Tegtmeir and David Gaum, and employees Rich Martin, Michael Hanobik, and Adam Csongedi. Respondent was represented by Attorney Wendell Provost, who acted as its chief spokesperson, and by three of the facility's managers: Warehouse Superintendent Brian Kidd, Supervisor Wayne McIntosh, and Operations Manager Bill Livingston.⁴

After Provost made an opening statement on July 20, the Union set forth a complete contract proposal raising both economic and noneconomic issues, and the parties began to discuss each of the items proposed by the Union. When they reached the Union's economic proposals, Provost indicated that Respondent wished to defer any discussion of economics until certain language issues were resolved. Citing competitive and customer relations concerns, Provost then made three language proposals: (1) six identified paid holidays would be converted to personal days, (2) the workweek would consist of 4 consecutive 10-hour days or 5 consecutive 8-hour days, including Saturdays and Sundays, all at straight time, and (3) a failure to work mandatory overtime would constitute a disciplinable work rule violation, rather than a less consequential infringement of Respondent's attendance policy. In contrast, the Union had initially proposed the addition of two paid holidays and sought to limit the number of hours an employee was required to work on days before or after a holiday. The Union requested additional information from Respondent concerning the latter's workweek proposal. After 6-1/2 hours of negotiation, the session closed with a tentative minor agreement over elimination of the existing grievance procedure's peer review provision.

During a 6-hour session on July 21, the parties discussed each other's proposals but did not raise economic issues. Respondent and the Union finalized their agreement on the elimination of peer review language in the grievance procedure and agreed that the term of the contract would be 3 years. The Union attempted to secure language that would eliminate any possibility of appealing arbitration awards, but Respondent rejected the proposal. The parties then agreed to further negotiations on August 2-4.

During the negotiating sessions on August 2, 3, and 4, the first two of which lasted between 7 and 8 hours, the parties did not discuss economic issues. They continued to discuss Respondent's holiday and workweek proposals, but the Union's counteroffer of exchanging Martin Luther King day for the day after Thanksgiving was rejected by Respondent. The Union indicated that it was not willing to accept a proposal that required its members to work both Saturday and Sunday at straight time. On August 2, the Union withdrew its proposals to (1) double the Union's jurisdiction under the contract and (2) reduce the probationary period for new employees. Respondent

² It is admitted that the Union is the designated exclusive bargaining representative of employees in the following appropriate unit: all employees employed by Cotter & Company only at 26025 First Street, Westlake, Ohio, and the vicinity within a radius of fifty (50) miles, as Distribution Experts, Maintenance, and Janitors.

³ All dates are 1995 unless otherwise indicated.

⁴ Livingston first joined Respondent's bargaining committee at the August 2 session.

did not withdraw any of its proposals. On August 3, Respondent supplied cost data on its health plan proposal, but the proposal was not discussed. The parties took up work rule issues, Respondent stating that (1) it would not limit mandatory overtime and (2) supervisors only performed bargaining unit work when employees left early. The Union took the position that (1) the contract did not include work rules, (2) Respondent had a right to make and enforce reasonable rules, and (3) the Union had a right to challenge the validity of such rules at arbitration. The parties tentatively agreed on overtime breaks at this session, but they were unable to reach agreement on Respondent's language proposals. On August 4, the parties continued to discuss the workweek and holiday proposals, and the Union iterated its request for information concerning the former. Hanobik stated that the parties were at an impasse on the holiday proposal, whereupon Masters vehemently denied the existence of an impasse and requested a break. The session lasted approximately 4 hours.

On August 23, negotiations resumed with only Smith, Tegtmeir, and Csongedi representing the Union. Provost reviewed and rejected the Union's outstanding proposals. He then stated that the parties were at an impasse on the language issues. Smith agreed that an impasse might exist with respect to noneconomic issues but noted that the parties' positions could change when economic issues were considered.⁵ Provost indicated that Respondent would make an economic proposal at the August 28 session.

At the outset of the August 28 session, Masters unequivocally stated that no impasse existed because there had been movement by both sides and there were a "lot of points the Union was willing to move on." The Union then made a counteroffer to Respondent's August 23 proposal. After the luncheon recess, Respondent made its first comprehensive economic proposal. Respondent's first wage proposal consisted of 20 cents an hour for the first year and 10 cents an hour for each of the 2 ensuing years for employees hired after August 27, 1985 (lower tier), and 20 cents an hour during each year of the contract for employees hired on or before August 27, 1985 (top tier). The Union had previously proposed (1) a general wage increase of 75 cents an hour during each year of the contract and (2) the elimination of the lower tier by equalizing lower and top tier wage levels over the 3 years of the contract. After hearing Respondent's wage proposal, the Union modified its position on wages and proposed (1) a general wage increase of 65 cents an hour in each year of the contract, (2) elimination of the lower tier over 4 years, (3) withdrawal of its demand for double time for overtime, and (4) modification of its 401k proposal by deferring employee participation in Respondent's plan until the second year of the contract.

Noneconomic issues were also discussed on August 28. Respondent revisited the previously agreed-on issue of duration and proposed that the contract term be increased from 36 to 42 months. This proposal was rejected by the Union. Respondent then modified its holiday proposal by eliminating Memorial Day, leaving only 3 days to be converted from holidays to personal days. Respondent also supplied the information sought by the Union concerning the workweek proposal. The Union altered its position and tentatively agreed to accept a workweek (1) for employees handling outbound traffic which consisted of five 8-hour

days or four 10-hour days with weekend work at straight time if Respondent would commit to a starting time for the 4-day week and would agree to pay overtime for the sixth 8-hour day or fifth 10-hour day of each week, and (2) for employees handling inbound traffic which consisted of five 8-hour days or four 10-hour days with weekend work on a voluntary basis. After a caucus, Respondent returned to economic issues and made a wage offer of (1) 25 cents in the first and second years of the contract and 20 cents in the third year for the lower tier and (2) 25 cents in the first year, 15 cents in the second, and 10 cents in the third for the top tier.⁶ With respect to its workweek proposal, Respondent indicated that the first shift would begin for employees working a 4-day week between 4 and 9 a.m. and the second shift, between 4 and 8 p.m. Finally, Respondent raised its offer for monthly contributions to the Union's Health and Welfare Plan from \$220 to \$252 per employee during the first year of the contract, with contributions in subsequent years to amount to no more than 75 percent of the cost of Respondent's plan.

On the morning of August 29, the Union (1) made a wage counterproposal for the top tier of 60 cents an hour in the first year of the contract and 55 cents in the final 2 years, (2) proposed eliminating the lower tier of wages over a 5-year period, (3) reduced the amount of shift premium it was seeking, (4) modified its 401k proposal by deferring employee participation in the plan until the third year of the contract, and (5) withdrew its mandatory overtime proposal. The Union stated that it needed further information on Respondent's workweek proposal but was "willing to work . . . on some type of a different work week." Respondent thereafter modified its position in several significant respects: (1) its holiday proposal was restricted to the day after Thanksgiving, (2) proposed monthly Union Health and Welfare contributions were increased to \$252 in the first year of the contract, \$255 in the second, and \$260 in the third, with an employee option of enrolling in Respondent's health plan without providing evidence of insurability, (3) a contract term of 3 years, and (4) 30-cent-hourly wage increases during each of the first 2 years of the contract and 25 cents in the third for lower tier employees and 25 cents in the first year, 15 cents in the second, and 10 cents in the third for employees in the top tier.

During the afternoon session on August 29, the Union (1) abandoned its proposal to gradually eliminate the lower tier wage level, (2) withdrew its prior wage proposal and offered to accept a lower tier raise of 60 cents per hour in the first year, 70 cents in the second, and 80 cents in the third and an hourly raise for top tier employees of 50 cents in each year of the contract, (3) reduced its shift premium demand by a nickel to 30 cents per hour, (4) lowered its demand for monthly Health and Welfare payments to \$305 in the first year, \$340 in the second, and \$355 in the third, (5) accepted Respondent's most recent holiday proposal on the condition that Martin Luther King day be made a personal day, and (6) dropped its request for participation in Respondent's 401k plan.⁷ After a caucus, Provost announced Respondent's "last, best and final offer": (1) lower tier employees would receive annual increases of 30 cents per hour while top tier employees would get 25 cents the first year and 15 cents in each of the last 2 years with an additional 5 cents in the final year for both tiers if the contract was ratified by August 31—prior to the commencement of nego-

⁵ Smith's testimony concerning who first raised the question of impasse was not directly refuted by Provost. For this reason and based on the demeanor of the parties while testifying, I credit Smith's account.

⁶ The apparent inconsistency between Respondent's wage and contract term proposals was not explained during the hearing.

⁷ I credit Provost's testimony that, "[e]ventually, they dropped the 401K, and said that they were more concerned with base wage increases."

tiations, Provost and his superiors agreed that this wage level was to be Respondent's "bottom line" offer,⁸ (2) employees earning less than lower tier wages would be raised to that tier, (3) monthly Health and Welfare contributions would be raised to \$252 in the first year, \$260 in the second, and \$270 in the third, and (4) prior proposals other than wages and Health and Welfare payments remained unchanged. Provost then stated for the first time that, if Respondent's final offer was not accepted by August 31, it would implement the offer and terminate dues checkoff, the deduction of initiation fees, and the arbitration of grievances. Masters declared that no impasse existed and that Respondent would violate the Act if it implemented the offer. Provost left the room, indicating that he would be available for 1 hour to answer any questions concerning the offer. Five minutes later, Smith called Provost's room, but there was no answer. Smith then visited the front desk and was told that Provost had checked out.

On August 30, the union negotiating team explained Respondent's offer to the unit employees who voted unanimously (1) not to vote on the question of ratification and (2) to strike. The latter vote was never effectuated. The following day, Smith and Masters telephoned Provost, informing him of the employees' refusal to accept the offer and asking him to meet and continue bargaining. Provost replied that "further meetings would not be worthwhile" since the Union had Respondent's final offer. On or about September 6, Respondent implemented its final offer and, as of September 1, revoked dues checkoff, the collection of initiation fees, and the arbitration of grievances.⁹ Around September 10, the Union, unaware of Respondent's implementation, again attempted to recommence negotiations but Respondent refused to do so. Effective September 22, Respondent also implemented the following work rule changes:¹⁰

3. Violating safety rules or safe work practices. *Failing to report any on the job injury the day the injury occurs.*

* * * *

5. Leaving the designated work areas without specific authorization from a supervisor or pursuant to these rules except during break, lunch period, at the end of the shift *or assigned overtime period (whichever is later).*

The General Counsel and the Union contend that (1) no impasse existed at the time Respondent terminated bargaining and (2) Respondent's implementation of its final offer was a refusal to bargain in good faith violative of Section 8(a)(5) of the Act. Respondent demurs. The Board articulated the standard by which this issue is to be resolved in *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *enfd. sub nom. AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968):

Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

⁸ Provost credibly so testified.

⁹ In a memorandum to employees dated September 8, 1995, Respondent indicated that it had implemented its final offer the preceding Wednesday, which was September 6.

¹⁰ Substantive changes from prior rules are italicized.

Impasse cannot exist "until there appears to be no realistic possibility that a continuation of bargaining at the time would be fruitful." *AFTRA v. NLRB*, 395 F.2d at 628; *Patrick & Co.*, 248 NLRB 390, 393 (1980), *enfd.* 644 F.2d 899 (9th Cir. 1981). Further, impasse as to a single issue does not terminate the parties' duty to bargain concerning other issues. *Patrick & Co.*, 248 NLRB at 392. Respondent here bears the burden of proving that impasse existed. See *Outboard Marine Corp.*, 307 NLRB 1333, 1363 (1992), *enfd.* 9 F.3d 113 (7th Cir. 1993).

Although the parties' bargaining history reveals a series of successfully concluded collective-bargaining agreements, the first six sessions of the instant negotiations were characterized by Respondent's out-of-hand rejection of virtually all of the Union's proposals. Respondent's allocation of more time for the instant negotiations than was its usual practice when bargaining with the Union is probative of nothing more than the fact that the language changes sought by Respondent represented radical departures from the parties' previous agreements. In this context, eight bargaining sessions of average duration, especially where Respondent did not make an economic proposal until the penultimate session, do not constitute the type of exhaustive negotiations which might prompt a finding of impasse. See *Teamsters Local 639 v. NLRB*, 924 F.2d 1078, 1083-1084 (D.C. Cir. 1991); *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1186 (5th Cir. 1982); and *Patrick & Co.*, 248 NLRB at 393. This finding is reinforced by the fact that Respondent did not supply information sought by the Union concerning the workweek proposal until immediately prior to making its final offer. See *Microdot, Inc.*, 288 NLRB 1015, 1016 (1988); *Pertec Computer Corp.*, 284 NLRB 810, 812 (1987).

The issues as to which disagreement existed at the time Respondent terminated negotiations were of exceptional importance to both parties, but the record does not support Respondent's argument that, "despite the parties' best efforts, neither party [was] willing to move from its respective position."¹¹ Both Respondent and the Union demonstrated flexibility and movement of position during the last two negotiating sessions. See *Wycoff Steel, Inc.*, 303 NLRB 517, 523 (1991); and *J. Josephson, Inc.*, 287 NLRB 1188, 1190 (1988). The only evident inflexibility was that of Respondent's representatives who lacked authority to bargain further concerning wages after making their final offer. See *Lloyd A. Fry Roofing Co. v. NLRB*, 216 F.2d 273, 275 (9th Cir. 1954); *Wycoff Steel, Inc.*, 303 NLRB at 525.

The contemporaneous understanding of both parties as to the state of negotiations does not demonstrate the existence of an impasse. When employee representatives on the union negotiating committee opined on August 3 that an impasse had been reached on the isolated issue of Respondent's holiday proposal, their statement was immediately disavowed by the Union's attorney. Thereafter, the parties bargained further concerning the issue, each making concessions in search of agreement. This behavior negates any possible inference of impasse on the holiday issue. See *Gulf States Mfg., Inc. v. NLRB*, 704 F.2d 1390, 1399 (5th Cir. 1983); *Good GMC, Inc.*, 267 NLRB 583, 585 (1983); and *Pillowtex Corp.*, 241 NLRB 40, 46 (1979). While the parties agreed on August 23 that an impasse might exist as to certain language issues, there was the explicit possibility that the parties might subsequently resolve those issues during the discussion of economic proposals. See *Korn Industries, Inc. v. NLRB*, 389 F.2d 117, 121 (4th Cir. 1967). Finally, Respondent's self-serving declaration of impasse on August 29 was immediately and forcefully

¹¹ Posthearing brief of Respondent Cotter & Company at 28.

rejected by the Union, which thereafter repeatedly attempted to reopen negotiations.

For the foregoing reasons, I conclude that Respondent did not demonstrate that an impasse existed at the time it stopped bargaining on August 29. Accordingly, I conclude that Respondent's implementation of its final offer before negotiations reached an impasse was a unilateral modification of the terms and conditions of employment under negotiation in violation of Section 8(a)(5) of the Act. See *NLRB v. Katz*, 369 U.S. 736, 743 (1962); *Wycoff Steel, Inc.*, 303 NLRB at 523; and *Taft Broadcasting Co.*, 163 NLRB at 478. Work rules, especially those involving the imposition of discipline, constitute a mandatory subject of bargaining, and Respondent's unilateral implementation of such rules without bargaining to impasse also violated Section 8(a)(5) of the Act. See *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1016 (1982), *enfd.* 722 F.2d 1120, 1126-1127 (3d Cir. 1983).

B. Michael Hanobik

Hanobik had been employed by Respondent for 7 years and was a second-shift receiver at the time of his October 6 discharge. He was also a member of the union negotiating committee and had been the acting second-shift steward for 4-1/2 years.¹² On or immediately prior to September 27, Supervisor Jim Davis spoke with Hanobik about disturbing the 11 p.m. "morning meeting" at the beginning of the third shift and told the latter not to do so in the future. Hanobik left work early on September 27 but returned at the commencement of the third shift. Upon arriving, he (1) entered the "morning meeting" without first checking in with the security guard, (2) shouted several times "Don't sign that goddamn bid. The company is trying to fuck you." (3) refused to leave when asked to do so by Supervisors Davis and Rick Ellis, (4) said "fuck you" to Supervisor Davis, (5) left the building after approximately 8 minutes, and (6) was not shown to have spoken directly with a single third-shift employee. At the close of an investigatory meeting held by Respondent the following day, Hanobik was suspended. After another investigatory meeting on October 6, he was discharged. Hanobik thereafter filed a discharge grievance which was not acted on by Respondent.

The General Counsel argues that Hanobik was entitled, as a union steward, to return to the facility in order to answer employee questions concerning a bidding process then under discussion by the work force. Given the above findings, as well as Hanobik's admission of the salient features of the conduct attributed to him, I find that (1) the General Counsel's argued rationale is without record support and (2) Hanobik was discharged because of his flagrant, insubordinate violation of Respondent's work rules and not as a result of his union activities.¹³ See *Charles Meyers & Co.*, 190 NLRB 448, 449 (1966).

C. Alejandro Gonzalez

Gonzalez loaded trucks in Respondent's shipping department for 18 months. He received an October 10¹⁴ verbal warning under Respondent's progressive disciplinary system for missing sched-

¹² I find Hanobik's prior discharge and reinstatement, which were discussed by the General Counsel on brief, to be without demonstrated relevance or probative value with respect to the issue before me.

¹³ Even if the General Counsel had made a prima facie showing, I would be forced to conclude that Respondent would have discharged Hanobik for conduct wholly unrelated to his protected concerted activities. See generally *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

¹⁴ The dates of Gonzalez' discipline are drawn from his January 2, 1996 disciplinary notice.

uled overtime under newly implemented Work Rule 5. On October 30, Respondent issued Gonzalez a written warning for being out of his work area.¹⁵ On December 28, Gonzalez was unable to work scheduled overtime and, on January 2, 1996, he was given a 6-day suspension for violating new Work Rule 5.

On December 29, Supervisor Linda Hall assigned two shipments weighing approximately 27,000 pounds to Gonzalez and advised him of the fact. Gonzalez indicated that he would rather do a lighter load, and Hall gave him a direct order to load the assigned shipments. When Gonzalez refused, Supervisor Frank Matus ordered him to do the assigned loads. Gonzalez again refused and said he wanted to speak with Kidd or Livingston. Hall stated that neither was in the facility and, at McIntosh's suggest, told Gonzalez to load the assigned shipments and talk with Kidd or Livingston the following Monday. Gonzalez did not return to work but walked around the shipping dock for 15 minutes and then went to lunch.¹⁶ After the lunch hour, Gonzalez reported a back injury, was driven by his supervisor to a medical center, diagnosed as having aggravated a herniated disc, and released from work until January 2, 1996. On January 12 Respondent discharged Gonzalez for violating its work rules on December 29 by hampering production and disobeying orders to do his job. Gonzalez' subsequently filed grievance was not processed by Respondent.

Gonzalez' verbal warning and suspension for not working scheduled overtime under Respondent's unlawfully implemented Work Rule 5 are plainly invalid. See *Ciba-Geigy Pharmaceuticals*, *supra*. Gonzalez was discharged pursuant to Respondent's system of progressive discipline which provides for a verbal warning, a written warning, suspension, and then discharge.¹⁷ Because some of the discipline meted out to Gonzalez was unlawful, his written warning should have been a verbal one and his discharge should have been a written warning. I therefore conclude that his warnings, suspension, and discharge were violative of Section 8(a)(5).

D. Matthew Dillon

Dillon worked for Respondent for 4 years and 2 months before he was discharged on December 7. He was a member of the Union but did not otherwise represent it.¹⁸ On September 28 and October 28, Dillon refused to work scheduled overtime for which he received, respectively, an October 3 verbal warning and a November 2 written warning for violating Respondent's newly implemented Work Rule 5. On November 7, Respondent suspended Dillon for 1 week for refusing to work scheduled overtime on November 3.¹⁹ Dillon filed a grievance over his suspension. After the suspension had elapsed, Kidd contacted Dillon and told him that (1) the discipline had been a mistake, (2) to report back to

¹⁵ This discipline was administered pursuant to the portion of Work Rule 5 which had been in effect before Respondent unilaterally implemented work rule changes.

¹⁶ Findings concerning the events of December 29 are based on Hall's credible, uncontroverted testimony; Gonzalez could not recall what occurred on the morning of December 29.

¹⁷ Respondent's system is outlined on its disciplinary notice forms.

¹⁸ On brief, the General Counsel contends that antiunion animus was demonstrated because Respondent could have known that Dillon was Hanobik's "best friend." Given the General Counsel's failure to demonstrate animus in connection with Hanobik's discharge, I find the contention concerning Dillon to be of little relevance.

¹⁹ The findings concerning Dillon's discipline are based on Respondent's disciplinary action notices.

work, and (3) he would be paid for the missed week.²⁰ When Dillon returned to work, he was assigned to the first shift because he had not signed a bid sheet for the second shift which he preferred. The shift bid sheet was posted prior to and during Dillon's suspension. Dillon's attempts to transfer back to the second shift were rejected by Respondent. On December 7, Respondent discharged Dillon for excessive absences under the Company's no-fault attendance policy. Neither the validity of the attendance policy nor Dillon's contravention of it are contested.²¹ Dillon filed a grievance over his discharge, which is still pending.

Dillon's warnings pursuant to Respondent's unlawfully implemented Work Rule 5 are clearly invalid and violative of Section 8(a)(5). See *Ciba-Geigy Pharmaceuticals*, supra. There is no evidence of animus in relation to Dillon's assignment to the first shift. Based on Respondent's credibly asserted reason for the assignment and the absence of any cogent explanation of Dillon's failure to file a shift bid, I reject the General Counsel's contention that this assignment was discriminatory. The General Counsel argues on brief that the absences which caused Dillon's discharge were due to his being unlawfully assigned to the first shift. Given my conclusion that Dillon's shift assignment was lawful, I reject the General Counsel's argument and conclude that Dillon's discharge was not shown to be improper.

E. Richard Martin

Martin filled orders in Respondent's shipping department. He had been a member of the Union's negotiating committee for 6 months when he was terminated on February 20, 1996. During September, Respondent gave Martin a verbal warning for failing to work scheduled overtime in violation of its newly implemented Work Rule 5. Martin received an apparently uncontested written warning in November. In December, Martin was suspended for being out of his work area.²² Martin's grievance concerning his suspension was never acted on by Respondent. On February 20, 1996, Respondent terminated Martin for being out of his work area. Martin filed a grievance over his termination, which is still pending.

Martin's verbal warning pursuant to Respondent's unlawfully implemented Work Rule 5 violates Section 8(a)(5). See *Ciba-Geigy Pharmaceuticals*, supra. Martin was concededly discharged under Respondent's system of progressive discipline which provided for a verbal warning, a written warning, suspension, and then discharge.²³ Because the initial discipline meted out to Martin was unlawful, Martin's written warning should have

²⁰ On brief, the General Counsel asserts that Respondent violated Sec. 8(a)(5) of the Act by settling Dillon's grievance without first discussing the matter with the Union. The General Counsel concedes that this matter was not alleged in the consolidated complaint but maintains that it was fully litigated. Given Respondent's admission that no grievances were processed in the manner set forth in old collective-bargaining agreement and the fact that Respondent's reply brief did not voice an objection to the General Counsel's assertion, I will permit amendment of the consolidated complaint to conform to the proof adduced at the hearing.

²¹ While there is a self-serving, unsworn allegation of disparate treatment in Dillon's discharge grievance, I find that the record does not contain substantial probative evidence of disparate treatment given the General Counsel's failure to proffer Respondent's attendance records.

²² This discipline was imposed under the part of Work Rule 5 which had been in effect before Respondent unilaterally implemented work rule changes.

²³ Posthearing brief of Respondent Cotter & Company at 43.

been a verbal one, his suspension should have been a written warning, and his discharge should have been a suspension. Accordingly, I conclude that his discharge was tainted by Respondent's earlier, unlawful discipline and is violative of Section 8(a)(5).

F. Adam Csongedi

Csongedi has been employed by Respondent since 1989. As relevant here, he served as a union steward and member of the Union's negotiating committee. On December 22, he received a verbal warning for deficient performance as an order filler. On January 19, 1996, Respondent gave him a written warning for the same reason. As a result of his warnings, Csongedi was placed on probation and assigned to an in-house quality check for several weeks. Both warnings and probation were imposed pursuant to a quality standard implemented after August 31 under article VII of the old collective-bargaining agreement which gave Respondent the right to use its rule making authority to establish quality and productivity standards. This unilateral modification of work rules in the form of quality standards and the resulting imposition of discipline on Csongedi are violations of Section 8(a)(5). See *Ciba-Geigy Pharmaceuticals*, supra.

Csongedi successfully completed the quality check program and was assigned as a quality control checker no later than the first week of March 1996. The process involved in quality checking is a direct reversal of the process involved in order filling, Csongedi's former position; and the "Quality Control Guidelines," which set forth details concerning the process, were prominently posted near his workstation. At the outset of his new duties, Csongedi was trained by Donna Parsons, a fellow employee and union member. Respondent has a general policy of "salting" orders, that is, placing errors in specific orders to see if the quality checkers catch them. Csongedi was given salted orders on March 6, 19, 21, and 28, 1996. When Csongedi discovered the March 6 error, he told Parsons that he would let the matter slide and not report the errors to supervision as required.²⁴ During his tenure as a quality checker, Csongedi never reported an error. Based on his failure to report the errors in the salted orders and his comments to Parsons, Respondent suspended him on March 29, 1996, for a 2-week period for filing falsified reports in violation of Work Rule 11. Csongedi's grievance concerning his suspension was never acted on by Respondent. Based on the foregoing findings, I conclude that Csongedi should have been disciplined for violating Work Rule 11. Because the initial discipline given Csongedi under Respondent's progressive disciplinary system was unlawful, Csongedi's suspension should have been a verbal warning. I therefore conclude that his suspension was tainted by Respondent's earlier, unlawful discipline and is violative of Section 8(a)(5).

On March 15, 1996, Supervisor Brian Dunlap issued an over-time call.²⁵ Subsequently, Dunlap walked out of an office and unintentionally collided with Csongedi. Because Csongedi was away from his work area, Dunlap asked where Csongedi had been. Csongedi told Dunlap to keep his distance, and the latter repeated his question. Csongedi asked to see Kidd or Livingston and, when told they were gone for the day, asked for union representation. Dunlap replied that there was no need for the Union and reiterated his question. Csongedi stated "I'm gone" and Dunlap said that, if Csongedi left, it would be considered a "walk-

²⁴ Parsons credibly so testified.

²⁵ The General Counsel's attempt to characterize the timing of this call as unusual is not supported by the record.

off.” Csongedi then spoke with Union Steward Tegtmeier who instructed Csongedi to return to work. Although Respondent did not impose any discipline, Csongedi filed a grievance concerning the encounter which is still pending.²⁶ Based on the foregoing, I conclude that (1) no investigatory interview took place and Csongedi was therefore not entitled to union representation and (2) the alleged assault did not occur.

G. Grievances and Dues

The final allegations of the consolidated complaint to be addressed are that Respondent has, since the beginning of September, unlawfully (1) refused to process grievances and (2) stopped deducting union dues on behalf of unit employees. Respondent’s refusal to deduct dues is not contested and the findings appearing above demonstrate that Respondent has repeatedly failed to process employee grievances as required by the parties’ most recent collective-bargaining agreement. It is well established the expiration of a collective-bargaining agreement does not relieve an employer of a contractual duty to process grievances. E.g., *Days Hotel of Southfield*, 311 NLRB 856, 862 (1993). There is no dispute in this case that the contract’s formal grievance and arbitration process was terminated when the contract expired, but Respondent maintains that it remained willing to “discuss” any matter which might have been grieved under the old procedure. Based on the foregoing findings, I conclude that Respondent’s refusals to deduct dues and process grievances were unilateral modifications after the expiration of a collective-bargaining agreement but before completing negotiation of a new agreement. Both refusals violate Section 8(a)(5) of the Act. See *Laborers Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 fn. 6 (1988).

CONCLUSIONS OF LAW

1. Respondent 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. By the following acts, Respondent has engaged and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act: (a) refusing to meet and continue to bargain with the Union over the terms and conditions of a collective-bargaining agreement, (b) implementing its last offer in the absence of an impasse in negotiations, (c) implementing new work rules absent an impasse in negotiations, (d) disciplining employees Gonzalez, Dillon, Martin, and Csongedi pursuant to unlawfully implemented work rules, (e) bypassing the Union and dealing directly with a unit employee, (f) discontinuing dues deductions of its employees, and (g) refusing to process grievances.
4. Respondent’s unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

²⁶ The findings concerning the encounter between Csongedi and Dunlap are based on the latter’s detailed, consistent testimony, which I credit over Csongedi’s inherently improbable account. Csongedi testified that he was unsure of the date of the encounter but believed that it took place a week before he became a quality checker. When I asked counsel for the General Counsel to clarify the date, he was unable to do so although it would appear that Csongedi’s grievance would have conclusively determined the date. For the foregoing reasons, I credit Dunlap’s explanation of why he believed the encounter occurred on March 15. Accordingly, there is no support for the General Counsel’s argument that the encounter was a cause for Csongedi’s assignment a quality checker.

5. The preponderance of the evidence does not indicate that Respondent has otherwise violated the Act.

REMEDY

Having found that Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease those practices and to take certain affirmative action designed to effectuate the policies of the Act. Respondent will be ordered to (a) on request, bargain with the Union, (b) restore the status quo ante by rescinding its unilateral modifications of the terms and conditions of employment, and (c) make whole any employees in the unit who sustained losses in wages or benefits because of Respondent’s unlawful conduct. Such amounts shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁷

ORDER

The Respondent, Cotter & Company, Westlake, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Refusing to meet and bargain in good faith over the terms and conditions of a collective-bargaining agreement with Teamsters Local Union No. 293, International Brotherhood of Teamsters, AFL–CIO (Union), as the exclusive bargaining representative of the employees in the following unit: all employees employed by Respondent only at 26025 First Street, Westlake, Ohio, and the vicinity within a radius of fifty (50) miles, as Distribution Experts, Maintenance and Janitors.
 - (b) Implementing its last offer before the parties have reached an impasse in negotiations.
 - (c) Implementing new work rules and quality standards before the parties have reached an impasse in negotiations.
 - (d) Disciplining employees pursuant to unlawfully implemented work rules.
 - (e) Bypassing the Union and dealing directly with a unit employee.
 - (f) Unlawfully discontinuing dues deductions on behalf of its employees.
 - (g) Unlawfully refusing to process grievances.
 - (h) 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 policies of the Act.
 - (a) On request, bargain in good faith with the Union as the exclusive bargaining representative of employees in the above-described appropriate unit with respect to the terms of a collective-bargaining agreement and, if an understanding is reached, embody it in a signed agreement.
 - (b) Cancel and rescind all terms and conditions of employment, including work rules and quality standards, unilaterally implemented on or after September 1, 1995.
 - (c) Cancel and rescind employee Alejandro Gonzalez’ October 10, 1995 verbal warning and his January 2, 1996 suspension; and

²⁷ 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.

reduce Gonzalez' October 30, 1995 written warning to a verbal warning and his January 12, 1996 discharge to a written warning.

(d) Cancel and rescind employee Matthew Dillon's October 3, 1995 verbal warning, his November 2, 1995 written warning, and his November 7, 1995 suspension.

(e) Cancel and rescind employee Richard Martin's September 1995 verbal warning; and reduce Martin's November 1995 written warning to a verbal warning, his December 1995 suspension to a written warning, and his February 20, 1996 discharge to a suspension.

(f) Cancel and rescind employee Adam Csongedi's December 22, 1995 verbal warning, his January 19, 1996 written warning, and his January 1996 quality probation; and reduce his March 29, 1996 suspension to a verbal warning.

(g) Offer Alejandro Gonzalez and Richard Martin immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(h) Make whole Alejandro Gonzalez, Richard Martin, and Adam Csongedi for any loss of earnings and other benefits suffered as a result of Respondent's unlawful behavior, in the manner set forth in the remedy section of this decision.

(i) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline set forth in subparagraphs (c) through (f), and within 3 days thereafter notify each of the affected employees in writing that this has been done and that the discipline will not be used against them in any way.

(j) 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 necessary to analyze the amount of backpay due under the terms of this order.

(k) Process all outstanding and future employee grievances.

(l) Make union dues deductions on behalf of its employees.

(m) Within 14 days after service by the Region, post at its facility in Westlake, Ohio, copies of the attached notice marked "Appendix."²⁸ Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by Respondent's representative, shall be posted by Respondent and shall be maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken 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, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since August 31, 1995.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

²⁸ 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."