

**The Buschman Company and Ironworkers Local 522,  
an affiliate of the International Association of  
Bridge, Structural, Ornamental & Reinforcing  
Ironworkers, AFL-CIO.** Case 9-CA-36311

July 5, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS  
LIEBMAN  
AND TRUESDALE

On May 11, 1999, Administrative Law Judge William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief. The Charging Party filed an answering brief, and the General Counsel filed a brief in support of the judge's decision.

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,<sup>1</sup> and conclusions and to adopt the recommended Order.

1. The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act when it refused to execute its collective-bargaining agreement with the Union. In reaching that conclusion, the judge found that a meeting of the minds existed on all material terms of the agreement, including an effective date. In its exceptions, the Respondent contends that the parties never reached agreement on an effective date. For the reasons discussed below, we find no merit in that contention.

The pertinent facts are as follows. On July 8, 1998,<sup>2</sup> the Union and the Respondent began to negotiate a successor agreement to the 1993-1998 agreement that was due to expire on August 6. At that first meeting, the Union put forward a complete proposal for a proposed new agreement with an effective date of August 7. On August 5, the Respondent gave the Union a typed counter-

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

The Charging Party argues that the Respondent's exceptions and brief should be disregarded for failing to comply with Sec. 102.46(c)(2) of the Board's Rules and Regulations, which provides that briefs shall specify the questions to be argued and the exceptions to which they relate. We find no merit in this contention. Although the Respondent's brief does not strictly comply with the Board's Rules, we do not find it so deficient as to warrant its rejection.

We find merit in the Respondent's exception to the judge's failure to grant its unopposed motion to correct the transcript, and we grant the motion.

<sup>2</sup> All dates refer to 1998 unless otherwise indicated.

proposal, consisting of a list of proposed changes to the existing agreement. This document was silent as to an effective date. On the morning of August 6, the Union made its own handwritten counterproposal listing proposed changes, which was also silent as to an effective date. The Respondent accepted the Union's counterproposal. Thus, on August 6, the parties had agreed on contract terms to present to the employees for ratification later that day.<sup>3</sup>

The Union then prepared a complete version of the new agreement, including the agreed-on changes to the existing contract as well as the unchanged terms, and containing an effective date of August 7. This document was distributed to the employees before the ratification vote. There is no evidence that the Respondent ever reviewed, or asked to review, the complete version of the agreement that was presented to the employees, either before the August 6 vote or at any time afterwards until September 4. The employees voted on August 6 not to ratify the agreement and went on strike.

Beginning immediately after the unsuccessful ratification vote, and for some 4 weeks thereafter, the Respondent repeatedly informed the Union and the employees that it "stood behind" the August 6 agreement and urged the employees to accept it.<sup>4</sup> Thus, on August 6, before the strike commenced, the Respondent posted a "Notice to All Employees" from its president, Jim McCarthy, throughout its facility. The notice stated that the Respondent was disappointed that the employees had voted not to ratify the agreement but that:

[w]e are resolved to stand behind the Union Committee and its recommendations of this agreement. . . .

We remain open for work and will continue to operate and serve all our customers, *until the new Agreement* negotiated in good faith over many weeks and accepted and unanimously by the Union's committee, *is finally accepted*. [Emphasis added.]

<sup>3</sup> Before the parties came to an agreement on August 6, William Engeman, Respondent's chief negotiator and counsel, proposed that if an agreement was reached by August 14, it be retroactive to August 10. There is no evidence in the record of any reply being made to that offer.

<sup>4</sup> In this decision, we shall refer, as the judge did, to the document prepared by the Union and distributed to the employees on August 6 as the "August 6 agreement," because it contained the terms and conditions agreed to by the Respondent and the Union on that date. By referring to this document as an "agreement," we are simply employing shorthand language; we do not mean to imply that it was a binding contract on August 6 or at any other time before it was ratified by the employees and executed by the Union on September 4, as discussed below. No party contends that a binding contract was reached before September 4.

About August 13, the Respondent mailed to all employees an 8-page document containing a letter from McCarthy stating, among other things, that the August 6 notice was enclosed, and that “This will remain the Company’s position.”

On August 21, the Respondent mailed each employee a video featuring a message from McCarthy. The video stated that the Union and the Respondent had negotiated “a good agreement” and that “management stands behind our negotiated agreement.” At a bargaining session, also on August 21, the Respondent’s attorney and negotiator read a prepared statement to the union negotiators which said, in part:

We want you to know that the Company continues to stand behind this committee and this agreement. We told you we would stand behind you and when you said no better terms were available you would be telling the truth. No better terms were or will be available. The Company is prepared to let this situation last indefinitely without any new offer which would better those terms.

In another letter to all employees, dated August 28, Human Resources Director Chris Webster again referred to the August 6 agreement and reiterated verbatim the August 21 statement quoted above.

Finally, on September 3, Webster told a striking employee that as far as he knew, the “contract” that the employees voted down was still on the table.

On September 4, the employees voted to accept the August 6 agreement and to end the strike. That same day, the Union presented an executed copy of the ratified agreement, which included the August 7 effective date, to the Respondent. The Respondent has refused to execute the agreement.

On September 8, the Respondent sent a proposed “strike settlement agreement” to the Union, which contained numerous terms that were not included in the August 6 agreement and which had not been the subject of previous negotiations. The Union rejected the “strike settlement agreement,” which it characterized as an attempt to modify the August 6 agreement.

On September 13, the Union sent a copy of the signed August 6 agreement to the International Union for its approval. The International approved the agreement on September 17, and on September 23, the Union mailed a copy of the approved agreement to the Respondent.

As the Respondent correctly notes, the obligation to execute a collective-bargaining agreement does not arise unless the parties have reached a meeting of the minds as to all substantive issues. The General Counsel has the burden of showing that such a meeting of the minds ex-

isted. In determining whether the General Counsel has made that showing, the Board is faced with the issue of intention: did the parties *intend* to have a contract? *New Orleans Stevedoring Co.*, 308 NLRB 1076, 1081 (1992), *enfd.* 997 F.2d 881 (5th Cir. 1993). We find that the record amply demonstrates such an intention.

As we have described above, during the period between August 6 and September 4, the Respondent repeatedly stated to employees that it “stood behind” the August 6 agreement, that no better terms would be offered, and that it would continue to operate and serve its customers *until the new agreement was finally accepted*. The day before the employees ratified that agreement, Webster told a striker that, to his knowledge, the August 6 “contract” was still on the table. The judge found, and we agree, that these statements clearly communicated the Respondent’s position that the Union was, at all times during that period, free to accept the August 6 agreement and that when it did so on September 4, it created a binding contract that the Respondent was required to execute.

We further find no merit in the Respondent’s contention that the parties did not reach a meeting of the minds on an effective date of August 7 for the new contract. The judge specifically credited the testimony of Union Business Agent Keith Reeves that the August 6 agreement reached by the Respondent and the Union included an effective date of August 7. This testimony was corroborated by Iron Workers International District Representative Frederick Clukey, who also participated in the bargaining.<sup>5</sup>

Moreover, as noted above, during the period between August 6 and September 4, the Respondent consistently took the position that the Respondent and the Union had reached an agreement on August 6, and urged its employees to ratify that agreement. Thus, the Respondent repeatedly informed the employees and the Union on and after August 6 that it “stood behind” the August 6 agreement, that no better terms would be forthcoming, and that it would continue to operate until the agreement was accepted. Clearly, during the entire period before ratification, the Respondent viewed the August 6 agreement as complete with respect to all necessary terms, including the effective date. Having repeatedly represented to its employees and to the Union that it “stood behind” the August 6 agreement, the Respondent cannot

<sup>5</sup> Our dissenting colleague discounts this testimony that the agreement had an August 7 effective date. He argues that the document itself contained no date and that the Respondent also proposed on August 6 that, if an agreement was reached by August 14, it would be retroactive to August 10. We reject this reasoning. As indicated above, the judge specifically credited Reeves’ testimony, which Clukey corroborated, that the parties had agreed on an August 7 effective date. That the date did not appear on the document does not detract from that finding. As for the Respondent’s retroactivity proposal, there is no record evidence that any response was made, and the fact that the Respondent made the proposal obviously did not preclude it from concluding an agreement that was inconsistent with the proposal.

now plausibly argue that there was no agreement or that the Respondent is not bound by its terms.

Further, to accept the Respondent's argument that a contract was not formed upon the employees' ratification of the August 6 agreement presents an implausible scenario, i.e., that the parties contemplated further bargaining as to the effective date of the agreement. The record contains no suggestion that either party envisioned such a scenario, and neither party ever communicated such an intention to the employees. To the contrary, the consistent message communicated to the employees was that ratification of the August 6 agreement was the final step to a complete and binding agreement.<sup>6</sup>

Accordingly, under these circumstances, we find, in agreement with the judge, that the Respondent was obligated to execute the August 6 agreement upon its ratification by the employees on September 4.

2. The Respondent also contends that ratification of the August 6 agreement by the employees on September 4 did not create a binding contract because the August 6 agreement specifically required the International Union's approval before it would become binding. The International did not approve the contract until September 17 and, in the interim, the Respondent attempted to modify the agreement by proposing new terms in the form of the "strike settlement agreement." Accordingly, the Respondent argues, even if the August 6 agreement was still available for acceptance on September 4, it modified its position on September 8 and thus retracted its offer of the August 6 agreement on that date, well before the International approved the contract.<sup>7</sup> Thus, the Respondent concludes, no enforceable agreement was ever reached, because it modified its offer before that offer was effectively accepted. We disagree.

Acceptance of the offer occurred on September 4. The International's approval was not a condition to the mak-

<sup>6</sup> We note further that the August 7 effective date is consistent with the parties' past practice, in that the parties' most recent prior agreement was effective from August 7, 1993, to August 6, 1998, even though the record indicates that it was not signed until 1995.

Contrary to the Respondent, we are not imposing a substantive contract term on the parties; we simply find that the effective date of August 7 was a term on which the parties had agreed. See, e.g., *TNT USA, Inc. v. NLRB*, 208 F.3d 362, 368 (2d Cir. 2000).

<sup>7</sup> The Respondent also argues that the Union's constitution requires the approval of the International before a contract will be binding. There is no evidence, however, that this provision was known to the Respondent during the negotiations. The Board has held that a union cannot rely on such an undisclosed constitutional requirement to avoid the binding force of an otherwise valid contract. *Electrical Workers IBEW Local 22 (Electronic Sound)*, 268 NLRB 760, 763-764 (1984). As the Union could not avoid being bound by the August 6 agreement on the basis of its previously undisclosed constitutional requirement of International approval of the contract, neither can the Respondent avoid the binding effect of the contract on that basis.

ing of an agreement. The provision relied on by the Respondent clearly stated that "before this Agreement and any amendments thereto may become binding and effective, the International must approve this Agreement and/or such amendments *as to form* (emphasis added)." The Board has held that where such approval is merely a perfunctory or ministerial act, an otherwise valid agreement will be binding on the parties regardless of whether the approval is actually secured. See *North Coast Counties District Council of Carpenters*, 197 NLRB 905, 907 (1972); see also *Auto Workers Local 365 (Cecilware Corp.)*, 307 NLRB 189, 195 (1992). Fredrick Clukey, the International's district representative, testified that the International's review would entail only correction of typographical errors.<sup>8</sup> In light of the language of the contract provision and Clukey's un rebutted testimony, we find that the International's approval was merely perfunctory, meant to correct minor errors, rather than as a condition precedent to a contract's effectiveness. We therefore find that the Union effectively accepted the August 6 agreement on September 4, even though the International did not approve the agreement until September 17, and thus that the contract was binding on the parties before the Respondent attempted to modify it on September 8 by proposing the "strike settlement agreement."

#### ORDER

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

#### MEMBER HURTGEN, dissenting.

Contrary to my colleagues, I do not find that the parties agreed on an effective date for a new contract. Because the matter of effective date is a material term of a contract,<sup>1</sup> I do not find that the Respondent's refusal to execute the alleged contract violated Section 8(a)(5) and (1).

On July 8, 1998, the parties began negotiations for a new collective-bargaining agreement to replace the one that was due to expire on August 6, 1998. At the first negotiation session, the Union made a bargaining proposal that contained an effective date of August 7, 1998. On August 5, the Respondent presented the Union with a typewritten counterproposal that contained no effective date. On August 6, the Union made a counterproposal that consisted of handwritten changes to the Respondent's August 5 counterproposal. That document also

<sup>8</sup> Thus, contrary to our dissenting colleague, Clukey's testimony does indicate what was meant by the requirement that the International approve the agreement "as to form."

<sup>1</sup> *Mercedes Benz of North America*, 258 NLRB 803 (1981).

contained no effective date. The Respondent then proposed that, if an agreement were reached by August 14, all contract provisions would be retroactive to August 10. The Respondent then accepted the substantive terms of the Union's August 6th proposal. The document was then presented to the employees. The Union unilaterally inserted an effective date of August 7. The employees rejected the tentative contract on August 6 and struck.

However, on September 4, the employees voted to accept the August 6 proposal. On the same day, the Union signed the proposal and presented it to the Respondent. The document continued the unilaterally inserted effective date of August 7. The Respondent has refused to sign that document.

It is clear that there never was a meeting of the minds as to the date. The purported contract was based on the August 6 proposal, and that proposal contained no effective date. Indeed, the evidence affirmatively establishes that there was no agreement as to effective date. The Respondent said that if an agreement were reached by August 14, the effective date would be August 10. However, no agreement was reached by August 14, inasmuch as the employees voted down the proposal on August 6. In short, the matter of effective date was left up in the air.

As a further indication of the uncertainty as to effective date, I note that the Union unilaterally inserted an effective date of August 7. There is no evidence that the Respondent was aware of, much less agreed to, this date. As another indication of uncertainty as to date, I note that the judge referred to an "August 6" agreement, and my colleagues suggest that it was a September 4 agreement. The fact is that there was no agreement as to date.

My colleagues rely upon the testimony of two union representatives who testified that the August 6 proposal included an effective date of August 7. However, as noted above, the August 6 proposal document contained no date. Further, accepting *arguendo* the above testimony, the fact is that the Respondent counteroffered, i.e., proposed that if an agreement were reached by August 14, the contract would be retroactive to August 10. Further in this regard, my colleagues note that the Union did not reply to Respondent's counteroffer of retroactivity. However, this does not contradict the fact that the counteroffer remained outstanding. The Union's failure to respond to it surely does not establish that the Respondent had agreed to withdraw it or had agreed to accept the Union's proposed effective date.

My colleagues rely upon the fact that, at various times after the employee rejection vote on August 6, the Respondent said it "stood behind" the proposal that the employees had rejected. I agree that the Respondent "stood

behind" the August 6 proposal. However, as discussed, the August 6 proposal contained no effective date.

Finally, even if there were a full agreement (including date), that agreement was subject to approval by the International Union. There is no indication that the International had approved it prior to Respondent's rejection of it on September 8. My colleagues rely upon the Union representative's testimony that the International's review would entail only the correction of typographical errors. If that were true, one would think that this would have been quickly accomplished. Further, even assuming *arguendo* the validity of this self-serving testimony, there is no evidence that Respondent understood that to be true. In these circumstances, it has not been established that International action was purely ministerial.

*Naima R. Clarke, Esq.*, for the General Counsel.

*William K. Engeman, Esq.* and *Jeremy P. Blumenfeld, Esq.*, for the Respondent.

*Robert H. Mitchell, Esq.*, for the Charging Party.

#### DECISION

##### STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This is an unfair labor practice case prosecuted by the National Labor Relations Board's (Board) General Counsel acting through the Regional Director for Region 9 of the Board following an investigation by Region 9's staff. The Regional Director for Region 9 issued a complaint and notice of hearing (complaint) on November 30, 1998, against The Buschman Company (Company) based on an unfair labor practice charge filed on October 2, 1998, by Ironworkers Local 522, an affiliate of the International Association of Bridge, Structural, Ornamental & Reinforcing Ironworkers, AFL-CIO (Union). I heard the case in trial in Cincinnati, Ohio, on March 1 and 2, 1999.

Specifically, the complaint alleges the Company, on or about September 4, 1998, failed and refused to reduce to writing and execute an agreed-upon contract with the Union containing the terms and conditions of employment of its production, maintenance, and janitorial employees. It is alleged the Company's failure to execute such an agreement violated Section 8(a)(5) and (1) of the National Labor Relations Act (Act).

In its answer to the complaint, the Company admits the Board's jurisdiction is properly invoked,<sup>1</sup> and that the Union is a labor organization within the meaning of the Act.<sup>2</sup> The Company denies violating the Act in any manner set forth in the complaint. Rather the Company denies no offer was "on the table" at the time the Union purported to ratify one. The Company asserts its contract proposal was specifically rejected by a union membership vote and expired before the Union belatedly attempted to ratify or accept the expired proposal. The Company further contends there was no "meeting of the minds" on all substantive issues at the time of the purported acceptance of the expired proposal by the Union.

I have studied the whole record, the parties' briefs, and the authorities they rely on. Based on more detail findings and analysis below, I conclude and find the Company violated the Act

<sup>1</sup> The Company is a corporation engaged in the manufacture and installation of material handling systems, such as conveyors, at and out of its Cincinnati, Ohio facility. During the 12 months preceding issuance of the complaint herein, the Company, in conducting its operations purchased and received at its Cincinnati, Ohio facility goods valued in excess of \$50,000 directly from points outside the State of Ohio. The parties admit, the evidence establishes, and I find the Company is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.

<sup>2</sup> The evidence establishes, the parties admit, and I find the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

substantially as alleged in the complaint and have recommend it cease and desist from the conduct found to be unlawful. I have recommended an appropriate remedy.

#### FINDINGS OF FACT

In attempting to establish or defend against the allegations set forth in the complaint the parties entered into certain factual stipulations and presented numerous exhibits. Additionally, the parties called some seven witnesses. I carefully observed the witnesses as they testified and have utilized my observations in arriving at the facts outlined below. I note certain (most) essential facts are undisputed. In setting forth some of the uncontradicted facts I have attributed such to certain witnesses. Where necessary to do so, credibility resolutions have been set forth. In general, my credibility resolutions are based on my observations of witnesses' demeanor, the weight of the evidence, established or admitted facts, and inherent probabilities and reasonable inferences which may be made from the record as a whole. To the extent that testimony or evidence not mentioned in this decision may be perceived to contradict my findings of fact, I have not disregarded that evidence but have rejected it as incredible, lacking in probative weight, surplusage, or irrelevant.

The Company manufactures and installs material handling systems, such as conveyors, and has a work force at any given time of approximately 600 to 650 employees of which approximately 320 to 350 are bargaining unit employees. The Company and Union have been parties to a number of successive collective-bargaining agreements. The most recent of which was effective by its terms from August 7, 1993, to August 6, 1998.

The Union is the collective-bargaining representative of the following employees (unit) of the Company:

All production, maintenance, and shop janitorial employees employed by [the Company] at or in the vicinity of its Cincinnati, Ohio facility, excluding all office and clerical employees, draftsman, engineering employees, watchmen and all professionals, guards and supervisors as defined in the Act.

The parties began negotiations toward a new collective-bargaining agreement on or about July 8, 1998.<sup>3</sup> The parties negotiated over certain changes from their most recent collective-bargaining agreement, with those items not specifically negotiated remaining as in the previous agreement. According to Union Business Agent Reeves the parties focused primarily on wages, health (hospitalization) insurance, temporary assignments, and seniority. The Union presented a "Proposed Agreement" to the Company at the parties July 8, 1998 negotiating session. The parties met a number of times between July 8 and August 6, 1998. At the August 5, 1998 bargaining session the Company presented its proposal for a 5-year collective-bargaining agreement "Upon ratification August 6." The Union made a counterproposal to the Company's August 5, 1998 proposal; and, on August 6, 1998, the parties arrived at a collective-bargaining agreement (the August 6 Agreement). According to Union Business Agent Reeves, whose testimony on this point I specifically credit, the parties agreed to a contract duration of 5 years starting on August 7, 1998. Reeves testified: "[t]hat was for a five year agreement so the agreement would stay in effort until midnight of August the 6th, 2003." The negotiators shook hands and expressed relief they had arrived at an agreement.

The union negotiating committee presented the August 6 Agreement to its membership for a ratification vote at 2 p.m. on August 6, 1998. The membership declined to ratify the agreement by a vote of 254 to 53. The membership voted not to reconsider the August 6 Agreement thereafter. The membership voted to and went on strike at midnight that same date. Business Agent Reeves testified the Union's negotiating committee telephoned Company Vice President Yarberry to advise him the agreement had been voted down and requested the parties meet. Yarberry stated the Company would meet with the Union to explain things but not to negotiate.

<sup>3</sup> The Company was represented in negotiations by its attorney, William Engeman, Human Resources Director Chris Webster, Vice President Lee Yarberry, and Plant Manager Keith Wells. The Union was represented by Business Agent Keith Reeves, General Organizer William Purdy, District Representative Fredrick Cluckley, General Organizer John Urbauer, and a number of bargaining unit members. The bargaining unit employees members were: Curtis Turner, Hugh Dotson, Elizabeth Knorr, Glenn Rice, Heather Abrahms, Dan Hicks, and Roxanne Keith.

Business Agent Reeves credibly testified Vice President Yarberry stated, "[W]e stand behind the committee and . . . behind [Reeves] that we have an agreement." Reeves told Yarberry, they were "back to our original proposal and that as of midnight the employees would be on strike."

On August 6, 1998, prior to the start of the strike the Company posted copies of a "Notice to All Employees" from Company President Jim McCarthy throughout its facility that read in part as follows:

We were notified this afternoon that Local 552's membership voted to strike your Company against the unanimous recommendation of their Negotiators and Union Committee that the new Agreement be accepted.

This is disappointing to all of us who have worked hard to build this Company. However, we are resolved to stand behind the Union Committee and its recommendations of this agreement. . . .

We remain open for work and will continue to operate and serve all our customers, until the new Agreement negotiated in good faith over many weeks and accepted and unanimously by the Union's committee, is finally accepted.

Within a week of the strike, Union Business Agent Reeves and Company Attorney/Negotiator Engeman spoke. Reeves testified Engeman suggested Human Resources Director Webster and Reeves conduct meetings with small groups of the employees and explain the economic package of the August 6 Agreement to the employees. The Union rejected Company Attorney/Negotiator Engeman's suggestion.

On or about August 13, 1998, the Company, by certified mail sent each employee an eight-page document containing, among other items, a letter from Company President McCarthy in which he stated in pertinent part:

We promised to keep you advised of developments. You should know that yesterday we contacted the Union negotiator. We affirmed the Company's resolve to go no further than the August 6 Agreement which they had unanimously recommended for your ratification, and that nothing that happened since that time had changed the facts we discussed.

We offered to share these facts with you in a series of meetings next week as you are most affected by the loss of pay and business associated with this situation. Today the Union negotiator, for some reason, was reluctant for us to address these matters together. We feel the facts are important, however, to your personal decision as whether to support your Union's recommendation of the August 6 Agreement.

Company President McCarthy in two other paragraphs of his letter explained, in some detail, what the parties had negotiated in the August 6 Agreement. Company President McCarthy wrote: "These are the facts that made your committee accept this Agreement and unanimously recommended ratification." Company President McCarthy continued in his letter:

We are aware of the published criticisms of the agreed terms. So that you have a complete understanding, we have attached a copy of the union counter proposal of 8/6/98 at 10:30 a.m. so you can see the terms now 'too little-too long' were the terms your own committee proposed. They also exceed the 3% year five year agreement that Local 522 had just signed with another local employer. I enclose also my published notice to employees

of August 6, 1998. This will remain the Company's position.

On August 21, 1998, the Company mailed each employee a videotaped message from Company President McCarthy. In the videotaped message President McCarthy stated in part:

My purpose here today is to insure there are no misunderstandings with regard to the actions that have been taken over the last six weeks, during the negotiating period up to August 6th and afterwards, when it was decided that there would be a strike at our Company.

We began our negotiations with the union negotiating committee on July 8, 1998. We met regularly and negotiated what we believe to be a good agreement. Contrary to what you may have heard and what the Union negotiating committee is now purported that was unanimous, and I'll say it again, unanimous acceptance.

Since the ratification vote, the Union and some of the negotiating committee have distance themselves from the agreement but that does not change the facts that there was an agreement based upon real bargaining and real facts.

Company President McCarthy then reviewed the Company's actions during the negotiations and expressed the need for the Company to stay competitive. President McCarthy in his videotaped speech told the employees the Company's management recognized the contribution of the work force and had attempted to reward that contribution in the agreement that was negotiated. Company President McCarthy concluded his videotaped presentation by stating in part:

We've announced management stands behind our negotiated agreement. We are continuing to operate the Company as usual and have excellent support from over 450 Buschman people who have worked hard over the last two weeks to make sure that we have met every single customer commitment. We know our people can meet every single customer commitment indefinitely.

Union Business Agent Reeves testified Federal Mediator Earl Leonhardt called the parties to a meeting on August 21, 1998. Company Attorney/Negotiator Engeman attempted to tape-record the meeting, however, the Federal Mediator and Union objected. The meeting was not recorded. Union Business Agent Reeves stated, Company Attorney/Negotiator Engeman did most of the talking at the meeting. Reeves credibly testified Engeman "stated we could vote no as many times as we wanted on the [August 6] agreement, that it didn't matter, that that's all there was, there'd be no more." According to Reeves a portion of the meeting was taken up by Company Attorney/Negotiator Engeman reading a prepared statement portions of which follow:

We want you to know that the Company continues to stand behind this committee and this agreement. We told you we would stand behind you and when you said no better terms were available you would be telling the truth. No better terms were or will be available. The Company is prepared to let this situation last indefinitely without any new offer which would better those terms.

Company Human Resources Director Webster's notes made at the August 21, 1998 meeting attributes the following remarks to Company Attorney/Negotiator Engeman.

Bill E. [Engeman]: We are staying with our position we have no other offer and we are standing on it and we continue to back the Bargaining Committee and the Agreement we reached.

Union Business Agent Reeves credibly testified that following Company Attorney/Negotiator Engeman's comments, both extemporaneous and prepared, Mediator Leonhardt separated the parties speaking with both privately. According to Union Business Agent Reeves, Mediator Leonhardt told the Union's negotiating committee Company Attorney/Negotiator Engeman had said, "You have our agreement, you have our offer, that's it." Union Business Agent Reeves said that based on the information from Mediator Leonhardt the Union mailed a "Special Notice" to its membership on August 24, 1998 which reads in part as follows:

On Friday, August 21, 1998, the Union Negotiating Committee attended a meeting that was directed by Federal Mediation and Conciliation Services with the Buschman Company officials. The Company's position is as follows:

1. The Company's proposal is on the table.
2. Should the strike continue, and become long term, the Company will transfer the work. Once the work is gone, it won't come back!!

On or about August 28, 1998, Human Resources Director Webster mailed a two-page letter to all employees in which he noted that recent communications with the employees from the Union contained misstatements of fact. Human Resources Director Webster stated he wanted to clear those misunderstandings. The first point the Company, according to Webster, wanted to clear up was "there was an agreement on August 6." Webster explained in his letter the agreement was unanimously arrived at by the members of both negotiating committees. Another point Webster contended the Company wanted to clear up was that "the Company did not say last Friday, August 21, 'the Company proposal is on the table.'" Webster then set forth in his letter the Company's version of what had been said at the August 21, 1998 meeting about the status of negotiations which follows:

We want you to know that the Company continues to stand behind this committee and this agreement. We told you we would stand behind you and when you said no better terms were available you would be telling the truth. No better terms were or will be available. The Company is prepared to let this situation last indefinitely without any new offer which would better those terms.

Human Resources Director Webster also indicated the Company wanted to clear up what the Company would do if the strike was long term and whether work would be transferred out. Webster explained the Company would continue indefinitely to meet all of its customer commitments. Webster noted the Company would "talk with the Union before deciding to change our method of operations after the strike based upon what we have been learning." Webster further noted in his letter, "[w]e anticipated . . . discussions to begin around September 6."

Business Agent Reeves testified that on September 1, 1998, the Union convened its membership to discuss "the way the strike was going" and to provide general information to the membership. According to Reeves the Union, at that time, made a counterproposal to the Company consisting of "fifty cents across the board per year"; "insurance per the last bargaining agreement"; and, the Union would agree to "keep the temporary language as proposed by the Company and agreed to on the 6th." Reeves testified the membership "pre-ratified" this counterproposal—meaning that if the Company accepted it the parties would immediately have an agreement. The Union's counteroffer was conveyed to the Company through Federal Mediator Leonhardt. The Company rejected the Union's counteroffer and when so advised by Leonhardt, Business Agent Reeves testified:

We then asked Mr. Leonhardt if he would ask the Company to change anything in the August 6 agreement, whether it be a penny here or a penny there or a date or anything, so we would have something totally different to

bring back to the people, or we could say it was different than the original agreement.

The Company again refused to do so.

It appears that on or about September 2, 1998, Federal Mediator Leonhardt attempted to arrange further meetings between the Company and the Union to take place after the Labor Day weekend perhaps on September 8, 9, or 10, 1998.

On September 2, 1998, Company Attorney/Negotiator Engeman telephoned Union General Organizer Purdy. Purdy testified Engeman alluded to the fact the Company was going to move work out of the facility and had "an operating plan" it could implement. Purdy recalled Engeman saying the Company could replace the striking workers. Purdy also recalled Engeman saying that because the Union had retained Attorney Cook to represent it that he, Engeman, could not talk to Purdy any further because Purdy was now the client of Attorney Cook and that he, Engeman, would work through Cook.

Engeman testified he told General Organizer Purdy in their September 2, 1998 conversation, "That there was going to be a proposal that he would not like presented the following week." Company Attorney/Negotiator Engeman testified, "We then had a discussion in which I simply told him I couldn't speak to him about these matters anymore, because he was represented by counsel, and we went on to chit-chat about family or something, I'm sure. But then the conversation ended."

General Organizer Purdy could not recall Engeman making any comments about a proposal to be presented the following week.

To the extent it is beneficial and/or helpful to a better understanding of this case I shall address the differences in recall (or lack thereof) between General Organizer Purdy's and Company Attorney/Negotiator Engeman's recollections regarding whether Engeman spoke about a future company proposal during their September 2, telephone conversation. Purdy did not recall Engeman making mention of any such proposal. It is not disputed Engeman advised Purdy he "couldn't speak to him about these matters anymore, because he was represented by counsel." Therefore, is it likely Engeman would have told Purdy he was going to present a proposal the following week that Purdy would not like? I think not. Engeman's insistence he could not deal further with Union Attorney Cook's client, namely Purdy, is somewhat contradictory to his insistence he told Purdy about a forthcoming proposal. Engeman's actions and comments are also somewhat inconsistent with his contention he advised Purdy of the forthcoming proposal. In light of these concerns I shall not rely on, nor do I credit, Engeman's testimony regarding a forthcoming proposal the Company might make.

Company employee Gary Wayne Hubbard testified he had been working for the Company since November 1992 and participated in the 1998 strike by walking the picket line. Hubbard testified that on September 3, 1998, while on the picket line he had an occasion to participate in a conversation between Human Resources Director Webster, Company Manufacturing Liaison Charlie Wallingford, and certain other striking employees. According to Hubbard, Webster and Wallingford told the striking employees they understood someone on the picket line wanted to speak with someone from management. They announced they were there. Hubbard testified he spoke up and said; "You know, if we had a chance to vote on [the] contract . . . the majority of the people would probably, you know, vote it through." According to Hubbard, Human Resources Director Webster responded that "as far as he was aware of, the contract that we voted down was still on the table." Hubbard then spoke with Company Manufacturing Liaison Wallingford about a personal matter. Hubbard told Wallingford he "couldn't go back in [to work] without the Union" because the Union was "the only thing that's really kept me in there, and stuff like that."<sup>4</sup>

Company Human Resources Director Webster testified that on September 3, 1998, Company Manufacturing Liaison Wallingford informed him at about 10 a.m. a picket had requested Wallingford come to the picket line. Webster accompanied Wallingford to the picket line.

<sup>4</sup> Hubbard explained that the personal matter behind his comments to Wallingford was that he, Hubbard, had sued the Company and won. Hubbard testified he felt the Company didn't like him very much and added "I figured, you know, if there wasn't a union in there, I wouldn't have a chance in hell to trying to make it in the shop they'd probably find a way to get rid of me."

Webster testified a striking employee asked Wallingford if the Company was hiring employees for the shop. According to Webster, Wallingford stated, the Company was hiring and would continue to hire. According to Webster, Wallingford explained that once the Company had hired enough employees to operate the shop the striking employees would go on a preferential hire list. Webster testified Hubbard then asked him two questions. According to Webster, Hubbard first asked if the Company and Union were meeting on September 6, 1998, or some time that next week. Webster told Hubbard the Company desired to meet with the Union on September 6, but no meeting had actually been scheduled. Webster testified Hubbard then stated he had heard a rumor that if they didn't vote to accept or ratify the agreement that the Company's offer would be less the next week. Webster testified: "My response was I hadn't heard anything about that, nor had I heard anyone say that." Webster specifically denied telling Hubbard the Company's offer was still on the table. Webster acknowledged he did not say the Company's offer was off the table.

Hubbard appeared candid and impressed me as a witness attempting to testify truthfully. I credit his testimony. In doing so I am not unmindful that he appeared to be an individual who would inject himself into someone else's conversation and that he is persuaded the Company might hold ill will against him. In crediting Hubbard, I note his and Webster's recollections are somewhat mutually supportive; however, I find as testified to by Hubbard, that Webster told Hubbard as far as he was aware the contract that had been voted down by the employees was still on the table.

Union Business Agent Reeves testified that on September 3, 1998, an employee came from the picket line to the Union's offices and said Company Vice President Yarberry told the pickets on the picket line that if the employees did not ratify the agreement it wouldn't be there the next week. Reeves testified that as a result of that information and after a brief discussion was had at the union hall "we decided to go ahead and have a ratification vote." The employees were notified by telephone of a meeting set for September 4, 1998. Reeves telephoned General Organizer Purdy on September 3, 1998, to discuss the scheduled meeting. Reeves asked Purdy to "run the meeting" the next day. Purdy testified Reeves specifically asked him to conduct the September 4, 1998 ratification meeting because "it seemed to be a point of urgency" and the Union "believed the Company was getting ready to withdraw its . . . agreement that had been on the table."

General Organizer Purdy testified that at the September 4, 1998 meeting the membership voted to withdraw its previous vote not to revoke the August 6 Agreement. The membership then voted to accept the August 6 Agreement by a vote of approximately 124 to 74. The members also voted to end the strike and immediately return to work.

Union General Organizer Purdy attempted to contact Company President McCarthy about the Union's actions but McCarthy was not available. Purdy spoke instead with Company Vice President Yarberry. Purdy testified, "I advised him that the agreement had been ratified and that the employees were ready to . . . return to work immediately." According to Purdy, Vice President Yarberry "expressed to some degree . . . a point of relief that the thing was over." Purdy said they then discussed returning the employees to work. Yarberry advised Purdy the Company was not ready at that point to take all the employees back to work, but "[t]hat the Company was in the process of setting up a return schedule" and employees returning to work immediately would be eligible holiday pay. Yarberry told Purdy the Company would set up a phone message system where employees could individually call the Company and, based on the message provided, be given a reporting schedule as to date, time and shift to return to work. The return-to-work telephone line was established by the Company prior to the end of that day.

Vice President Yarberry testified he received a telephone call from Union General Organizer Purdy. Purdy informed him there had been a favorable ratification vote and the Union would like to have the workers come back to work. Yarberry testified, "I stated at that time that I understood what he was telling me, and would welcome the employees back." Yarberry advised Purdy the Company's Attorney/Negotiator Engeman was out of state at the time and could not review the situation. Yarberry advised Purdy that whatever document they were working from to fax to the Company's office and such could be available for the Company's review the following Tuesday. Vice President Yarberry testified their conversation "included some other comments about the people being there and . . . when they came back to work and 'can we consider this an acceptance.'" Yarberry told Purdy he understood what he, Purdy, was telling him but, Purdy would have to understand that the Company's attorney was not available

at that time nor had the Company's negotiating committee had a chance to review the situation. Yarberry again asked Purdy to fax to the Company whatever documents he wanted them to have. According to Yarberry, Purdy stated rather than fax the materials he would bring them to the Company.

Immediately following the September 4, 1998 ratification of the August 6 Agreement, a delegation from the Union went to the Company to present a copy of the ratified agreement. The Union's delegation included General Organizer Purdy, Union Business Agent Reeves, Local Union President Dave Beiderbeck, and union negotiating committee members; Dan Hicks, Curtis Turner, and Roxanne Keith. According to General Organizer Purdy, whose testimony I credit, they met with Company Vice President Yarberry and Human Resources Director Webster. Purdy requested the representatives "initial off" the ratified agreement.<sup>5</sup> General Organizer Purdy testified:

They [Yarberry and Webster] indicated that it appeared to be . . . what the August 6 agreement was, but that they would have to meet and discuss with . . . the rest of the employer committee before they could respond to it, that they were not prepared to initial off.

Yarberry said it was a "very short" meeting. Purdy credibly testified neither Yarberry or Webster indicated the Company's offer entered into on August 6, 1998, was no longer viable.

Company Vice President Yarberry testified that when General Organizer Purdy handed him the document he recorded the time and date of receipt upon it and showed it to Human Resources Director Webster. Yarberry testified Purdy asked if they had an agreement and if this was okay. Yarberry said he "reiterated the point that [Attorney/Negotiator] Engeman was out of town, that we were unable to get our committee together but would do so on Tuesday."<sup>6</sup> Vice President Yarberry acknowledged he did not tell General Organizer Purdy or the union committee the August 6, 1998 agreement was no longer viable, or, the Company's offer was off the table, or there were other matters which the Company needed to discuss before any agreement could be arrived at.

Human Resources Director Webster testified that when the Union presented the agreement to them on September 4, 1998, they told the committee "we understand . . . what you have provided us." Webster acknowledged neither he nor Yarberry said anything to the Union about needing to negotiate strike settlement issues or that there was no offer on the table for the Union to accept and/or ratify.

On September 8, 1998, Union Business Agent Reeves prepared a letter to Human Resources Director Webster which was hand delivered to Webster on September 9, 1998, containing the following:

On Friday, September 4, 1998, striking members of Shopmen's Local Union No. 522 ratified the pending contract offer ("the August 6th Agreement"). All strike activity ceased against the Company. General Organizer Bill Purdy and the negotiating committee made an unconditional offer to return to work on behalf of the striking employees of the Company.

This letter confirms and restates in writing that offer to return to work, effective September 4, 1998. The members of Shopmen's Local Union No. 522 stand ready to report to work upon notice from the Company.

It is acknowledged that all employees desiring to be returned to work during the week commencing Tuesday, September 8, 1998.

Tuesday, September 8, 1998 was the first business day after the Union's strike ending and ratification votes had been taken on September 4, 1998. On that date the Company faxed to the Union, with a cover letter from Human Resources Director Webster, the Company's proposed

strike settlement agreement. The strike settlement agreement consisted of three pages divided into four major subject matters. The first dealt with restoration of customer and shareholder confidence in the operation of the Company. In it the Union's shop committee was committed to work with shop supervisors, managers and officers of the Company to demonstrate by concrete steps that continuous improvement would be a way of life over the term of this 5-year agreement. The parties also would be committed to developing and sharing productivity and efficiency measures. The strike settlement agreement would confirm management's right to act without further discussion on any work scheduling, work assignments, make-buy decisions, work location decisions and making in-plant process improvements. The second major subject of the strike settlement agreement dealt with litigation settlement and/or costs related to the strike. The Union's officers would commit to approaching all businesses in the area and offer to restore any property damage, compensate for any vehicles damaged in the area, and pay all attorney costs related to injunctive action to a maximum of \$5000. The parties would agree that no further legal proceedings, including grievances, arbitration, unfair labor practice charges, Federal or State EEO charges, or law suits of any kind would be brought by the Company, Union, or employees represented by the Union regarding any matters occurring during or associated with the dispute ended by the strike settlement agreement. The third major subject dealt with restoring relationships between employees, supervisors, and managers. This area of the agreement involved among other concerns, asserted picket line misconduct, and that the parties would recognize that maintenance of full union membership was not required for compliance with the union-security provisions of the agreement. The fourth major area of the strike settlement agreement dealt with effective dates for wage and benefit increases and holiday pay for certain striking employees based on when they returned to work and on certain temporary worker language for the contract.

Union Business Agent Reeves credibly testified that none of the issues raised in the Company's proposed strike settlement agreement was raised by the Company with the Union prior to September 8, 1998.

On September 10, 1998, Union Business Agent Reeves responded in writing to Human Resources Director Webster's letter regarding the Company's September 8, 1998 strike settlement agreement. In his letter Reeves expressed "great" surprise about the Company's strike settlement agreement inasmuch as the employees had offered themselves for unconditional return to work on September 4, and all striking employees had been returned to work. Reeves noted no portion of the strike settlement agreement was ever presented to any representative of the Union at any time prior to the Union's ratifying the August 6 Agreement. Reeves continued in his letter:

None of the conditions or terms proposed in the Company's proposed "*Strike Settlement Agreement*" were ever discussed between the parties, at any time. We received the document containing the proposal via facsimile on September 8, 1998. As a result, Shopmen's Local Union No. 522 cannot, does not, and will not accept any of the proposed changes to the August 6 agreement which are detailed in the *proposed "Strike Settlement Agreement."*

Reeves advised Webster the Union stood ready to execute a contract containing the terms of the August 6 Agreement and rejected the Company's attempt to modify the ratified agreement in any manner.

In a letter dated September 11, 1998, Company Human Resources Director Webster advised Union Business Agent Reeves the Company had received Reeves' most recent correspondence (referred to above) and acknowledged the Union had rejected the Company's strike settlement agreement. Webster disputed the existence of an offer remaining open on September 4, 1998, at the time the Union purported to accept it. Webster noted, "We, obviously, cannot execute the proposal you made on September 4 as it has not been accepted and no complete agreement has been reached."

Union Business Agent Reeves, with a cover letter dated September 23, 1998, forwarded to Human Resources Director Webster a complete copy of the ratified collective-bargaining agreement. Reeves asked for a convenient time that the agreement could be signed.

<sup>5</sup> Purdy testified the document presented to "initial off" was a type-written version of the August 6, 1998 (handwritten) agreement.

<sup>6</sup> Yarberry explained the following Monday was a holiday.

## Discussion, Analysis, and Conclusions

Section 8(d) of the Act, which addresses the obligation to bargain collectively and in good faith, with respect to wages, hours, and other terms and conditions of employment, requires “the execution of a written contract incorporating any agreement reached if requested by either party.” If the Company and Union arrived at an agreement, the Company’s failure to execute a written contract incorporating the terms of the agreement with the Union would constitute an unlawful refusal to bargain as required by Section 8(a)(5) of the Act. *H. J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941). Section 8(d) of the Act however, does not compel either party to agree to a proposal or require the making of a concession. A threshold question therefore is whether the parties in fact reached an agreement. If there was no agreement or “no meeting of the minds” as contended by the Company herein then it would not be unlawful for the Company to refuse to execute the contract presented to it by the Union. Stated differently, the Board has no authority to order an employer to execute an agreement to which it has not assented. It is not the function of the Board to determine what the parties should have agreed on. *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1971).

In the instant case it is undisputed the parties reached a complete agreement for a new contract on August 6, 1998. It is likewise undisputed the union membership overwhelmingly rejected the August 6, 1998 Agreement on that same date and further authorized and almost immediately commenced a strike against the Company. Thereafter on September 4, 1998, the union membership ratified the August 6, 1998 agreement (August 6 Agreement) and at that time ended its strike against the Company. The central question herein is, was the August 6 Agreement on the table for the Union to accept on September 4, 1998 so as to compel the Company to execute and abide by it, or had the August 6 Agreement been subject to acceptance by a specified deadline or had it been withdrawn or modified by changed circumstances or otherwise such that the parties would have believed the offer to have been withdrawn.

For the reasons outlined below I am persuaded the contract offer was still on the table susceptible to acceptance and ratification as the Union did on September 4, 1998. Accordingly, I shall find the Company’s failure to execute the August 6 Agreement constituted a violation of Section 8(a)(5) and (1) of the Act.

The evidence is overwhelming the offer of August 6, 1998, had not been withdrawn and was available for acceptance at the time the Union accepted it. It is irrelevant the Union originally rejected the August 6 Agreement. As the Board and courts have noted, a contract offer is not automatically terminated by the other party’s rejection of it or that a counterproposal had been made. A contract offer may be accepted within a reasonable time unless, prior to acceptance, the contract proposal has been specifically withdrawn or was made subject to or contingent upon some conditions subsequent or intervening circumstances that would make it unfair to hold the offeror to its bargain. *Pepsi-Cola Bottling Co.*, 251 NLRB 187 (1980), enf.d. 659 F.2d 87 (8th Cir. 1981); see also *Georgia Kraft Co. v. NLRB*, 696 F.2d 931 (11th Cir. 1983), vacated and remanded on other grounds 466 U.S. 901 (1984), 104 S.Ct. 1673 at 1674. It is well established that technical rules of contract do not control on the issue of whether a collective-bargaining agreement has been reached. The common-law rule that a rejection or counterproposal necessarily terminates an offer has little if any relevance in a collective-bargaining setting. Simply stated Federal labor policy encourages the formation of collective-bargaining agreements.

The Company’s contention the August 6 Agreement expired by its terms when it was not ratified on August 6, 1998, is contradicted by its actions on and after that date. For example, when Union Business Agent Reeves informed Company Vice President Yarberr the employees had failed to ratify the agreement and would go on strike Yarberr told Reeves the Company was sticking to the agreement. The Union was advised any subsequent meetings would be to explain the agreement but not for the purpose of continued negotiations. On the same day the union membership failed to ratify the August 6 Agreement, Company President McCarthy in a “Notice to All Employees” informed the employees the Company would remain open for work and continue to serve its customers “until the new agreement negotiated in good faith over many weeks and accepted and unanimously recommended by the Union committee, is finally accepted.” Notwithstanding the failure of ratification by the union membership the Company made it clear it was adhering to the August 6 Agreement it had made with the Union. As the Board noted in *Williamhouse-Regency of Delaware*, 297 NLRB 199 (1989), enf.d. 915 F.2d 631 (11th Cir. 1990) “an offer, once made, remains on the table unless explicitly with-

drawn by the offeror or unless circumstances arise that would reasonable lead the parties to believe that the offer had been withdrawn.” In the instant case the early actions of the Company clearly indicated, and all parties could reasonable have believed, the August 6 Agreement remained on the table open for acceptance. The circuit court in *Williamhouse-Regency* noted the employers’ final offer prior to a strike in that case was not automatically terminated by the union’s rejection and decision to strike. The court in *Williamhouse-Regency* went on to note the offer therein could be, and was, accepted by the union therein at the conclusion of the strike where the employer therein never expressly withdrew its offer and continued to suggest the terms of its offer were still open for acceptance by its communications to the members during the strike. The court also noted in *Williamhouse-Regency* that nothing had occurred during the strike in that case that materially changed the relationship of the parties or made it unfair to hold the employer therein to its bargain. I find the same to be true in the instant case.

Furthermore, 1 week into the strike, on August 13, 1998, Company President McCarthy mailed a letter to all employees in which he stated the Company continued to stand behind its August 6 Agreement with the Union. In a videotaped message sent to each employee on August 21, 1998, Company President McCarthy reiterated the Company’s position that the August 6 Agreement was still open for acceptance. In his videotaped message President McCarthy stated in part, “we met regularly and negotiated what we believed to be a good agreement”, and explained the ratification vote did not “change the fact that there was an agreement based upon real bargaining and real facts.” Near the end of his videotaped speech President McCarthy added “[W]e’ve announced that management stands behind our negotiated agreement.”

The Company again expressed its commitment to the August 6 Agreement, at a meeting with the parties and Federal mediators on August 21, 1998, when Company Attorney/Negotiator Engeman indicated the Union could reject the agreement as many times as it wanted, but nothing more would be forthcoming from the Company. Company Attorney/Negotiator Engeman read from a prepared statement that the Company continued to stand behind its committee and the agreement and emphasized again that no better terms would be available to the Union.

Based on the overwhelming weight of the evidence, I reject the Company’s contention it put the Union on notice it had withdrawn from the agreement when Human Resources Director Webster informed the employees in writing on August 28, 1998 that contrary to what the Union had indicated the Company did not state at the August 21, 1998 meeting that the Company’s proposal was still on the table. It is clear the Company’s position remained, as it had throughout, when Webster in his August 28, 1998 letter informed the employees:

We want you to know that the Company continues to stand behind this committee and this agreement [August 6 Agreement]. We told you we would stand behind you and when you said no better terms were available you would be telling the truth. No better terms were or will be available. The Company is prepared to let this situation last indefinitely without any new offer which would better those terms.

I likewise reject the contention that when the Union made a preratified counterproposal to the Company on September 1, 1998, such removed the August 6 Agreement from the table. A counterproposal does not necessarily terminate an offer that is on the bargaining table. Here, the Company through the Federal mediator, rejected the Union’s counterproposal and after being requested to change any, ever so insignificant, point in the August 6 Agreement so the Union could present a “different” proposal to its membership the Company refused to do so. The Company, by its actions, made it clear the August 6 Agreement was still on the table and that the Union could not expect anything better from the Company.

The September 2, 1998 telephone exchange between Company Attorney/Negotiator Engeman and Union General Organizer Purdy did not change the fact the offer was still on the table for acceptance. Company Attorney/Negotiator Engeman and Purdy in their telephone exchange briefly mentioned the fact the Company would be moving work out of the facility and discussed the fact the Union had retained legal counsel. As explained elsewhere in this decision, I do not credit Engeman’s assertions regarding mention of a contract proposal that would be forthcoming from the Company. Additionally there is no credible evidence the Union was

placed on notice, during this telephone exchange, the Company was withdrawing from the August 6 Agreement.

On September 3, 1998, Human Resources Director Webster told an employee in the presence of others on the picket line that "as far as he was aware of, the contract that we voted down [August 6 Agreement] was still on the table." Thus on September 4, 1998, at the time the union membership voted to accept the August 6 Agreement and to end their strike, nothing had taken place to indicate the offer was or had been removed from the table. In fact, the overwhelming evidence indicates the August 6 Agreement remained on the table because the Company not only failed to withdraw it prior to its acceptance but the Company's actions clearly demonstrated it was still viable.

At the time the Company was notified the August 6 Agreement had been ratified and the workers would be returning to work, Vice President Yarbber expressed relief the strike was over and neither he nor Human Resources Director Webster gave any indication the Company's offer was no longer viable. In fact the Company immediately returned the employees who had been on strike to work. It was not until September 8, 1998, that the Company took any action to indicate it did not believe an agreement had been arrived at. On that date, September 8, 1998, Human Resources Director Webster notified Union Business Agent Reeves, in writing, the Company wanted to negotiate a strike settlement agreement. None of the issues raised in the Company's proposed strike settlement agreement was raised by the Company with the Union prior to September 8, 1998.

I am fully persuaded the Union accepted the August 6 Agreement at a time while it was still on the table and susceptible to acceptance. The Company's additional proposals came after the contract had been accepted. The Company is obligated to execute the collective-bargaining agreement as tendered to Human Resources Director Webster in completed form on September 23, 1998.

I reject the Company's argument there was no effective date for the August 6 Agreement as being factually incorrect. The August 6 Agreement envisioned an August 7, 1998 effective date for a 5-year collective-bargaining agreement. At no time was the effective date, as set forth in the August 6 Agreement, altered in any manner. The fact the Company did not retroactively make certain payments and contributions to the August 7, 1998 date is of no great moment in as much as the Company has yet to execute and abide by *all* the terms of the August 6 Agreement. The Company's argument it never agreed to a change in the relevant hire date for "Second Tier" employees from August 7, 1984, to August 7, 1994, is without merit. Union District Representative Cluckley credibly testified there was no change that the incorrect date was an inadvertent typographical error. Typographical errors do not relieve the Company of its obligation to execute the collective-bargaining agreement containing the agreed upon terms. *Trojan Steel Corp.*, 222 NLRB 478, 483 (1976). I likewise reject the Company's argument that by including a summary of the agreed upon health benefits in the agreement the Union incorporated something that had not been agreed upon. This argument is nothing more than one of form over substance which I reject. It is undisputed the parties had agreed upon the health plan in question. The Union simply incorporated a summary of what was agreed upon into the parties collective-bargaining agreement. Everything included in the collective-bargaining agreement regarding health benefits had been agreed upon by the parties. Other contentions of the Company, not mentioned herein, have been considered and rejected as being without merit.

In conclusion, I find the Company violated Section 8(a)(5) and (1) of the Act as alleged in the complaint, when it refused to execute its collective-bargaining agreement with the Union.

#### CONCLUSIONS OF LAW

1. The Company 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. Since on or about September 4, 1998, the Company has violated Section 8(a)(5) and (1) of the Act by failing and refusing to execute its collective-bargaining agreement with the Union.
4. The unfair labor practices engaged in by the Company affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### THE REMEDY

Having found that the Company has engaged in certain unfair labor practices I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Company shall, upon request, execute the collective-bargaining agreement arrived at with the Union.<sup>7</sup> The Company shall make whole those employees covered by the collective-bargaining agreement from August 7, 1998, forward, for any loss of earnings and other benefits suffered by them as a result of the Company's unlawful failure and refusal to execute the collective-bargaining agreement as requested on September 4, 1998, plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Company shall make the Union whole for losses, if any, the Union may have suffered related to any failure to deduct union dues and transmit same to the Union.

On these findings of fact, and conclusions of law, and on the entire record I issue the following recommended<sup>8</sup>

#### ORDER

The Company, The Buschman Company, Cincinnati, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from
  - (a) Failing and refusing to execute its collective-bargaining agreement with the Union as specifically described in the remedy section of this decision.
  - (b) 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) Forthwith execute its collective-bargaining agreement with and the Union, as described in the remedy section of this decision, and as requested by the Union on September 4, 1998.
  - (b) Make whole those employees covered by the collective-bargaining agreement from August 7, 1998, forward for any loss of earnings and other benefits suffered as a result of the Company's unlawful failure and refusal to execute the collective-bargaining agreement since requested on September 4, 1998, in the manner set forth in the remedy section of this decision.
  - (c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of reimbursement, if any, due pursuant to this Order.
  - (d) Reimburse the Union for losses, if any, the Union may have suffered related to the failure to deduct and transmit dues to the Union.
  - (e) Within 14 days after service by the Regional Director for Region 9 of the National Labor Relations Board, post at its Cincinnati, Ohio facility copies of the attached notice marked "Appendix."<sup>9</sup> Copies of the Notice, on forms provided by the Regional Director for Region 9 after being signed by the Company's authorized representative, shall be posted by the Company and 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 the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the Notice to Employees to all employees that have been employed by the Company on or at any time since September 4, 1998.

<sup>7</sup> The agreement is GC Exh. 16(a).

<sup>8</sup> 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.

<sup>9</sup> If this Order is enforced by 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."

(f) Within 21 days after service by the Region, file with the Regional Director for Region 9 of the Board sworn certification of a responsible official on a form provided by the Region attesting to the steps the Company has taken to comply.

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT fail or refuse to execute our collective-bargaining agreement with the Union.

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 by the Union, forthwith execute our collective-bargaining agreement with the Union.

WE WILL make whole our unit employees for losses, if any, they may have suffered by reason of our failure to execute the agreement with interest.

WE WILL reimburse the Union for losses, if any, the Union may have suffered related to the failure to deduct and transmit dues to the Union.

THE BUSCHMAN COMPANY