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**St. George Warehouse, Inc. and Merchandise Drivers
Local No. 641, International Brotherhood of
Teamsters, AFL–CIO. Case 22–CA–24902**

May 12, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER
AND WALSH

On October 22, 2002, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.¹

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 in part, reverse them in part, and to adopt the recommended Order as modified and set forth in full below.²

I. FACTS

This case involves a newly certified union and the parties' negotiations for an initial collective-bargaining

¹ There are no exceptions to the judge's findings that the Respondent violated Sec. 8(a)(5) and (1) by delaying in providing the Union with information on health insurance premiums and failing to provide the Union with the names, addresses, job classifications, wage rates, and duration of employment of temporary agency employees who have performed bargaining unit work.

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

The General Counsel moved to strike the Respondent's exceptions on the basis that they do not comply with Sec. 102.46(b) and (c) of the Board's Rules and Regulations. First, the General Counsel argues that the exceptions do not designate the precise portions of the record relied on and that the brief does not contain clear and concise references to the exceptions being argued. We find, however, that the Respondent's exceptions and brief are in substantial compliance with the Board's Rule. Second, the General Counsel argues that the Respondent's brief exceeds the scope of the exceptions by stating, in support of its argument that it did not engage in surface bargaining, that the parties have been bargaining since the close of the hearing. We do not rely on that alleged fact in our decision. Therefore, we deny the General Counsel's motion to strike. See *Jack in the Box Distribution Center Systems*, 339 NLRB No. 5 fn. 1 (2003).

² We shall modify the judge's conclusions of law, remedy, and recommended Order and substitute a new notice to conform to our findings and to the Board's standard remedial language.

agreement. The judge found that the Respondent committed several violations of Section 8(a)(5) and (1), including unilaterally transferring unit work to temporary agency employees, failing to provide the Union with certain requested information, and engaging in surface bargaining. As explained below, we agree with the judge that the unilateral transfer of work and the failure to provide information violated Section 8(a)(5) and (1), but we reverse and dismiss the surface bargaining allegation.

The election was held on April 16, 1999. At the time of the election, the unit consisted of about 42 warehouse employees. After litigating the eligibility of two voters whose ballots were challenged, the Union was certified on October 27, 2000. The Respondent tested the certification and refused to bargain. The Board found that the refusal to bargain violated Section 8(a)(5) and (1), and the court enforced the Board's Order. See *St. George Warehouse*, 333 NLRB No. 113 (2001) (not reported in bound volume), *enfd. sub nom. NLRB v. St. George Warehouse*, No. 01-2215 (3d Cir. Aug. 7, 2001). From October 2001 through at least May 2002, the parties negotiated for a first contract. As of the July 2002 hearing, they had not reached an agreement.

The Respondent warehouses containers from ships. Prior to the election, the Respondent had a practice of using a fluctuating number of temporary agency employees to supplement its permanent work force of "direct hires," or bargaining unit employees. The bargaining unit description specifically excludes these agency employees. Sometime after the election, the Respondent decided to stop hiring any more direct hires and to use temporary agency employees instead. As unit employees quit or were fired for cause, the Respondent did not replace them. When it needed additional workers, it used temporary agency employees. As a result of this new practice, the unit decreased over time from 42 employees at the time of the election to 8 employees at the time of the July 2002 hearing. It is undisputed that the decision to replace departing direct hires with temporary agency employees was made unilaterally, without notice to the Union or an opportunity to bargain.

The judge found that the Respondent violated Section 8(a)(5) and (1) by unilaterally transferring unit work to temporary agency employees without giving the Union notice and the opportunity to bargain. The judge further found that the Respondent violated Section 8(a)(5) and (1) by failing to furnish the Union with the names and addresses of temporary agencies supplying workers to the Respondent and any contracts or other documents setting forth the terms and conditions applying to those

workers. We agree with the judge and adopt his findings as further explained below.³

The judge also found that the Respondent violated Section 8(a)(5) and (1) by engaging in surface bargaining. As stated below, we find that the totality of the Respondent's conduct does not warrant a finding of surface bargaining. Therefore, we reverse and dismiss this allegation.

II. UNILATERAL TRANSFER OF UNIT WORK

As stated above, the Respondent's unilateral transfer of unit work to temporary agency employees began sometime after the April 1999 election. The Union filed its charge on November 26, 2001. The Respondent argues that the charge is barred by Section 10(b), because the Union had actual or constructive notice of the violation more than 6 months before filing the charge.⁴ We agree with the judge that the Respondent's 10(b) argument lacks merit and that the unilateral transfer of unit work violated Section 8(a)(5) and (1).

The Respondent's 10(b) argument centers around the activities of Jan Katz, who became the Union's business agent in April 2001. Katz worked as a driver for one of the Respondent's customers from 1999 through March 2001. As a driver, Katz came to the Respondent's premises several times a week. The Respondent argues that Katz talked to employees when he was at the Respondent's facility, and that someone would have told him that the Respondent was using agency employees to replace its departing unit employees. Because the temporary agency employees working at the Respondent's facility wore different colored vests from the direct hires, the Respondent also argues that Katz should have noticed this difference and inquired about it.

"The 6-month limitations period prescribed by Section 10(b) begins to run only when a party has clear and unequivocal notice of a violation of the Act." *CAB Associates*, 340 NLRB No. 171, slip op. at 2 (2003) (internal

³ In finding that the Respondent violated Sec. 8(a)(5) and (1) by refusing to provide the Union with names and addresses of the temporary agencies and any contracts or other documents setting forth the terms and conditions of the temporary workers, the judge relied in part on *Gourmet Award Foods, Northeast*, 332 NLRB 170 (2000). In that case, however, there were no exceptions to the judge's finding that the respondent refused to provide information requested by the union. Therefore, the issue was not before the Board. Accordingly, we do not rely on *Gourmet Award Foods*. Instead, we rely on *Optica Lee Borinquen, Inc.*, 307 NLRB 705, 717 (1992), enf. 991 F.2d 786 (1st Cir. 1993) (where respondent was using nonunit general practitioners (GPs) to perform work of unit optometrists, the respondent's contracts with GPs were relevant to bargaining).

⁴ Sec. 10(b) provides in relevant part that "no complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . ."

citation omitted). "The requisite notice may be actual or constructive." *Id.* "In determining whether a party was on constructive notice, the inquiry is whether that party should have become aware of a violation in the exercise of reasonable diligence." *Id.* (internal citation omitted). It is well settled that the burden of proving a 10(b) defense rests on the party asserting it. See *Nursing Center at Vineland*, 318 NLRB 337, 339 (1995).

We agree with the judge that the Respondent failed to carry this burden. First, the Respondent has not shown that the Union had actual knowledge of the violation more than 6 months before filing the charge. According to the credited testimony, Katz did not learn that the Respondent was transferring unit work to agency employees until August 2001, well within the 10(b) period.⁵ Furthermore, the Respondent has not shown constructive notice. During the time period in which the Respondent argues that the Union should have become aware of the transfer of unit work, the Respondent was refusing to bargain with the Union, and the Union had no steward in the shop to police working conditions. See *Duke University*, 315 NLRB 1291 fn. 1, 1296-1297 (1995) (10(b) argument rejected where there was no evidence that the union should have known of respondent's failure to replace full-time drivers before 10(b) period; during this time, respondent was refusing to recognize union). Jan Katz, who was working as a driver for one of the Respondent's customers at the time, was not an employee of the Respondent and was not yet a business agent for the Union, and thus he was certainly not on the premises in order to police the Respondent's compliance with its collective-bargaining responsibilities. In addition, it appears that there was significant turnover among the Respondent's direct hires during the time period when Katz worked as a driver.⁶ Therefore, by the time the Respondent began using agency employees to replace its direct hires, Katz had likely become accustomed to seeing new faces among the Respondent's work force. Finally, although Katz regularly came to the Respondent's facility, he was not permitted in the warehouse area, which reduces the likelihood that he would have noticed that

⁵ We disagree with the judge to the extent he found no credible evidence that the Union knew before August 21, 2001, that the Respondent was using *any* temporary agency employees. The unit description expressly excludes temporary agency employees, which suggests that the Union was aware of some use of agency employees. However, this does not affect our decision. The violation alleged and found here is not the mere use of agency employees to supplement its direct hires (which the Respondent had done for several years), but the unilateral transfer of unit work to agency employees by using agency employees to replace its direct hires. The judge found, and the credited evidence shows, that the Union did not learn of this practice until August 2001.

⁶ For example, the judge found that the Respondent directly hired 30 new employees in 1999.

warehouse employees were being replaced by temporary agency employees. For these reasons, the Respondent has failed to prove constructive notice. We therefore agree with the judge that the Respondent's 10(b) defense must fail. We further agree with the judge, for the reasons stated in his decision, that the Respondent's unilateral transfer of unit work to temporary agency employees violated Section 8(a)(5) and (1).⁷

III. SURFACE BARGAINING

The judge found that the Respondent violated Section 8(a)(5) and (1) by engaging in surface bargaining. We reverse. Contrary to our dissenting colleague, we find that, on balance, the evidence does not support a finding of surface bargaining.

A. Legal Standard

Section 8(d) of the Act defines the duty to bargain collectively as “the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession.” “Good-faith bargaining ‘presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract.’” *Public Service Co. of Oklahoma*, 334 NLRB 487 (2001), *enfd.* 318 F.3d 1173 (10th Cir. 2003) (quoting *NLRB v. Insurance Agents’ Union*, 361 U.S. 477, 485 (1960)). However, “[a] party is entitled to stand firm on a position if he reasonably believes that it is fair and proper or that he has sufficient bargaining strength to force the other party to agree.” *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984) (citing *NLRB v. Advanced Business Forms Corp.*, 474 F.2d 457, 467 (2d Cir. 1973)).

“In determining whether a party has violated its statutory duty to bargain in good faith, the Board examines the totality of the party’s conduct, both at and away from the bargaining table.” *Public Service Co.*, *supra* at 487 (internal citations omitted). From the context of a party’s total conduct, the Board determines whether the party is “engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement.” *Id.*

B. The Respondent’s Conduct Does Not Warrant a Finding of Surface Bargaining

Applying the above principles here, and examining the Respondent’s conduct both at and away from the bar-

⁷ As explained *infra*, however, we shall modify the judge’s remedy for this violation.

gaining table, we find that the Respondent did not engage in surface bargaining.

1. Conduct at the bargaining table

The Respondent’s conduct at the bargaining table does not establish surface bargaining. The Respondent did not manifest an intent to avoid negotiations. Indeed, the parties met frequently and regularly. Moreover, as the judge conceded, the Respondent did not engage in regressive bargaining or propose reductions in existing benefits. Indeed, the Respondent made concessions and reached agreement with the Union on a number of issues. For example, the Respondent ultimately agreed to the Union’s demand for a pay differential for second-shift employees, a 30-day leave of absence for certain purposes, and the appointment of one shop steward and one alternate steward. The Respondent also agreed to the Union’s nondiscrimination and severability clauses and agreed to incorporate Family and Medical Leave Act language into the contract. The Respondent stated that it would agree to the Union’s proposed grievance and arbitration procedure on the condition that employees could be immediately discharged if they committed certain listed offenses, such as theft.⁸ Finally, the Respondent proposed a wage increase and later increased that offer.

Although the judge found that the Respondent failed to give reasons for rejecting certain union proposals, with respect to many proposals the Respondent did give reasons. For example, the Respondent rejected the Union’s request for additional holidays, because the docks (from which the Respondent unloads and loads containers) were open on those days. The Respondent rejected a proposal that would prevent supervisors from performing unit work, because supervisors had done so in the past when the Respondent was pressed to meet a deadline. The Respondent denied the Union’s request to incorporate this practice into the contract, because the practice was too sporadic to reduce to writing in a way that would not likely result in grievances over its interpretation. The Respondent rejected the Union’s proposal that all employees’ wages be raised to \$16.75 (which would have resulted in an \$8.75 increase for some employees), because only one employee earned that wage, and he was scheduled to retire shortly.⁹ The Respondent also sent a letter to the Union explaining in detail its positions on wages, supervisors performing unit work, leaves of absence, bereavement leave, and other issues.

⁸ There is no evidence that the Respondent’s proposal would exempt these immediate discharges from the grievance and arbitration process.

⁹ As stated above, however, the Respondent did propose a wage increase.

As further evidence of surface bargaining, the judge noted that the Respondent rejected a union-security clause and proposed a broad management-rights clause. However, the rejection of a union-security clause does not constitute bad-faith bargaining. See *APT Medical Transportation*, 333 NLRB 760, 770 (2001).¹⁰ Similarly, it is not unlawful for an employer to propose and bargain for a broad management-rights clause. See *Commercial Candy Vending Division*, 294 NLRB 908, 909 (1989). Although the Board has found surface bargaining where an employer insists on proposals that would leave the union and employees “with substantially less rights and protection than they would have had if they had relied solely upon the certification,”¹¹ the Respondent’s management-rights clause would not have done so. For example, as stated above, the Respondent was willing to agree to a grievance and arbitration procedure, so long as the Respondent was able to discharge employees immediately for certain enumerated offenses.

The judge and our colleague also find that the Respondent tried to delay bargaining. We find the evidence on this issue unpersuasive. The judge noted that the Respondent suggested suspending negotiations in May

¹⁰ In finding that the Respondent’s rejection of a union-security clause was evidence of surface bargaining, the judge cited *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1043 (1996). In *Bryant & Stratton*, however, the Board expressly declined to adopt the judge’s analysis of that issue. See 321 NLRB 1007 fn. 4. Our colleague’s reliance on *Hospitality Motor Inn, Inc.*, 249 NLRB 1036 (1980), enf. 667 F.2d 562 (6th Cir. 1982), cert. denied 459 U.S. 969 (1982), to support the same point is also unavailing. In *Hospitality Motor Inn*, the employer’s “philosophical” opposition to a union-security clause was absolute and obstructionist. There, the employer established that the Union’s request for a union-security clause would preclude reaching an agreement, even if the parties could reach resolution of all other issues. In addition, the employer stated that it would not agree to a union-security clause, even if “100 percent of the employees signed authorization cards.” *Id.* at 1039. Moreover, as the Board stressed, the employer’s intransigent intent not to reach agreement on union-security and dues-checkoff provisions was but one aspect of a “totality of conduct” evincing a failure to bargain in good faith. *Id.* at 1036 fn. 1. In the instant case, the Respondent’s opposition to the Union’s demand for a union-security clause was tied to the specific facts of the instant case—the Union’s narrow margin of victory—and was not presented as an obstacle to agreement on other terms or an ultimate agreement.

Our colleague relies on *Radisson Plaza* as support for his view that the Respondent’s reference, in explaining its opposition to the Union’s demand for a union-security clause, to the Union’s margin of victory is evidence of bad faith. However, *Radisson Plaza* is factually inapposite. There, the Board found the employer’s reference to the election victory was frequent, it permeated the employer’s bargaining proposal, and it did not involve a rejection of a union-security clause. 307 NLRB 94, 96 (1992), enf. 987 F.2d 1376 (8th Cir. 1992). In the instant case, the reference to the Union’s narrow victory was only raised as relevant to the Respondent’s unwillingness to require all employees to support the Union.

¹¹ *A-1 King Size Sandwiches*, 265 NLRB 850, 860 (1982), enf. 732 F.2d 872 (11th Cir. 1984), cert. denied 469 U.S. 1035 (1984).

2002, until the Union’s charge of unilateral transfer of unit work was decided. However, the Union did not agree to suspend negotiations, and although the Respondent was unable to meet again that May, the evidence does not show that the Respondent stalled or refused further meetings. The judge also found that the Respondent improperly prevented two employee bargaining committee members from attending one negotiation session, claiming that the employees could not be released from work that morning. However, this was an isolated occurrence; there is no evidence that the employees were prevented from attending any of the parties’ other bargaining sessions.

Accordingly, we find that the Respondent’s conduct at the bargaining table fails to show that the Respondent was “unlawfully endeavoring to frustrate the possibility of arriving at any agreement.” *Public Service Co.*, supra at 487.

2. Conduct away from the bargaining table

The Respondent’s conduct away from the bargaining table also fails to warrant a finding of surface bargaining. Although we have found that the Respondent violated Section 8(a)(5) and (1) by unilaterally transferring unit work and refusing to provide certain information to the Union, this conduct in and of itself does not show that the Respondent intended to frustrate agreement. The Board has been “reluctant to find bad-faith bargaining exclusively on the basis of a party’s misconduct away from the bargaining table.” *Litton Systems*, 300 NLRB 324, 330 (1990), enf. 949 F.2d 249 (8th Cir. 1991), cert. denied 503 U.S. 985 (1992) (respondent’s unlawful unilateral changes were insufficient to show overall bad-faith bargaining). In *Litton*, the Board reasoned:

Typically, away from the table misconduct has been considered for what light it sheds on conduct at the bargaining table, but without evidence that the party’s conduct at the bargaining table itself indicates an intent [not] to reach agreement it has not been held to provide an independent basis to find bad-faith bargaining.

Id. In the present case, as we have found, the Respondent’s conduct at the bargaining table does not show an intent to frustrate agreement. Therefore, the Respondent’s other 8(a)(5) violations do not warrant a finding of surface bargaining, absent more persuasive evidence of misconduct at the bargaining table.

In addition, the General Counsel failed to show a nexus between the Respondent’s 8(a)(5) violations and the Respondent’s conduct at the bargaining table. As our dissenting colleague acknowledges, the Board looks to whether such a nexus exists in determining whether unfair labor practices that occur away from the bargaining

table support a surface bargaining allegation. Here, the judge and our dissenting colleague provide no support for the assertion that the unilateral transfer of work affected negotiations. The judge stated only that he “believe[d]” that it must have had a negative impact on the negotiations. He failed to point to any specific evidence of such a relationship. Moreover, the Respondent agreed to continue negotiations while the issue was being litigated.

Our colleague notes that the Respondent said in bargaining that the General Counsel’s proposed remedy for the unilateral changes (restoration of the status quo ante) would affect the Respondent’s position in bargaining. As a practical matter, that was a true statement. But, that is not to say that the unilateral changes caused the Respondent to have a mind-set to bargain in bad faith. To the contrary, the Respondent on May 8 reiterated its position that all terms and conditions of employment were open for negotiation. The Respondent also demonstrated the good faith of its assertion by improving its wage offer at that time. Thus, the Respondent demonstrated that the pendency of the unfair labor practice allegation would not preclude good-faith negotiations.

Likewise, the judge and our dissenting colleague allege that the erosion in the bargaining unit negatively impacted negotiations without pointing to specific evidence manifesting such an impact. Although the increased resort to agency employees diminished the unit, this does not, and did not, preclude good-faith bargaining as to terms and conditions of employment for the remaining unit.

Finally, the evidence does not demonstrate a nexus between the Respondent’s response to the Union’s information requests and the progress of negotiations. Our dissenting colleague ignores the fact that overall negotiations continued while the Union’s requests were pending and that the Respondent provided much of the requested information during the course of negotiations. Thus, the Respondent’s conduct did not act to impede the progress of negotiations. Moreover, negotiations continued on the very subjects that the dissent claims were stymied. For example, it is uncontested that when the Respondent provided information about employees’ health care premiums, negotiations ensued. Nor does the dissent contest that the parties were able to negotiate over wages, including over the concessions on wages made by the Respondent, despite the pendency of the Union’s request for information about the agency employees’ terms. The dissent fails to support its assertion that the large gap between the Union’s and the Respondent’s wage proposals was due to a lack of information, as opposed to a fundamental disagreement over appropriate and competitive

wage rates. The Union had enough information to adequately explain that the basis for its request that the Respondent increase wages as much as \$8.75 an hour was that it wanted to bring all employees up to the same level as the highest-paid employee.

Further, the delay in providing information concerning health insurance does not establish bad-faith bargaining. The Union was not thereby “forced” to propose that the Respondent pay the entire premium. It chose to make that proposal, and the Respondent rejected it.

Finally, the judge and our dissenting colleague rely on an isolated statement made by the Respondent’s counsel, John Craner, to the Union’s counsel after a bargaining session. Craner allegedly stated that “we both know what’s going to happen here; you’re not going to get a contract, and the Union [is] going to end up abandoning the shop.” The judge and our colleague cite Craner’s comment as evidence that the Respondent had no desire to reach an agreement with the Union. We disagree with this interpretation. Coming, as it did, after a difficult bargaining session, Craner’s comment appears to be nothing more than a frustrated prediction that the parties would not be able to reach agreement.

In any event, even if we were to accept the interpretation of Craner’s comment urged by the judge and our colleague, the evidence does not show, as contended by our dissenting colleague, that it set the tone for subsequent negotiations. The dissent calls the comment “suspect” because it was made early in the negotiations. Any suspicions raised by the comment, however, were put to rest by the Respondent’s willingness to continue negotiations for months after Craner made the comment at issue. The Respondent’s willingness to make significant concessions during those negotiations also put to rest any such suspicions. Thus, our dissenting colleague relies on suspicions raised after the second bargaining session and ignores the reality of the subsequent substantive negotiations. Moreover, the comment does not outweigh the other factors discussed above that militate against a finding of surface bargaining. “Where the overall bargaining conduct indicates good faith and willingness to negotiate, a stray statement indicating inflexibility will not overcome the general tenor of good faith negotiation.” *Pleasantview Nursing Home, Inc. v. NLRB*, 351 F.3d 747, 758 (6th Cir. 2003) (citing *Industrial Electric Reels*, 310 NLRB 1069, 1072 (1993)).

3. Conclusion

Having considered the Respondent’s conduct both at and away from the bargaining table, the weight of the evidence does not warrant a finding of surface bargaining. The Respondent met with the Union, made concessions and reached agreement on a number of issues, gave

explanations for many of its bargaining positions, and did not engage in regressive bargaining or propose reductions in existing benefits. The totality of the Respondent's conduct shows that the Respondent did nothing more than "engag[e] in hard but lawful bargaining to achieve a contract that it considers desirable." *Public Service Co.*, supra at 487. Accordingly, we reverse the judge and dismiss the allegation that the Respondent engaged in surface bargaining.¹²

AMENDED CONCLUSIONS OF LAW

1. Delete Conclusion of Law 7.

AMENDED REMEDY

Having found that the Respondent violated Section 8(a)(5) and (1) by unilaterally transferring unit work to temporary agency employees, the judge recommended, in part, that the Respondent immediately restore and maintain the 7:1 ratio of direct hires to agency employees that existed at the time of the union election. However, as the judge recognized, the Respondent had a past practice prior to the election of using agency employees to supplement (but not replace) its direct hires. The total number of agency employees used by the Respondent fluctuated from week to week. In addition, there was some fluctuation in the total number of direct hires. Therefore, although the ratio of direct hires to agency employees was 7:1 on the date of the election, that ratio was not constant, but fluctuated from week to week, even before the Respondent began its unlawful practice of transferring unit work to agency employees. The judge's recommended 7:1 ratio does not account for this fluctuation.

Accordingly, rather than ordering the Respondent to restore and maintain a 7:1 ratio of direct hires to agency employees, we shall order the Respondent to rescind the unlawful unilateral change and restore the status quo ante by restoring the unit to where it would have been without the unilateral changes. See *Duke University*, 315 NLRB

1291, 1291–1292 (1995). We leave to the compliance stage the determination of the proportion of direct hires and agency employees that the Respondent must maintain in order for the unit to be properly restored.

Furthermore, the judge ordered a 1-year extension of the certification year under *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962). Having found that the Respondent did not engage in surface bargaining, we find that an extension of the certification year is not warranted for the remaining 8(a)(5) violations. The evidence does not show that these violations tainted the parties' negotiations in such a way as to warrant extending the certification year. Indeed, as we have found, the Respondent's violations of Section 8(a)(5) do not outweigh the evidence that the Respondent bargained in good faith with the Union. Accordingly, we will not extend the certification year. See *Cortland Transit, Inc.*, 324 NLRB 372 (1997).

ORDER

The Respondent, St. George Warehouse, Inc., Kearny, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally transferring unit work to temporary agency employees without giving the Merchandise Drivers Local No. 641, International Brotherhood of Teamsters, AFL-CIO, notice and an opportunity to bargain.

(b) Failing to furnish the Union with requested information concerning temporary agency employees and the agencies that supplied them.

(c) Delaying in furnishing the Union with requested information concerning the amount of premiums paid by the Respondent for its employees' health insurance coverage.

(d) 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) Rescind the unlawful unilateral transfer of unit work to temporary agency employees and restore the status quo by restoring the unit to where it would have been without the unilateral changes.

(b) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain collectively and in good faith with the Union as the exclusive representative of the employees in the following appropriate unit:

All full-time and regular part-time warehouse employees employed by the Respondent at its South Kearny, New Jersey location, but excluding all temporary

¹² In finding surface bargaining, our dissenting colleague relies on decisions with far more compelling facts than those present here. For example, in *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992), enfd. 987 F.2d 1376 (8th Cir. 1993), the respondent engaged in conduct at the bargaining table that clearly showed an intent to frustrate agreement: egregious delay tactics, filibusters on irrelevant matters, and extreme proposals that would have permitted it to unilaterally change working conditions whenever it pleased. In *Mid-Continent Concrete*, 336 NLRB 258 (2001), enfd. 308 F.3d 859 (8th Cir. 2002), the Respondent engaged in regressive bargaining, called for substantial reductions in wages and benefits, failed to make concessions, stalled negotiations, and stated that "the Union would be there one year," the company "could wait until all the Union's supporters were gone," and the union would accomplish "absolutely zero." The evidence in the present case falls far short of this level.

agency employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

(c) Provide the Union with the information it requested on October 10, 2001 concerning temporary agency employees and the agencies that provided them.

(d) Within 14 days after service by the Region, post at its facility in Kearny, New Jersey, copies of the attached notice marked "Appendix."¹³ Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 16, 1999.

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

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

Dated, Washington, D.C. May 12, 2004

Robert J. Battista,	Chairman
Peter C. Schaumber,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER WALSH, dissenting in part.

I agree with my colleagues that the Respondent violated Section 8(a)(5) and (1) by unilaterally transferring unit work to temporary agency employees and by refusing to furnish the Union with the names and addresses of

¹³ 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."

temporary agencies supplying workers to the Respondent and any contracts or other documents setting forth the terms and conditions applying to those workers. Contrary to my colleagues, however, I agree with the judge that the Respondent also violated Section 8(a)(5) and (1) by engaging in surface bargaining. Without revisiting all of the facts relied on by the judge, I write separately to highlight the key evidence and respond to points raised by my colleagues.

I. LEGAL STANDARD

As my colleagues acknowledge, in determining whether an employer engaged in surface bargaining, the Board examines the totality of the employer's conduct, both at and away from the bargaining table. *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001), enf. 308 F.3d 859 (8th Cir. 2002). The Board then determines "whether the employer is engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement." *Public Service Co. of Oklahoma*, 334 NLRB 487 (2001), enf. 318 F.3d 1173 (10th Cir. 2003). "[M]ere pretense at negotiations with a completely closed mind and without a spirit of cooperation does not satisfy the requirements of the Act." *Mid-Continent Concrete*, supra at 259 (2001) (quoting *NLRB v. Wonder State Mfg. Co.*, 344 F.2d 210 (8th Cir. 1965)). "[T]he Board should be especially sensitive to claims that bargaining for a first contract has not been in good faith." *APT Medical Transportation*, 333 NLRB 760 fn. 4 (2001).

In evaluating the totality of the employer's conduct, the Board considers such factors as failure to give explanations for bargaining positions, delaying tactics, unilateral changes in mandatory subjects of bargaining, failure to provide relevant information, and unlawful conduct away from the bargaining table. See *Mid-Continent Concrete*, supra at 259–260; *Altorfer Machinery*, 332 NLRB 130, 150 (2000); *Atlanta Hilton and Tower*, 271 NLRB 1600, 1603 (1984). Each of these factors is present here, and the totality of the Respondent's conduct shows that the Respondent crossed the line from lawful hard bargaining to unlawful surface bargaining.

II. THE RESPONDENT'S CONDUCT

A. Independent 8(a)(5) Violations

My colleagues agree with the judge that the Respondent violated Section 8(a)(5) and (1) by unilaterally transferring unit work to temporary agency employees without giving the Union notice and an opportunity to bargain. My colleagues also agree with the judge that the Respondent violated Section 8(a)(5) and (1) by refusing to provide the Union with the names and addresses of

temporary agencies supplying workers to the Respondent and any contracts or other documents setting forth the terms and conditions applying to those workers. It is uncontested that the Respondent violated Section 8(a)(5) and (1) by delaying in providing the Union with information on health insurance premiums and refusing to provide certain other information about the temporary employees.

In evaluating the evidence of surface bargaining, my colleagues minimize these violations. As the judge found, however, the totality of the Respondent's conduct, and the course of the parties' negotiations, must be examined in light of these violations, particularly the unilateral transfer of unit work. This unilateral change eroded the bargaining unit from 42 employees at the time of the election to 8 employees at the time of the hearing. Nevertheless, my colleagues note that the Board is "reluctant to find bad-faith bargaining exclusively on the basis of a party's misconduct away from the bargaining table." *Litton Systems*, 300 NLRB 324, 330 (1990), enf. 949 F.2d 249 (8th Cir. 1991), cert. denied 503 U.S. 985 (1992). The judge, however, did not rely exclusively on such conduct; he considered it in conjunction with the Respondent's conduct at the bargaining table. In any event, *Litton* is easily distinguishable. In that case, the Board found that certain limited unilateral changes were not "linked to the ongoing negotiations in such a way as to frustrate the reaching of an agreement." *Id.* at 330. In the present case, contrary to my colleagues' finding, there is a "nexus" between the unlawful acts and the Respondent's conduct during negotiations. See *Mid-Continent Concrete*, supra at 261 (unilateral changes were evidence of bad-faith bargaining). The Respondent's violations strike at the very heart of the parties' negotiations in a way that would tend to frustrate agreement. Through its unilateral transfer of unit work to agency employees, the Respondent almost completely eroded the very unit for which the Union was bargaining.¹ The unilateral change also became a point of contention in negotiations. The Union repeatedly raised the issue at the bargaining table. Furthermore, although my colleagues emphasize that the Respondent agreed to continue bargaining while the transfer of work was litigated, the Respondent essentially conceded that the parties' dispute over the transfer affected negotiations. As the judge noted, the Respondent's counsel stated in a letter to

¹ The Respondent's own counsel and lead negotiator, John Craner, implicitly acknowledged that the erosion of the bargaining unit would end up frustrating any chances of agreement, when he told the Union's counsel (as detailed below), "we both know what's going to happen here; you're not going to get a contract, and the Union [is] going to end up abandoning the shop."

the Union that the pending unfair labor practice complaint "must affect the position of the Company with regard to many of the issues presently on the table, primarily because the remedy sought by General Counsel is to require St. George to offer direct employment to agency employees or to terminate those agency employees and hire additional employees."² Finally, the unilateral transfer of work demonstrated the Respondent's efforts to eliminate the very unit for which the parties were bargaining. The Board and courts have found that unilateral changes in terms and conditions of employment are evidence of bad faith, because "those actions seek to communicate to employees that there is no need for the Union . . ." *Mid-Continent Concrete*, supra at 261; see also *Radisson Plaza Minneapolis*, 987 F.2d 1376, 1382 (8th Cir. 1993) (conduct away from the table, including unilateral changes, was evidence of surface bargaining, because respondent "treated the unions as irrelevant with respect to issues of vital significance"). In the present case, the Respondent's conduct did exactly that: it sent the message that the Union was irrelevant, because the Respondent had unilaterally placed the unit on a path to extinction.

Similarly, there was a nexus between the Respondent's unlawful refusal to provide any information on the temporary agency employees and the Respondent's conduct during negotiations. The transfer of unit work to those agency employees was a key point of contention during bargaining. My colleagues note that the parties "were able to negotiate over wages" despite the Respondent's refusal to provide information on the agency employees' terms and conditions of employment. However, the issue of wages was one on which the parties remained far apart throughout negotiations.

Finally, the Respondent delayed for almost 6 months in providing health insurance premium information. As a result, the Union's counsel testified that she was unable to make an informed proposal on health insurance and was forced to propose that the Respondent pay the entire cost.³ The Respondent's unlawful conduct, therefore, delayed meaningful bargaining on this issue.⁴

² My colleagues find that the Respondent's unlawful unilateral changes did not "cause[] the Respondent to have a mind-set to bargain in bad faith." Regardless of what "caused" the Respondent's bad faith, the point is that the unilateral changes, which affected the parties' negotiations, are evidence of bad faith.

³ My colleagues state that the Union was not "forced" to make this proposal, but "chose" to do so. The point is, however, that the Union made that choice because it lacked relevant information on health insurance, which it sought in order to make a more educated proposal.

⁴ Contrary to my colleagues' suggestion, the fact that the parties continued to hold bargaining sessions despite the Respondent's 8(a)(5) violations does not preclude finding a nexus between those violations and the Respondent's bargaining conduct. As explained above, there is

In sum, “there is a nexus between the unlawful acts and the Respondent’s conduct during negotiations sufficient to reflect the Respondent’s intent not to bargain in good faith.” *Mid-Continent Concrete*, supra at 261 (unilateral changes were evidence of bad-faith bargaining); see also *Radisson Plaza Minneapolis*, 307 NLRB 94, 95 (1992), enfd. 987 F.2d 1376 (8th Cir. 1993) (respondent’s unlawful unilateral change and refusal to provide relevant information were evidence of surface bargaining; these violations “manifest[ed] a mindset inconsistent with acceptance of the Union as the unit employees’ bargaining representative”). Accordingly, the particular Section 8(a)(5) violations in this case are strong evidence of the Respondent’s mindset to frustrate agreement, and shed light on the Respondent’s conduct at the bargaining table, which is discussed below.

B. The Respondent’s Statement That the Union Would Not Get a Contract

In addition to the Respondent’s violations of the Act, the words of the Respondent’s own counsel and lead negotiator, John Craner, make clear that the Respondent lacked any sincere intent to reach agreement. Immediately after a bargaining session, Craner told the Union’s counsel that “we both know what’s going to happen here; you’re not going to get a contract, and the Union [is] going to end up abandoning the shop.” My colleagues dismiss this comment as a “prediction.” The record does not support my colleagues’ benign interpretation.

The comment was made at the end of the parties’ second bargaining session. A “prediction” of failure so early in the bargaining process is inherently suspect. Indeed, coming from the Respondent’s counsel and lead negotiator, Craner’s statement appears to be “a roadmap to the Respondent’s bargaining strategy.” *Mid-Continent Concrete*, supra at 261 (finding surface bargaining in part because of respondent’s statements that bargaining was futile and the union would be there only 1 year). The statement strongly suggests that the Respondent viewed the negotiations as “mere pretense” and bargained “without a spirit of cooperation.” *Id.* at 259. Bargaining in this manner does not satisfy the requirements of the Act. See *id.*

C. The Respondent’s Conduct at the Bargaining Table

The Respondent’s conduct at the bargaining table further shows an intent merely to go through the motions of

evidence that the Respondent’s conduct negatively affected negotiations, even though it did not entirely preclude them. Moreover, although delaying negotiations is evidence of surface bargaining, it is not a required element. The relevant inquiry is whether the Respondent’s bargaining was in good faith, with a sincere desire to reach agreement, or was “mere pretense.” *Mid-Continent Concrete*, supra at 259.

bargaining, without a sincere desire to reach agreement. For example, when the Union asked the Respondent what its overtime practice was, the Respondent told the Union to go ask the employees. Furthermore, the Respondent failed to give reasons for rejecting numerous union proposals, other than to say that it wanted to maintain the status quo or use its own language instead of the Union’s.⁵ The refusal to offer explanations for bargaining proposals is an indication of bad-faith bargaining. See *Altorfer Machinery*, 332 NLRB 130, 150 (2000). Even when the Respondent gave reasons for its positions, they were often conclusory or perfunctory. For example, the Respondent rejected the Union’s request for a bulletin board out of purported concerns about “pornography,” but did not give any basis for believing that the Union would abuse a bulletin board by posting pornography. The Respondent rejected a proposal that would give the Union’s business agent access to the shop. The Respondent cited interference with production as its concern, but rejected the Union’s offer to include language stating that access would not unreasonably interfere with production. The Respondent ultimately stated only that “we know what they’re there for. We don’t want them back in the shop.”

The Respondent also rejected the Union’s proposal for a union-security clause. The rejection of a union-security clause does not, by itself, show bad-faith bargaining. In this case, however, the Respondent rejected the clause because the Union had won the election by only one vote. The Board has relied on frequent references to a union’s slim margin of majority as evidence of surface bargaining. See *Radisson Plaza*, supra at 96.⁶ In the present case, the Respondent’s reason for rejecting the union-security clause shows a mindset inconsistent with accepting the Union as the employees’ bargaining representative.

The Respondent also tried to delay bargaining. As the judge found, the Respondent improperly prevented two employees on the bargaining committee from attending a negotiation session. When the Union’s unfair labor prac-

⁵ For example, the Respondent gave no explanation for its positions on vacations, sick days, personal days, health coverage, or its 401(k) plan, other than to say that it wanted to maintain its current policies. The Respondent gave no explanation for rejecting the Union’s management-rights and no-strike proposals, other than to say that the Respondent simply preferred its own language.

⁶ To the extent that my colleagues find that the Respondent’s “unwillingness to require all employees to support the Union” was a legitimate basis for rejecting the union-security clause, they cite no authority for this proposition. Indeed, “the assertion of ‘philosophical’ objections does not satisfy the statutory obligation to bargain in good faith” concerning union security. *Hospitality Motor Inn*, 249 NLRB 1036, 1040 (1980), enfd. 667 F.2d 562 (6th Cir. 1982), cert. denied 459 U.S. 969 (1982).

tice charge was set for hearing, the Respondent suggested that negotiations be held in abeyance until the charge was decided, arguing that it could not meet at all for the next month because its only available dates would now be spent preparing for the hearing.

III. CONCLUSION

Having examined the totality of the Respondent's conduct, there is ample evidence to support a finding of surface bargaining. The Respondent expressly stated that the Union would not get a contract, made an unlawful unilateral change that seriously eroded the bargaining unit, delayed and refused to provide relevant information to the Union, and engaged in conduct at the bargaining table that showed its intent to frustrate bargaining and prevent the successful negotiation of a collective-bargaining agreement. Accordingly, the judge correctly found that the Respondent violated Section 8(a)(5) and (1) by engaging in surface bargaining.⁷

Dated, Washington, D.C. May 12, 2004

Dennis P. Walsh, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally transfer unit work to temporary agency employees without giving the Merchandise

⁷ Because I would affirm the judge's finding of surface bargaining, I would also extend the certification year under *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962). I need not pass on whether extending the certification year would be appropriate here in the absence of a finding of surface bargaining.

Drivers Local No. 641, International Brotherhood of Teamsters, AFL-CIO, notice and an opportunity to bargain.

WE WILL NOT fail to furnish the Union with requested information concerning temporary agency employees and the agencies that supplied them.

WE WILL NOT delay in furnishing the Union with requested information concerning the amount of premiums paid by us for our employees' health insurance coverage.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights set forth above.

WE WILL rescind the unlawful unilateral transfer of unit work to temporary agency employees and restore the status quo by restoring the unit to where it would have been without the unilateral change.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain collectively and in good faith with the Union as the exclusive representative of the employees in the following appropriate unit:

All full-time and regular part-time warehouse employees employed by the Respondent at its South Kearny, New Jersey location, but excluding all temporary agency employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL provide the Union with the information it requested on October 10, 2001 concerning temporary agency employees and the agencies that provided them.

ST. GEORGE WAREHOUSE, INC.

Julie Kaufman, Esq., for the General Counsel.

John A. Craner, Esq. (Craner, Satkin, & Scheer, P.C.), of Scotch Plains, New Jersey, for the Respondent

Gary A. Carlson, Esq. (Lynch & Martin, Esqs.), of West Orange, New Jersey, for the Union.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based upon a charge, a first amended charge, and a second amended charge filed on November 26, 2001, February 26, 2002, and March 28, 2002, respectively, by Merchandise Drivers Local No. 641, International Brotherhood of Teamsters, AFL-CIO (Union), a complaint was issued on April 30, 2002, and a first amended complaint was issued on May 29, 2002, against St. George Warehouse, Inc. (Respondent or Employer).

The complaint alleges essentially that since about January 2000, the Respondent unilaterally transferred unit work to employment agency employees without prior notice to the Union or affording it an opportunity to bargain with the Respondent concerning such transfer. The complaint also alleges that the

Respondent has failed and refused to furnish certain information to the Union concerning the agency personnel working at its facility, and delayed in providing information concerning the amount of premiums paid by the Respondent for its employees' health insurance coverage. Finally, the complaint alleges that the Respondent engaged in conduct indicative of surface bargaining. All of the above conduct is alleged to violate Section 8(a)(5) and (1) of the Act.

The Respondent's answer denied the material allegations of the complaint and asserted certain affirmative defenses, including that the complaint's allegations concerning the use of agency employees was barred by Section 10(b) of the Act. On July 8 and 9, 2002, a hearing was held before me in Newark, New Jersey.

Upon the evidence presented in this proceeding and my observation of the demeanor of the witnesses and after consideration of the briefs filed by all parties, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation having an office and place of business in South Kearny, New Jersey, has been engaged in the warehousing of commodities. During the past twelve months, the Respondent performed warehousing services valued in excess of \$50,000 in states other than New Jersey. The Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent also admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

A petition was filed by the Union on March 8, 1999, and following an election on April 16, 1999, the Union was certified on October 27, 2000, in the following appropriate unit:¹

All full-time and regular part-time warehouse employees employed by the Respondent at its South Kearny, New Jersey location, but excluding all temporary agency employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

Thereafter, the Respondent refused to bargain, and on April 10, 2001, the Board granted a motion for summary judgment filed by the General Counsel. The Board's Order directing bargaining² was enforced by the Third Circuit Court of Appeals on August 7, 2001.³

Shortly after the court enforcement of the Board's order, the Union made a request for information, which included a list of employees, benefit plan information, and employee manuals.

On August 21, the Respondent provided certain information, including a list of employees employed as of July 23. That list contained the names of 15 employees. Lori Smith, counsel to

the Union, testified that she was "struck" by the fact that the list contained so few employees whereas the *Excelsior* list for the election held slightly more than 2 years before, included the names of 40 to 44 workers, including the 37 employees who voted in the election.

Smith asked Jan Katz, the Union's vice president and business agent, to assemble contract proposals. Katz testified that in August, he called employee Tony Daniels and advised him that the Union would be negotiating with the Respondent for a contract. Katz, who saw the July 23 list of employees, asked Daniels why the employee complement had dropped. Daniels informed him that the Respondent was using "agency people."

Katz stated that on September 15, he attended a diner meeting with about four employees, including Daniels. At the meeting he discussed with the men their proposals for a contract with the Respondent. At that time, the four men told Katz that more temporary employees were employed at the facility than before, and that the agency workers outnumbered the regular employees.⁴

Katz stated that between the April 1999 election and his August 2001 conversation with Daniels, he was not told by any Employer representative that it was using agency employees rather than hiring new unit workers. Nor was he told by any employee prior to speaking with Daniels in August that agency employees were being utilized, or that the employee complement had declined by 50 percent. There was no shop steward at the Respondent's premises following the election. Although Katz visited the premises as a driver employed by another company, he was not permitted in the warehouse area. Even though he spoke with employees of the Respondent at such times, he was not told about the presence of agency employees.

By letter of October 10, 2001, the Union requested the following information from the Respondent:⁵

- (a) Name, address, job classification and wage rate of agency personnel performing bargaining unit work and length of time such individuals have worked at the Employer's facility.
- (b) Name and address of each agency which has or continues to supply workers to the Employer to perform warehouse work from January 1, 2001 to the present.

⁴ Katz could not recall, in his direct testimony, that he had such a meeting. However, on rebuttal he testified that such a meeting was held. I credit his rebuttal testimony, which is supported both by a document written by him at the meeting, and by Daniels' testimony. The fact that Daniels testified that the weather was cold at the time of the meeting may be incorrect, but Daniels accurately recalled the meeting as being held about 2 months before negotiations began, in the Fall of 2001. Although the first bargaining session was held about 5½ weeks after the diner meeting, the testimony of Daniels and Katz is sufficiently corroborative to permit me to credit their testimony concerning the meeting date and its contents. The Respondent argues that Katz' statement to Daniels that "we won" refers to the Union's certification in April 1999. It argues that the meeting must have been held at that time. However, it is more likely and I find that "we won" referred to the August 7, 2001 court enforcement of the summary judgment of the refusal to bargain matter which immediately preceded the bargaining, and Katz' contact with the employees to prepare bargaining demands.

⁵ The Union requested additional information, but the complaint allegations relate only to these requested items.

¹ A revised tally of ballots indicated that the vote was 18 ballots for the Union and 17 against.

² 333 NLRB 113 (2001).

³ All dates hereafter are in 2001 unless otherwise stated.

(c) Any contracts, correspondence or other documents, setting forth terms and conditions applying to any employees supplied to the Employer by any agency from January 1, 2001 to the present.

(d) Amount of premiums paid by the Employer for its employees' health insurance coverage.

On October 16, the Respondent's counsel replied to the request. He stated that inasmuch as the bargaining unit does not include temporary personnel, he saw "no basis" for furnishing the Union with any information relating to them, as requested in items (a) through (c), above. The Respondent has not furnished any such information. He further refused to furnish information concerning item (d), above, since such information was confidential.

Union attorney Smith testified that the information concerning the agency employees was relevant because, following her receipt of the July employee list which indicated a reduction in the number of workers, she became concerned that the Respondent was utilizing agency personnel to fill unit positions. She also believed that the amount of money paid those employees was relevant to these first negotiations to show what the Respondent was willing to pay its employees.

Smith sought information concerning the amount the Respondent paid for premiums for its employees' health insurance coverage because she believed that such data was relevant to show how much money the Respondent was capable of paying.

B. The Negotiation Sessions

1. The October 25 meeting

This meeting was held in the office of the Respondent's attorney, John Craner. Present at the meeting was Jan Katz, the Union's vice-president and business agent.⁶ Craner's client was not present. Smith testified that she had previously told Craner that she wanted the parties present when the Union presented its proposals and she was dismayed that the Respondent's principal was not present. Respondent's executive vice president Linda Kuper testified that she was not aware, until the hearing, that this meeting occurred.

All subsequent meetings were held at the Respondent's facility during which the participants were Smith, Katz, employees Tony Daniels and Rob Wallace,⁷ Craner, and at least one principal of the Respondent.⁸

Smith told Craner that she believed that the Respondent was transferring bargaining unit work to agency employees. Craner replied that the company had the right to hire agency employees inasmuch as they were not part of the collective-bargaining unit. They discussed whether temporary and permanent employees could be in the same unit. Craner agreed to Smith's request that a maximum of three employees be present at negotiations to act as the Union's employee-bargaining committee.

⁶ It was stipulated that if Katz testified about what was said at the negotiations, his testimony would corroborate Smith's testimony in that regard.

⁷ The two employees were not present at one meeting which will be discussed below.

⁸ All references to Kuper hereafter will be to Linda Kuper unless otherwise stated.

The Union presented its written proposals which included provisions concerning Union recognition, visitation and bulletin boards, seniority, leave of absence, discharges and discipline, grievances and arbitration, no strike-no lockout, nondiscrimination, hours of work, rest period, overtime, call-in pay, vacations, holidays, sick/personal days, funeral leave, jury duty, job posting, successors and assigns, management-rights clause, and a term of 3 years. It was proposed that supervisors must not perform unit work. The amount of wage increases was left blank. It was also proposed that the Respondent provide a health insurance plan and a 401(k) or pension plan. However, specific details of those plans was not set forth. The issue of health care premiums was discussed at the meeting.

Smith testified that the fact that she was able to prepare the Union's proposals without knowing what the Respondent was paying for its health insurance premiums was of no moment since the Union did not make a health insurance proposal among its list of demands. They discussed the Employer's response to her information request.

Smith offered to explain each proposal and answer any questions Craner might have, but he "rifled" through them, declined Smith's invitation and said that he would look at the proposals later.

Thereafter, by letter dated October 30, Craner stated that inasmuch as temporary agency employees are not part of the unit, he saw "no reason" to discuss them or anything related to them. The letter included a list of employees as of October 19, showing that 12 workers were then employed. The letter also contained information concerning the amount of weekly deductions made from employee salaries for health insurance benefits.

2. The November 21 meeting

Smith testified that she informed Craner that she believed that the Respondent was "systematically transferring" all the unit work to agency employees. She noted that the number of employees in the October 19 list had been reduced by two from the July list. Craner replied that those employees were supervisors, and that the company had the right to employ agency personnel. Smith responded that doing so was an unlawful refusal to bargain and an unfair labor practice, and that she would file a charge. Craner said that she should do so, and suggested suspending negotiations until the issue was decided by the Board. Smith declined to hold the negotiations in abeyance.

The Respondent presented its proposals. Smith went through the proposals with Craner in order to get a "sense" of the major issues.

The Respondent agreed to the Union's nondiscrimination clause and severability clause. It also agreed to the Union's proposal that the lunch periods and rest periods continue as currently practiced. It agreed that all employees must be approved by the U.S. Customs Service as a condition of continued employment. The Respondent also agreed to the Union's jury duty clause.

The Respondent agreed to recognize the Union as the bargaining agent of all warehouse employees, but its proposal excluded temporary agency employees from the term "employees". The Respondent rejected the Union's management-rights clause, and instead proposed a broad management-rights clause

giving it the right, in its "sole and exclusive judgment and discretion" to hire, promote, discipline employees for cause, demote, transfer, lay-off, recall employees, set the standards of productivity, enter into contracts with agencies to supply personnel, close, expand, or relocate its facility, cease any job, and change methods of operation.

In response to the Union's proposal that it designate shop stewards "in such numbers as are necessary" and have a Union bulletin board, the Respondent proposed that no more than one shop steward be appointed, and that union notices may be posted on the Respondent's bulletin board upon approval by the Respondent. The Union's business agent's access to the facility was limited to meetings "in connection with the grievance procedure" and other meetings as may be scheduled between the agent and the Respondent. It also provided that the agent would be granted access to the facility only upon the advance approval of the Employer for such purposes as the Employer approves. The Respondent proposed a no-strike no-lockout clause.

A discussion was held concerning the business agent's access to the facility. Smith argued that the agent may want to immediately investigate an emergency at the shop involving a health and safety issue. Craner said that the agent could visit the shop and speak with Kuper who may or may not give him access to the shop area, or she may have an employee come to the office to meet with him. When Smith argued that the agent himself may have to investigate the safety condition in the shop, Craner suggested that OSHA be contacted.

The Respondent rejected the Union's checkoff and union-security clause. Union attorney Smith asked Craner what objection he had to them. Craner replied that the election was very close and he did not believe that it was proper to impose a union on employees who did not vote for it. Smith replied that the Union won the election by a majority vote and it is the certified representative of the unit employees. Smith stated that Craner did not discuss the issue further.

The Union's discipline, discharge and grievance-arbitration clauses provided that the Respondent may discipline or discharge an employee for just cause, subject to the grievance procedure, which provided for a three step process ending in arbitration pursuant to the rules of the New Jersey State Board of Mediation.

The Respondent's proposal stated that the Respondent will agree to the Union's proposals for discharge, discipline and grievance-arbitration, set forth above, but in addition it proposed that it may immediately discharge an employee for theft, possession of or use of any prohibited drug, possession of or being under the influence of alcohol, insubordination, fighting on company premises, and engaging in a strike or refusal to work.

The Respondent agreed to the Union's seniority proposal, but would not agree that seniority would be deemed broken if an employee overstayed his leave of absence. The Respondent refused to agree to that proposal since it also refused to agree to the Union's proposal that an unpaid leave of absence may be granted for good and proper cause.

The Union proposed that the basic work week shall consist of 40 hours and 8 hours per day, with two shifts, from 8 a.m. to 4:30 p.m. and from 3:30 p.m. to 11:30 p.m., and that a differen-

tial in pay be given for employees working on the second shift. The amount of the differential sought was not specified. The Respondent agreed to the Union's hours of work proposal except that the starting shift times set forth in the Union's proposal were not correct. The Respondent refused to agree to second shift differential pay.

The Respondent agreed to the Union's proposal that overtime at the rate of time and one-half be paid for work performed in excess of 40 hours in 1 week, except that if the employee does not work 40 hours during the week he would be paid straight time on Saturday until he works 40 hours.

The Respondent refused to agree to the Union's proposal for call-in pay which provided that, in the absence of four hours advance notice, the employee is guaranteed four hours work or four hours pay.

The Union's vacation pay proposal essentially provided that the employee is entitled to 1 week's vacation pay after 1 year of continuous employment; 2 weeks after 3 years employment; and 3 weeks after 5 years of employment. The Respondent refused to agree to that proposal. The Respondent's proposal was to maintain its current vacation policy which provided for 1 week of paid vacation after 12 months of continuous employment, and 2 weeks paid vacation after 3 years of employment. Smith testified that she asked Craner what its vacation policy was. He replied that he did not have to provide that information since she could speak to the employees concerning that inasmuch as the Union represents them.

The Respondent agreed to all of the paid holidays set forth in the Union's proposal, which included New Year's Day, Memorial Day, July 4th, Labor Day, Thanksgiving Day, and Christmas Day. However it did not agree to the Union's demand that New Year's Eve, Christmas Eve, and the day after Thanksgiving be considered as paid holidays. The Respondent also agreed to the Union's proposals that the employee must work the last scheduled day before and after the holiday to be eligible for holiday pay and work performed on a holiday shall be compensated at the rate of one and one-half times the basic hourly wage rate plus 8 hours of holiday pay at basic hourly wage rates.

The Respondent proposed to retain its present 401(k) plan/pension plan. Smith asked what the contribution rate was. Craner replied that he had provided the summary plan description for the 401(k) plan in its letter of August 21, and asked her to review that. Kuper said that the Respondent paid 50 percent of the contribution up to 3 percent of salary. Smith testified that at the meetings Craner discouraged Kuper from responding to the Union's negotiators directly. When she attempted to reply to the Union's questions Craner interrupted, saying that he would respond. The Respondent refused to agree that supervisors must not perform bargaining unit work.

The Respondent refused to agree to the Union's sick/personal days proposal. That demand was that an employee earns one sick/personal day every 10 weeks for a total of 10 sick/personal days per calendar year, which are carried over into the new year if not used. The Respondent offered to retain its present program which provides for up to four sick or personal days per year. Employees accumulate one personal or sick day every 3 months of "constant attendance."

The Union's funeral leave offer provided that employees may be granted up to 5 days leave for the death of a spouse, child, mother, or father, and up to 3 days leave for the death of any member of the immediate family which includes a sister, brother, mother-in-law, father-in-law, grandparent, grandchild, and any other member of the family who resides at the employee's home. The Respondent agreed "in principle" that funeral leave be granted for the death of a spouse, child, mother, or father, but not for the other persons set forth in the Union's proposal. The Respondent also proposed that the amount of time excused from work due to the death of a spouse, child, mother, or father be negotiated.

The Respondent refused to agree to the Union's proposal that job openings be posted, and also did not agree to the Union's demand that the contract was binding upon the Respondent's transferees, successors and assigns, and that if the Respondent sells or transfers its business or facility it shall continue to be liable for the complete performance of the agreement unless or until the purchaser or transferee expressly acknowledges in writing that it is fully bound by the terms of the agreement.

The Respondent proposed that the duration of the contract be negotiated. The Respondent noted that any terms in the Union's proposal not addressed in the Respondent's counter-offer may be discussed at the negotiations.

During or at the end of the meeting, Smith asked Craner for a tour of the facility so that she could understand the "process" taking place there. She testified that at the conclusion of the meeting, she walked to the Xerox machine in order to make a copy of a document. Craner, who was present at the machine, told her that Kuper refused to permit Smith to go into the warehouse area, adding that he was not even allowed there. According to Smith, Craner then told her that "well we both know what's going to happen here; you're not going to get a contract, and the Union was going to end up abandoning the shop." Smith replied "well you may be very surprised about that." Smith stated that she believed that Katz was also present at the Xerox machine. Smith conceded that Craner did not repeat that comment in the five ensuing bargaining meetings.

Katz testified that at the conclusion of the negotiations, and as they were leaving Kuper's office on their way to the Xerox machine, he asked Craner if he and Smith could tour the warehouse. At that time Kuper was still in the office, but Katz did not believe that she heard his request. Craner said he would have to speak with Kuper about that. He left and returned, saying that they were not permitted to do so. At that point, Katz, Craner, and Smith were at the Xerox machine. According to Katz, Craner told Smith "you can see what's going on here, that we are not going to have a contract and the union is going to wind up abandoning the shop." Smith replied "you might be surprised" or "I don't think so" or both.

Craner denied making the comments attributed to him, specifically denying telling Smith that there would never be a contract. He testified that Smith wanted to see the warehouse. At the conclusion of the negotiations, Smith left the room to make a copy of a document and Craner then asked Kuper if Smith could see the warehouse. Kuper said "no." Smith re-entered the room, and Craner asked her to step outside. Craner told her that he believed that she should be able to see the warehouse but

Kuper did not want anyone from the Union walking in that area. They then re-entered the room and attempted to arrange a further date for negotiations.

Kuper testified that Smith left the room with Katz and they went to the copier machine. She remained in the office with Mr. Kuper, Craner and the two committee members. Craner mentioned that Smith wanted a tour of the warehouse and Kuper refused to permit it. When Smith and Katz returned, Craner said that he wanted to meet with Smith outside the room. They left. Katz remained in the room with Kuper and the two union members. Kuper denied hearing the statements attributed to Craner.

There are minor variations in the versions given by Smith and Katz. For example, Smith said that she requested a tour and Katz said that he made the request. Nevertheless, I credit their testimony over that of Craner and Kuper. I do so because I cannot credit Kuper's testimony that Katz was present when Smith and Craner spoke alone outside the room. As discussed below, Kuper's testimony with respect to a major aspect of this case, the decision to cease hiring directly hired employees was self-contradictory and also contradicted the Respondent's documentary evidence. I further find that the statements attributed to Craner are believable in the context of this case. Thus, as will be discussed below I find that the Respondent bargained in bad faith with no intent to reach agreement thereby making his assertion believable. In light of the Respondent's unlawful unilateral change in which it decided to cease hiring unit employees the unit could be expected to be reduced to zero. In that case, Craner could reasonably believe that no contract would be reached and that the Union would ultimately abandon the shop.

I accordingly find that Craner told Smith and Katz that no contract would be reached and the Union would ultimately abandon the shop.

3. The December 12 meeting

Smith proposed that inasmuch as there were two shifts, that two shop stewards be appointed, one for each shift. She asked why the Respondent counter-offered that only one shop steward be appointed. Smith testified that Craner said that he wanted one steward, and refused to discuss the matter further. Smith also asked about a union bulletin board. Craner said that a union board was not necessary, and that the Respondent would not agree to one. He suggested, pursuant to the written proposal, that the Union could post documents on the Respondent's board.

Smith asked that the "capital offenses" for which the Respondent proposed immediate discharge be removed from the body of the contract. Craner insisted that he wanted them in the contract itself. Smith stated that she asked what the Respondent's practice and policy on overtime was, and whether overtime work was readily available. Craner replied that she would have to obtain that information from the employees since he was not obligated to provide it.

They discussed vacations, sick days, holidays, and funeral leave, with Smith requesting the increases set forth in the Union's proposal. Craner refused, saying that an increase in vacation time would call the "downfall" of the Respondent. As to all four issues, Craner's position was that the Respondent would

maintain its current policies as to those matters. Smith commented that it appeared that the Respondent sought to maintain the "status quo." Craner replied, "so?" Smith noted that Craner refused to discuss the issue of holidays.

The Union proposed that the Family and Medical Leave Act (FMLA) be incorporated into the contract as well as a 30-day leave provision for other personal reasons not covered by FMLA. Smith and Craner discussed the applicability of FMLA to the employees involved.

There was a discussion concerning the Union's proposal that supervisors not perform bargaining unit work. Craner rejected that demand. Smith attempted to learn the reason for the objection to the proposal in an effort to find some common ground upon which they could agree. She asked whether he was concerned that the Union's proposal would preclude supervisors from helping in emergency conditions in which they were needed to perform unit work, and offered to draft language permitting their work during emergencies. Craner replied that he wanted to retain the current practice and he believed that the Union's proposed language would lead to grievances being filed.

Kuper testified that the reason for the Respondent's concern with the Union's language prohibiting supervisors from doing unit work is that supervisors were needed in emergency situations, usually to load a container, due at the pier at a certain time, under tight time constraints. Kuper conceded that Smith proposed language permitting such emergency work by supervisors or for training, or as consistent with past practice as long as an employee's overtime opportunities were not affected. However, Kuper stated, without explanation, that the Respondent did not agree to those proposals.

Smith reiterated the Union's proposal that jobs be posted, so that night-shift employees could bid for job openings on the day shift. Smith stated that Craner did not wish to discuss that proposal, saying that the Respondent wanted to be able to assign work the way it chose.

4. The February 19, 2002 meeting

Union committee members Daniels and Wallace were not present at this meeting. Kuper told Smith that the two employees could not be released from work because two ships were due in port at the same time due to a delay and a storm at sea, and that the facility was inundated with work.

Smith had prepared the Union's economic proposals for presentation at this meeting but wanted to discuss the proposals with the committee members. She had not done so prior to the meeting but expected to be able to meet with them as in the past. Smith conceded that perhaps the Respondent offered to meet on another day, but Smith wanted the meeting to proceed.

Smith again told Craner that she believed that unit work had been transferred to agency personnel. Craner replied that he did not want the agency people to be included in the certified bargaining unit. Smith offered to have the agency employees' interest in the Union verified by a card check, adding that she did not think that was necessary, but would agree to such a procedure in order to expedite the negotiations. Craner did not respond to that offer, but Smith believed that he rejected her suggestion. Smith also asked for the insurance premium infor-

mation that had not been provided. Craner said that such information was confidential and he would not provide it.

At the end of the meeting, the parties attempted to arrange another meeting. Craner told Smith that he would not be available for 5 to 6 weeks, until early April, as he was going on vacation. He insisted that he told Smith that at the December meeting. Smith denied being told that prior to this meeting.

Smith stated that at the conclusion of the meeting, she spoke with Daniels and Wallace, the two committee members. They said that their work day was a normal one and they did not have an overabundance of work. Daniels testified that work was slow all morning, and he swept for 1½ hours, from 8 a.m. until 9 or 9:30 a.m. He is ordinarily assigned to sweep when no other work was available. He could not recall whether he became busy with the containers at 9:30 or at any time up until 11 a.m., but the negotiation session ended at 10:30 a.m., and he believes that he swept until 9:30 a.m. Daniels did not believe that a large number of containers came into the warehouse at 9 a.m.

Kuper testified that on that day, two vessels were arriving in port at the same time. In addition, Monday was a holiday, President's Day, and the facility was closed so that the warehouse was unusually busy on the next business day, which was also the day of the negotiation session. Kuper stated that there were 65 containers to unload that day compared to a usually busy Monday of 40 to 45 containers. Kuper said that she told Smith and Katz that she did not know that one vessel would be stuck at sea and that both would be arriving at the same time. She offered the phone number of the steamship line to verify that two ships were scheduled to dock at the same time, and she offered to reschedule the meeting.

I credit the testimony of Daniels over that of Kuper. I base this credibility finding on the fact that, as will be discussed below, Kuper's testimony with respect to a major aspect of this case, the decision to cease hiring directly hired employees, was self-contradictory and also contradicted the Respondent's documentary evidence. I accordingly find that the Respondent, without cause, refused permission to the two union committee members to attend the bargaining session.

5. The April 4 meeting

The Union's Economic Proposals and the Employer's April 8 Response

Smith characterized this as the best meeting the parties had. She orally presented the Union's economic proposals. Smith stated that Craner listened to her presentation, expressed "astonishment" at the Union's demands, and said that he would get back to her.

Following the meeting, on April 8, Craner sent Smith a letter responding to the Union's economic proposals and counter proposals made at the April 4 meeting. Both the Union's proposals and the Employer's response will be set forth here. The letter also included the health insurance premium information requested by Smith on October 10. Smith testified that because she did not have such information when the Union made its health insurance proposal at this meeting, she was forced to propose that the Respondent pay the entire cost of the employees' health coverage.

As to wages, the Union proposed that each employee's wage be raised in the first year of the contract to \$16.75 per hour, the highest wage then being paid, and thereafter, each employee receive a \$1 per hour increase in the next 2 years of the contract. The Union also proposed a phase-in of 80 percent of that highest salary for newly hired employees. Their salary would then be increased, over time, to the maximum rate.

In his April 8 response, Craner noted that only one employee earns \$16.75 per hour and that the company was advised that he was retiring shortly. He noted that the range of pay for other employees is from \$8 to \$15.50 per hour, and that it would not agree to raise, in the first year of the contract, all employees' wages to \$16.75 per hour since some employees would receive an \$8.75 per hour raise.

The Respondent also stated that it proposed that the current wage rates remain in effect, but also proposed an across-the-board increase of 25 cents per hour in each of the 3 years of the contract, and would continue its present policy of discretionary bonuses. Regarding new hires, the Respondent proposed a starting rate of \$8 per hour and a 25 cents per hour raise after 1 year of employment, and another 25 cents raise in the second year of employment.

The Union also proposed that the Respondent's contribution to the 401(k) plan be 100 percent up to 3 percent of salary, instead of 50 percent up to 3 percent of salary which was its current policy. The Respondent rejected the Union's proposal and offered to continue its current contribution—50 percent up to a maximum of 3 percent of salary.

Smith also proposed that the Respondent should pay 100 percent of the health insurance premium. The Union later reduced its demand to state that the employee would pay 10 percent of the premium and the Respondent would pay 90 percent. Smith proposed a shift differential of \$1 per shift. Craner provided certain information regarding health insurance for employees, which included the amounts the employee and the employer contribute for various forms of medical and dental insurance coverage. The Respondent proposed to continue the same coverage and eligibility requirements that it currently had. Craner agreed to the Union's proposal for a \$1 per day shift differential for employees employed on the afternoon or evening shift. The Employer also agreed to the Union's proposal for one shop steward and one alternate steward. The Respondent proposed that only the union business agent present contractual violations, but the shop steward could investigate and present grievances concerning discipline on company time.

Smith testified that she also went through the Respondent's proposals, offered several counter-proposals to them, and also reduced the Union's previous demands. For example, the Union reduced its sick leave request from 10 to 5 days per year, and proposed having one shop steward and an alternate instead of two stewards. Craner responded that he did not think the shop steward proposal was unreasonable, but he did not accept that proposal. Similarly, Craner did not accept the Union's FMLA and 30 day leave of absence proposals, but said he would consider them.

Regarding funeral leave, the Respondent proposed that employees have three paid days off for the loss of a spouse, children, parents of the employee and spouse, and a 1 day paid

leave for grandparents of an employee. The Employer's proposal places some restrictions on the days given. For example, if the funeral is on Sunday, the company would only pay for one day's funeral leave. The Respondent agreed to the Union's proposal to include language addressing FMLA. As to the Union's demand that employees have one month's leave of absence, the Employer agreed to permit employees to have a leave of absence up to 1 month if the purpose of such leave is to visit family located out of the state or out of the country, or to attend drug rehabilitation or for any valid reason in the discretion of the Employer. The Employer proposed additional restrictions such as the worker must give at least 90 days notice and employees are limited to one leave of absence during the contract period. Craner's letter also gave examples of a valid reason, a 25th wedding anniversary trip to Europe, and an invalid reason, travelling to another state to see a baseball game.

Smith again raised the issue of supervisors performing unit work, and attempted to accommodate the Respondent's interests in its objections to that proposal. However, Smith stated that she "did not get a real response" and the issue "did not move." Craner's letter described Smith's proposal as an objection to supervisors doing bargaining unit work except to instruct employees and in emergencies. He refused to include any language in the contract regarding this matter since he believed that doing so would cause "more problems" and the filing of grievances. He explained that such work is done on a random basis to help employees due to a large volume of work, although they may not be termed "emergencies." He further noted that employees have not lost any income because supervisors have performed unit work.

Smith reduced the Union's demands for additional holidays. She proposed that employees be excused for one-half day, with pay, on New Year's Eve and Christmas Eve, and a full day off with pay on the day after Thanksgiving. She stated that Craner did not respond to her new proposal. Craner's letter rejected that proposal since those days have always been working days. He further explained that the docks are open on those days and closing the facility on those days would cause increased costs to the Respondent and would affect its business operations.

The parties spoke about the grievance procedure proposals. Smith bargained about limiting the language of the "capital offenses" so that the offenses, as defined, were less broad. For example, the Respondent's proposal called for immediate discharge for theft. Smith asked that the named offense be changed to "proven theft." According to Smith, "no consensus was reached" although a lengthy discussion was held concerning that issue. They also spoke about the capital offense of fighting on company premises. They bargained about whether "fighting" included a verbal altercation or only physical contact. Smith testified that she believed that in the context of the overall negotiations, the Respondent's position regarding the capital offenses was an "exercise in semantics" because, in her view, it did not appear that Craner was serious about reaching agreement on that language. For example, they discussed the meaning of insubordination and gross insubordination, Smith gave examples, and Craner repeatedly said that her language was not sufficient. In his April 8 letter, Craner said that lan-

guage could be “worked out” as to the issue of the list of capital offenses subjecting employees to immediate discharge.

6. The April 24 meeting

Smith characterized this meeting as “very hostile.” They discussed the Respondent’s proposal that the business agent, and not the shop steward, present contractual grievances. Smith proposed that the business agent have access to the shop, but Craner did not agree because he was concerned that the agent would interfere with production. Smith suggested that language be included saying that the agent would not unreasonably interfere with production. Craner rejected that language. She then offered to give 24 hours notice of the agent’s arrival. That too was unacceptable. Finally, Smith asked what his concern was, and Craner replied that he just did not want the agent in the shop, adding “we know what they’re there for.” Smith asked him how the agent could process contractual grievances if he had no access to the shop. Craner replied that he could phone the employee at home or request from management that the employee be brought to the front office to be interviewed by the agent. Smith responded that such a procedure was “tantamount to no access.”

Craner also refused to agree to a union bulletin board, adding that the Union could use the Employer’s board with notices approved by Kuper. Smith asked what kinds of posting would be inappropriate. Craner said that obscene or pornographic material would not be acceptable., and gave an example where employees at a different company transmitted pornographic material on the employer’s e-mail system. Craner said that the Union could post any “legitimate” notices on the Employer’s board. Smith objected to the term “legitimate” since the legitimacy of the notices was left up to the sole discretion of Kuper. Kuper testified that she had just received a pornographic message on her computer that morning. Kuper further stated that the Employer agreed that it would not unreasonably limit what the Union could post on the Employer’s board, but that any postings would have to be reviewed by her.

Smith stated that Craner agreed, or at least said he would look into the Union’s proposal that employees be permitted to bid on job vacancies on the day or night shift so that they could transfer from one shift to another.

Craner agreed to incorporate the FMLA into the contract, and also agreed to a 30-day leave of absence with 45-days notice. Regarding that issue, the parties discussed the examples of valid and invalid reasons for a leave of absence. Smith sought to include in the contract language that the Employer could not unreasonably deny a request for a leave of absence. She stated that she and Craner “appeared to be in agreement” regarding the term “unreasonably deny” and a long discussion was had regarding that matter. Finally, she asked Craner whether they could include such language, and he refused.

Smith raised the issue of the one-half day paid holidays which was previously rejected by the Respondent. She proposed that the 2 1/2 days be “floating holidays” which could be chosen at the employee’s discretion or on notice to the Respondent. Craner rejected that proposal. Smith also revised the Union’s proposals for the no strike-no lockout clause and the man-

agement-rights clause. Craner did not review them at the session.

Smith asked for a description of the Respondent’s practice concerning supervisors doing unit work. She stated that the Union agreed to maintain the practice as long as it did not undermine the integrity of the unit or affect overtime opportunities. She said that Craner “seemed somewhat amenable” to the proposal but gave no “definitive response” to it.

Smith stated that she received no response from Craner to the Union’s previous reduction of its demand to 10 percent co-pay of health insurance premiums by employees and 90 percent by the Respondent.

Smith stated generally that when she and Craner discussed the proposals, specifically the demands concerning the union bulletin board and shop stewards, Craner did not provide a reason for his position and did not make a counter-offer at the bargaining table. His response was that he would send a letter to her. Smith stated that Craner gave no reason for rejecting a proposal. If he had done so she would have attempted to satisfy his objections to a proposal. Since he did not do so, she found it difficult to engage in negotiations for that reason.

In contrast, Respondent’s official Kuper, who attended all the negotiating sessions except the first, testified that the Employer responded to each of the Union’s proposals and gave reasons for rejecting a Union proposal or taking the position it did. Kuper did not, however, give any specifics of the Employer’s responses and reasons beyond what is set forth above.⁹ She stated that the Respondent never refused to discuss an issue raised by the Union.

7. The May 8 meeting

On April 30, a complaint was issued against the Respondent alleging the same matters as are alleged in the first amended complaint involved here.

Craner sent a letter dated May 7, to Smith which outlined the positions of the Union and the Employer on the major issues of the negotiations. The letter also noted that the complaint “must affect the position of the Company with regard to many of the issues presently on the table” because of the remedy sought by the General Counsel to require the Respondent to offer direct employment to agency employees or to terminate them and hire additional employees. In the letter, the Respondent rejected the Union’s April 24, revised no strike-no lockout and management-rights proposals, saying that it wanted its own language.

At the May 8 session Smith asked what position he was changing due to the issuance of the complaint as noted in his May 7 letter. Craner said that movement may have been made on holidays but since the complaint may result in a different unit, he could not make any further proposals on holidays.

Smith and Craner reviewed his May 7 letter. Smith told him that the letter did not include all the issues that were discussed; the notation regarding shop stewards did not mention the issue of access to the shop; it did not refer to the floating holiday proposed by the Union; and it omitted vacation, overtime, and job posting.

⁹ The only other witness for the Respondent, Craner, testified only concerning his alleged remark at the Xerox machine.

Smith also mentioned at the time that many of the Respondent's proposals were simply to maintain the status quo which did not represent any movement by the Employer. She cited examples as health care insurance, the 401(k) plan, funeral leave, holidays, sick and personal days, and management-rights.

Smith reduced the Union's wage proposal to \$15.50 per hour for employees with ten or more years of seniority, with the rest of the employees advancing to that rate on a percentage basis. Craner did not respond to that new proposal. Craner also said that he preferred the Respondent's proposed language regarding management-rights and the no strike-no lockout clauses.

Smith stated that Craner made no new counterproposals at the meeting.

They discussed further meetings. Craner said that if the unfair labor practice hearing was held in early June as scheduled, he would not be available to negotiate any further since he had to prepare for the hearing, and had no other time available.

8. Further contact between the parties

Immediately following the May 8 meeting, Craner sent a letter to Smith, advising that the Respondent was raising its wage offer to 30 cents per hour in each of the 3 years of the contract, or a total of 90 cents per hour over the 3 year contract. Kuper testified that this offer was based upon another company's offer to the Union. All other terms and conditions regarding wages for current and newly hired employees would remain as in the Respondent's previous offer. Craner explained that the wage offer was consistent with industry practice, and should be considered a final offer. He noted that all other terms and conditions of the contract "remain subject to negotiation." Craner added that he would review Smith's management's rights and no strike-no lockout language and would respond to them at their next meeting.

In his letter, Craner noted some available dates for negotiations in mid May, but only if the unfair labor practice hearing was adjourned.

Smith stated that following the May 8 meeting, she and Craner agreed to meet on May 16. Craner cancelled that meeting. Another meeting was arranged for May 23. He called on May 22, to cancel because he was currently involved in deposition-taking. Smith asked him to call her to arrange further sessions. Craner said he would but he did not call thereafter.

C. *The Surface Bargaining Allegations*

The complaint alleges that the Respondent engaged in conduct indicative of surface bargaining by, but not limited to the increased use of agency employees rather than directly hired unit employees to perform unit work; preventing employee bargaining committee members from attending negotiations; proposing an overbroad management-rights clause; refusing to provide the Union with information relevant to the collective-bargaining agreement negotiations; refusing to provide reasons for its counter-proposals; and advising the Union that a contractual agreement was not anticipated.

General Counsel alleges that various provisions in the Respondent's 12 page "hourly employees manual" are the same as those proposed by the Respondent in negotiations. General Counsel asserts that this shows that Respondent sought only to

maintain the employees' current terms and conditions of employment, and did not make proposals which would advance their current terms and conditions. General Counsel argues therefore that the Respondent did not bargain in good faith because it did not propose greater benefits than the employees already received.

The manual states that it was revised on June 23, 1994. It contains certain employment policies. Respondent's official Kuper testified that the manual was in effect during the time of the election in April 1999, but was discontinued shortly after that time, in the spring or summer of 1999. Although the manual itself was no longer in effect, nevertheless certain policies contained therein continued to be applied.

In support of General Counsel's argument, according to Smith, the Respondent's holiday proposal was the same as in the manual. An examination of the manual indicates that the Respondent gave its employees seven paid holidays including Good Friday. In negotiations, it agreed to the Union's proposal which included seven paid holidays, including Presidents' Day. The Union's demand did not include Good Friday.

Smith also claimed, and the documents establish, that the Respondent's vacation policy was the same as it proposed in negotiations. Indeed, Craner told Smith that he wanted to maintain the Respondent's current vacation policy. The leave of absence provision in the manual simply stated that such leave may be granted to full-time employees having 1 year of continuous service. The manual stated that employees were entitled to 3 paid sick days per year. In its contract proposal, the Respondent stated that it wanted to retain its present program, up to four accumulative sick or personal days. Regarding bereavement leave, the manual provided for 3 days paid leave for the death of a spouse, child, mother or father, grandparents, and siblings. However, the proposal presented at negotiations was more restrictive, providing for leave for the deaths of a spouse, child, mother, or father only, but providing for 1 day's paid leave for the funeral of a grandparent.

Smith termed the Respondent's refusal to agree to a union-security clause as surface bargaining because of Craner's reason for refusing—the election was too close to impose a union on employees who had not voted for it. Smith conceded that she did not propose an alternative to a union security and checkoff clause since bargaining had not progressed to that point. Smith also considered the Respondent's proposed management-rights clause to be evidence of surface bargaining since the clause was extremely broad, giving the Employer the unlimited right to close, relocate, and otherwise alter its business.

Smith testified that the Employer's proposals, as given on November 21, were unacceptable since the absence of a union-security clause and the broad management-rights clause, and the refusal of access to the facility by the Union's business agent except by permission of Respondent's official combined to prevent the Union from communicating with and fully representing the employees. She stated that further evidence of surface bargaining are the absence of a checkoff clause and the six broadly termed capital offenses for which employees could be discharged immediately. She stated that Craner did not give reasons why he wanted certain proposals or why he did not

want certain union proposals, thereby precluding productive negotiations concerning alternatives to those demands.

Smith conceded that the Respondent did not attempt to reduce the wage rate from its current level, or increase the amount of money employees had to pay for health insurance, or reduce the amount of the Employer contribution to the 401(k) plan, or to reduce the number of holidays.

D. The Agency Employees

Respondent's official Kuper first testified on examination by the General Counsel pursuant to Section 611(c) of the Federal Rules of Evidence that some time after the April 16, 1999 election a decision was made to use agency workers rather than hire employees directly. However, she testified on cross-examination by Respondent's counsel that the decision was made prior to the election, at the end of November 1998, into the early months of 1999, even prior to the petition being filed on March 8, 1999. Regardless of the time of the decision, it is admitted that the Respondent did not inform the Union of this decision.

The reason for the decision not to hire permanent employees, as stated by Kuper, was that one of its competitors went out of business in about November 1998, and the Respondent sought to assume its business. She explained that the Respondent was "inundated" with work and had to hire 10 to 20 employees immediately. In order to do so, she utilized the services of agencies which could supply those workers on short notice. The Respondent's records show an increase, from two agency employees used in the week ending January 22, 1999, to six and then twelve used in the weeks ending January 29 and February 5, respectively.

As part of that decision, it was determined that as the direct hires left their jobs, either by quitting or termination, the Respondent would use agency employees to fill those vacancies. That policy is still in effect, so that if any of the eight currently employed direct hires leaves his employment, an agency employee would be utilized in his place, if needed. If an additional employee is not needed, no one would be hired. It has not been alleged that the departure of any of the direct hires has been the product of an unfair labor practice. Rather, it appears that they left due to quitting or termination for cause.

Kuper stated that this decision was made because the hiring and employment process was easier with the utilization of agency workers. The Employer did not have to advertise for workers, it did not have to screen the applicants, and there was a savings of payroll and federal income taxes, unemployment insurance, and workers compensation payments.

Inasmuch as there is a conflict in Kuper's testimony as to whether the decision to phase out the direct hire of employees was made before or after the election, an analysis of the employment of those categories of employees must be made.

The Respondent's payroll records, Respondent's exhibit 2, indicates that agency employees were utilized as early as February 20, 1998,¹⁰ at which time three agency workers and seventeen direct hires were employed. Thereafter, the number of agency employees fluctuated from one to seven through the

date of the April 16, 1999 election, while the number of direct hires increased steadily from 17 to 42 during that period of time.

Following the election, the number of agency employees remained under ten through July 23, 1999, while the number of direct hires decreased to 39. Thereafter, from August 6, 1999, when 16 agency employees and 39 direct hires were working, the number of agency employees increased steadily and dramatically through October 27, 2000, the date of the certification. At that time, 31 agency employees were employed while the number of direct hires stood at the reduced level of 19.

By June 14, 2002, 44 agency employees and 8 direct hires were employed. At the time of the hearing, 8 direct employees continued to be employed.

Although that payroll record shows the total number of agency and direct hired employees working at the Respondent's facility, another payroll record, General Counsel's exhibit 18, shows the actual hiring dates of the direct hires. That payroll record contradicts Kuper's testimony that the Respondent made a decision prior to the election to stop hiring directly employed workers. Thus, General Counsel's exhibit 18, a list of direct hire employees from January 1, 1998 to June 15, 2002, prepared by Kuper, shows that 30 direct employees were hired in 1999 following the election¹¹ and 21 direct employees were hired from January through September 2000.¹²

Thus, in contrast to Kuper's testimony that the Respondent decided to stop hiring direct employees before the election, the Respondent's records establish that the hire of such employees continued long after the election. I accordingly find that the Respondent's decision not to hire direct employees, if it was made at all, was made after the election.

Kuper stated that the agency people and the direct hires functioned as one integrated unit with no difference in the type of work performed by each group, and each group worked together on the day and night shifts. The agency workers wear different colored vests than the regular workers, they punch their time cards at a time clock which is different than the time clock used by the regular employees, and they arrive together, usually by van.

I find that the Respondent's decision to stop hiring direct employees and instead to employ agency employees was made after the April 16, 1999 election. I base that finding upon the above evidence, particularly Kuper's testimony as a Section 611(c) witness that the decision was made following the election. In addition, the Respondent's payroll records show that 30 new direct hires were made in 1999 following the election and 21 new direct hires were made in 2000, long after the decision was supposedly made that no new employees would be directly hired.

¹¹ April 1999—6 employees; May—5; June—3; July—1; August—1; September—5; October—1; November—4; December—4.

¹² January 2000—4 employees; February—3; March—2; April—3; May—1; June—5; July—2; August—0; September—1.

¹⁰ All payroll periods refer to the "week ending."

III. ANALYSIS AND DISCUSSION

A. *The Alleged Transfer of Unit Work*

1. The section 10(b) argument

The complaint alleges that since about January 2000, the Respondent unilaterally transferred unit work to temporary agency employees.

The Respondent argues that the complaint alleging the unlawful transfer of work to the agency employees is barred by the 6-month statute of limitations set forth in Section 10(b) of the Act. Section 10(b) provides that “no complaint shall issue upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board.”

The Respondent argues that the performance of bargaining unit work by the temporary agency employees began more than 6 months prior to the time the charge was filed on November 26, 2001. Accordingly, the Respondent contends that the complaint must be dismissed in this regard.

The Section 10(b) period does not begin to run “until the aggrieved party has received actual or constructive notice of the conduct that constitutes the alleged unfair labor practice.” *Concourse Nursing Home*, 328 NLRB 692, 694 (1999). Such notice must be “clear and unambiguous.” *Patsy Trucking*, 297 NLRB 860, 862 (1990).

While it is true that the Respondent first utilized temporary agency employees in February 1998, there has been no credible evidence that the Union was aware of such use prior to August 21, 2001, when it received a list of names of unit employees from the Respondent. Shortly after that time, in August and September, Union Agent Katz learned from the employees that temporary agency employees were performing unit work.

I cannot find that the Union should have known that agency employees were used prior to August 2001. The Union had been involved in protracted litigation with the Respondent following the April 1999 election. Thus, although the Union was certified in October 2000, following the Respondent’s refusal to bargain, a Board Order and a Court decree, entered in August, 2001, were necessary to bring the Respondent to the bargaining table. Katz credibly testified that during the lengthy period of time of Respondent’s refusal to bargain, no employee told him that that agency employees were being used. Nor did any representative of the Respondent inform the Union that it was utilizing agency employees and not the unit employees to perform unit work.

Although Katz was at the Respondent’s premises regularly in his capacity as a driver for another company, he was not permitted in the warehouse area, and although he spoke to the unit employees at such times he was not told about the agency workers. Even if members of the bargaining unit knew of the change, that does not necessarily mean that the Union did. *Adair Standish Corp.*, 295 NLRB 985, 986 (1989). Further, no one functioned as a shop steward after the election. Based upon similar facts, the Board in *Duke University*, 315 NLRB 1291, 1296–1297 (1995), held that Section 10(b) was not tolled where the union did not become aware that the employer failed to replace full-time drivers as vacancies were created after the election, but instead hired part-time drivers who were outside

the unit. In *Duke*, as in this case, the Board noted that the employer had refused to bargain and the union did not have a steward “to whom it can look to police working conditions.”

Moreover, the complaint allegation relates to the Respondent’s transfer of unit work from the directly hired unit employees to the agency employees. The allegation does not simply involve the mere use of temporary employees. It had been the Respondent’s policy to use agency employees to perform unit work and such work was done since early 1998. Even assuming that the Union was told earlier that the Respondent was using agency workers to perform unit work, such knowledge may not have resulted in a finding that the Union was on notice of the violation alleged here.

This is because it was the *transfer* of such work that is at issue here. The transfer of such work, involving as it did the failure to replace unit workers clearly did not become known to the Union until the Union received the list of workers in August 2001.

I accordingly find and conclude that the Union did not receive clear and unambiguous actual or constructive notice of the transfer of unit work to the agency employees until August 21, 2001. Accordingly, the filing of the charge 3 months later on November 26, 2001, was timely.

2. The alleged violation

The Respondent denies that it had an obligation to bargain about the alleged transfer of work because its alleged decision not to hire any more directly employed workers was made prior to the election, or if it was made after the election, it was made prior to the certification. It argues that it had no obligation to consult with the Union until after the certification.

In *Overnite Transportation Co.*, 335 NLRB 372 (2001) the Board held:

It is well-settled that absent compelling circumstances, an employer that chooses unilaterally to change its employees’ terms and conditions of employment between the time of an election and the time of certification does so at its own peril, if the union is ultimately certified. Citing *Mike O’Connor Chevrolet*, 209 NLRB 701 (1974).

Inasmuch as I find that the decision to cease hiring directly employed workers and to utilize agency employees to perform bargaining unit work occurred following the election, the Respondent’s actions after the election and prior to the certification were at its own peril. After the Union was certified the Respondent unlawfully refused to bargain by unilaterally engaging in such conduct between the time of the election and the certification.

The first question which must be addressed is whether the Respondent’s alleged transfer of unit work to the agency employees was a substantial, material, and unlawful unilateral change in violation of its obligation to bargain. If the Respondent “followed an established practice and did not alter the status quo” no change has taken place. *The Post Tribune Co.*, 337 NLRB 1279 (2002). The Respondent argues that no change took place since it had an established practice of assigning unit work to agency employees. While it is true that the Respondent began to utilize agency employees to perform unit

work more than 1 year prior to the election, its initial use of those employees was only to supplement and augment its regular unit work force and not to supplant them. In addition, the numbers of agency employees used was low, an average of 3.7 employees per week in the 34 weeks prior to the election. In contrast, following the election and until the certification, an average of 17.5 agency employees were used each week.

Further, its decision to replace the unit employees with agency employees as they left the Respondent's employ served to not merely change, but seriously and steadily erode the unit. Thus, from a bargaining unit of 42 employees at the time of the election there were 19 unit workers at the time of the certification, and 8 at the time of the hearing.

I also reject the Respondent's argument that the definition of the certified unit somehow permitted the Respondent to unilaterally decide to eliminate it. The Respondent is correct that, as a stipulated election took place here, the Union agreed to the definition of the voting unit which was ultimately certified. That unit expressly excludes all temporary agency employees. The Respondent argues that by agreeing to exclude agency employees the Union agreed that they could perform unit work and it cannot now complain that the unit is being decimated.

Although the Union may have been aware that the agency employees were performing unit work there is no evidence that the Union agreed that the agency workers could replace the unit employees or that the Union agreed that the certified unit would eventually be abolished. As set forth above, until the election the agency employees were used in small numbers to supplement the unit work force. Only following the election was a decision made to transfer the unit work to the agency employees as the unit employees left. Accordingly, it cannot be said that at the time the voting unit was agreed to the Union made an informed decision that the agency workers would ultimately replace its petitioned-for unit. Just as the Union agreed to the exclusion of office clerical employees, professional employees, guards, and supervisors from the unit, it did not implicitly agree to their performance of unit work. Indeed, as seen in the negotiations, the Union vigorously contested the Respondent's use of supervisors to perform unit work.

The Respondent appears to want it both ways. At the same time as it argues that the agency employees had traditionally performed unit work and therefore there was no change in their continued performance of such work, it contends that since they were excluded from the unit its decision to transfer the unit work to them cannot be challenged.

I cannot agree with this argument. This case may be analogized to one in which the employer transferred unit work to supervisors who were excluded from the unit. Here, similarly, the Respondent transferred unit work to the temporary agency employees who were also excluded from the bargaining unit. The Board has held that the "reclassification or transfer of bargaining unit work to managers or supervisors is a mandatory subject of bargaining where it has an impact on unit work." *Regal Cinemas, Inc.*, 334 NLRB 304 (2001); *Land O' Lakes*, 299 NLRB 982, 986 (1990).

The Board has found a violation of the Act by an employer's "failing to give the union an opportunity to bargain concerning the employer's decision to transfer unit work to nonunit super-

visors." *Stevens International, Inc.*, 337 NLRB 143 (2001); *University of Pittsburgh Medical Center*, 325 NLRB 443 (1998).

The Respondent's actions in transferring unit work to the agency employees resulted in the removal of such work from the unit, creating a change in the unit's terms and conditions of employment and giving rise to the Respondent's bargaining obligation under Section 8(d) of the Act. *Hampton House*, 317 NLRB 1005 (1995). The actions of the Respondent had a significant impact on unit employees' job interests. There was an erosion and elimination of unit jobs by the decision to employ agency employees instead of the direct hires. The use of such temporary employees varied significantly in degree from what had been customary under past practice. See *Westinghouse Electric Corp.*, 150 NLRB 1574, 1576-1577 (1965). Whereas at first the agency employees were used only to supplement the direct hires, following the election they were used to replace the directly hired employees when their employment ended.

In *Duke University*, 315 NLRB 1291, 1297-1298 (1995), following an election, as here, the employer failed and refused to fill bargaining unit positions as full-time drivers left the unit. Instead, it hired part-time drivers who were outside the unit. The Board held that "hiring people outside the unit to do [unit] work does impair the unit's integrity." The Board found a violation in the respondent's unilateral conduct.

The Board's doctrine concerning subcontracting may also be applied to this case. In *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964), the Supreme Court held that the decision to subcontract work which resulted in the replacement of unit employees with those of a contractor to do the same work is a mandatory subject for bargaining, and that such duty includes the duty to advise a union in advance of making a decision to subcontract. I reject the Respondent's argument that what happened here cannot be compared to subcontracting because a subcontract involves the removal of unit work. It is clear that unit work was removed from the certified unit and transferred to the nonunit temporary agency employees.

In *Storall Mfg. Co.*, 275 NLRB 220, 239 (1985), the Board found that the employer unlawfully made unilateral changes when it laid off its night shift unit employees and replaced them with temporary agency employees even though it had used temporary employees in the past. The Board found that this was a change in established working conditions since its past practice had been to use unit employees for the night shift. In *Overnite Transportation Co.*, 330 NLRB 1275, 1276 (2000), where the employer subcontracted unit work, the Board held that "the bargaining unit is adversely affected whenever bargaining unit work is given away to nonunit employees, regardless of whether the work would otherwise have been performed by employees already in the unit or by new employees who would have been hired into the unit." See *Valley Oil Co.*, 210 NLRB 370, 382 (1974), where the employer increased its subcontracting of gasoline hauling.

The Respondent's actions in substituting agency employees for its bargaining unit employees as they leave their employment will make it possible for it to eliminate the existing bargaining unit and dilute its bargaining strength. Eventually, as testified by Kuper, as each unit employee leaves his job, a tem-

porary agency worker will replace him. Ultimately, the unit will be eliminated. Absent discriminatory intent, nothing in the law prevents the Respondent from making and implementing that decision. What the law requires is that it first offer to bargain about such a decision. This it has admittedly failed to do.

I accordingly find and conclude that by transferring unit work to agency employees without bargaining with the Union or offering to bargain with the Union about its decision to transfer such work, the Respondent has violated Section 8(a)(5) and (1) of the Act.

B. The Alleged Refusal to Provide Information

1. Information concerning the agency employees

As set forth above, on October 10, 2001, the Union requested the (a) name, address, job classification, and wage rate of agency personnel performing bargaining unit work and length of time such individuals have worked at Respondent's facility (b) the name and address of each agency which has or continues to supply workers to Respondent to perform warehouse work and (c) any contracts, correspondence, or other documents, setting forth terms and conditions applying to any employees supplied to Respondent by any agency. The Respondent refused to supply such information because the temporary agency employees were excluded from the bargaining unit.

Although a union bears the burden of establishing the relevance of requested information pertaining to nonunit individuals, it is well settled that the burden of establishing the relevance of such information "is not exceptionally heavy," and is satisfied by "some initial but not overwhelming demonstration by the union." In this regard, the Board uses a broad, discovery-type standard in determining relevance in information requests, including those for which a special demonstration of relevance is needed, and potential or probable relevance is sufficient to give rise to an employer's obligation to provide information." *Hertz Corp.*, 319 NLRB 597, 599 (1995).

I am satisfied that the Union has established the relevance of all the information requested concerning the agency employees and the agencies themselves. Following her receipt of information that the Respondent was using agency employees to perform unit work, Union attorney Smith requested the above information.

The information requested is clearly relevant to the Union's investigation of the nature and extent of the use of workers outside the unit who are being used to supplant the unit work force. *Lenox Hill Hospital*, 327 NLRB 1065, 1068-1069 (1999). Thus, the information sought concerning the identity of the temporary workers, their classification, wages, and the length of time employed at the facility validly relate to the number of temporary workers who were utilized by the Respondent instead of unit employees, and includes the period of time they were doing such work. Their wages are relevant, as stated by Smith, in order to determine what the Respondent was willing to pay its employees for the performance of the same work that was done by the temporary employees. *Depository Trust Co.*, 300 NLRB 700 fn. 2 (1990); *Continental Winding*

Co., 305 NLRB 122 (1991). Such information accordingly was of use in the negotiations for a contract.

Similarly, the request for the name and address of each agency which has or continues to supply workers to Respondent to perform warehouse work and any contracts, correspondence or other documents, setting forth terms and conditions applying to any employees supplied to the Respondent by any agency, is relevant to a determination of which agencies are supplying the Respondent with employees and could result in a request of those agencies, once identified, to provide information concerning the numbers of employees provided. The contracts and other documents are relevant to determine how much money the Respondent was willing to pay the agencies for the work of the temporary employees.

This information was particularly necessary and relevant in view of the Respondent's erosion of the unit by its replacement of the unit workers with the agency employees. *Gourmet Award Foods, Northeast*, 332 NLRB 170 (2000), and was therefore relevant and necessary to the Union's performance of its duties as the exclusive representative of the unit employees.

2. Information Concerning the Health Insurance Premiums

In its letter of October 10, 2001, the Union also requested the "amount of premiums paid by Respondent for its employees' health insurance coverage." The Respondent at first refused to furnish that information on the ground that it was confidential, but then provided such information 6 months later on April 8, 2002.

There has been no showing why the health insurance premium information was considered by the Respondent to be confidential. The Board has held that the premiums paid under health insurance plans constitute wages, and as wages, such information is presumptively relevant. *The Nestle Company*, 238 NLRB 92, 94 (1978). The cost of employee fringe benefits is particularly important during ongoing negotiations, and the 6-month delay in providing such information was improper and unlawful. *Baldwin Shop 'N Save*, 314 NLRB 114, 124 (1994).

I accordingly find and conclude that the information requested by the Union was relevant to its representation of the unit employees and its negotiation of a collective-bargaining agreement. I further find that the Respondent's refusal to provide the information concerning the agency employees and the agencies, and its delay in furnishing the information concerning the health insurance premiums paid by it violated Section 8(a)(5) and (1) of the Act.

C. The Respondent's Alleged Conduct Indicative of Surface Bargaining

The complaint alleges that during the bargaining, specifically, in the months of October, November, and December 1991, and February and April 2002, the Respondent engaged in conduct indicative of surface bargaining including, but not limited to (a) the increased use of agency employees rather than directly hired unit employees to perform unit work (b) preventing employee bargaining committee members from attending negotiations (c) proposing an overbroad management-rights clause (d) refusing to provide the union with information relevant to the collective-bargaining negotiations (e) refusing to

provide reasons for its counterproposals and (f) advising the Union that a contractual agreement was not anticipated.

Section 8(d) of the Act requires “the employer to meet at reasonable times with the representative of its employees and confer in good faith with respect to wages, hours and other terms and conditions of employment. This obligation does not compel either party to agree to a proposal or to make a concession.” Nonetheless, the Act is predicated on the notion that the parties must have a sincere desire to enter into “good faith negotiation with an intent to settle differences and arrive at an agreement.” Therefore, “mere pretense at negotiations with a completely closed mind and without a spirit of cooperation does not satisfy the requirements of the Act.” A violation may be found where the employer will only reach an agreement on its own terms and none other.

In determining whether the Respondent bargained in bad faith, we look to the “totality of the Respondent’s conduct,” both at and away from the bargaining table. Relevant factors include: unreasonable bargaining demands, delaying tactics, efforts to bypass the bargaining representative, failure to provide relevant information, and unlawful conduct away from the bargaining table. *Mid-Continent Concrete*, 336 NLRB 258, 260 (2001), citing *Atlanta Hilton & Tower*, 271 NLRB 1600 (1974) and other cases.

“Surface bargaining is the antithesis of good-faith bargaining. It consists of employing the forms of collective bargaining without any intention of concluding an agreement.” *U.S. Ecology Corp.*, 331 NLRB 223, 225 (2000). In reviewing the bargaining that took place here it is particularly important to recognize that the negotiations are for a first contract. The concurring opinion of Member Liebman in *APT Medical Transportation*, 333 NLRB 760 (2001) is especially noteworthy:

There is perhaps no more difficult problem in contemporary labor-management relations than achieving an initial agreement, and nothing more critical to establishing the new relationship than the tone and conduct of the first negotiations. The Board should therefore exercise special care in monitoring the first contract bargaining process and closely scrutinize behavior which “reflects a cast of mind against reaching agreement.”

The bargaining process must be examined in light of the overriding event which had the ability to render the bargaining moot. That was the Respondent’s unilateral transfer of unit work to temporary agency employees. As set forth above, following the election, the Respondent decided to cease hiring unit employees and instead transfer unit work to the nonunit agency workers. This was not a simple unilateral change. This was a change which effectively reduced a unit of 42 employees employed at the time of the election to 19 at the time of the certification, to 12 at the time of the first negotiation session.

The Respondent transformed a healthy unit to an anemic one over a relatively short period of time. Moreover, there is no hope for recovery inasmuch as it is inevitable that once the last directly hired employee leaves his employment the unit will cease to exist. Accordingly, I believe that the negotiations were necessarily colored by the Respondent’s unilateral change. This

major unilateral change served to create an atmosphere in which the Union was bargaining against the clock—knowing that the longer the negotiations continued the fewer the unit employees it represented. At the same time the Respondent was aware that the Union’s strength in the unit was diminishing. The unilateral change had the effect of contributing to the lack of agreement. The change also clearly communicated to employees that there was no need for the Union as their collective-bargaining representative. *Mid-Continent Concrete*, supra at 260. This is especially true where, in this case, nothing the Union could negotiate would matter since the unit was destined for extinction.

It is with this context in mind that I address the bargaining process. First with respect to conduct at the bargaining table, Smith gave uncontradicted testimony that she told Craner that she wanted principals of the parties present at each negotiation. Kuper was not present at the first negotiation on October 25, held at Craner’s office. Not only was she not present, she was not even aware that a negotiation session had occurred on that day. Presence of the Respondent’s official could have served to move the discussions along, especially since the Union presented its first proposal at that meeting.

I also find that the Respondent improperly prevented the two Union committeemen from attending the February 19 meeting. As set forth above, I find that they were available to attend. Their nonattendance prevented the Union from presenting its economic demands to the Respondent at that session. Based upon past practice, Smith believed that she would be able to speak to the two employees prior to the session regarding the Union’s economic proposals. When the committeemen were not present she had to postpone the presentation of the Union’s demands. This served to delay the bargaining. Smith also gave uncontradicted evidence that Craner did not tell her prior to that meeting that he would be unable to attend a meeting until early April. That too served to delay bargaining since Smith stated that she would have attempted to schedule another meeting before he left for vacation.

The Respondent further attempted to delay bargaining by Craner’s suggestion that negotiations be held in abeyance until the instant charge was decided. As Craner surely was aware, a decision on the charge could possibly involve involving lengthy Board and court proceedings which could take months or years. He also was surely aware that by the time all such proceedings were exhausted the unit may have been extinct with the departure of the final unit members.

The Respondent’s failure to provide relevant information concerning the temporary employees and the agencies providing them, and its delay in providing presumptively relevant information concerning the amount of the health insurance premiums delayed bargaining since Smith needed them for her preparation of the Union’s proposals.

The Respondent refused to provide explanations for its rejection of Union proposals concerning vacations, overtime, job bidding, supervisors performing unit work, sick days, personal days, bereavement leave, health coverage, 401(k) plan, management-rights, no strike-no lockout other than insist that it wanted to maintain its current policies. This is indicative of bad faith bargaining. In this connection, I note that Kuper testified

that the Respondent responded to each of the Union's proposals, and explained the reasons why it either wanted a particular position or disagreed with the union's position. However, aside from those proposals set forth in the narrative above in which the Respondent made explanations, I cannot find that it did so. I cannot credit Kuper's conclusory testimony which was devoid of details that such explanations were made on the above subjects. The Respondent's unwillingness to compromise on, or provide explanations for its proposals is evidence of bad-faith bargaining. *Altorfer Machinery Co.*, 332 NLRB 130 (2000); *Mid-Continent Concrete*, supra at 260. The requirement that bargaining be done in good faith requires that the employer is "obliged to make *some* reasonable effort in *some* direction to compose his differences with the union if Section 8(a)(5) is to be read as imposing any substantial obligation at all." *Atlanta Hilton & Tower*, supra at 1603 (emphasis in original).

The Respondent proposed an extraordinarily broad management-rights clause, conferring on it complete discretion as to the hire, promotion, discipline of employees for cause, demotion, transfer, lay-off, recall of employees, setting the standards of productivity, entering into contracts with agencies to supply personnel, close, expand, or relocate its facility, cease any job, and change methods of operation. Of course, an employer may propose and bargain concerning a broad management-rights clause. *Commercial Candy Vending Division*, 294 NLRB 908, 909 (1989). However, in connection with that clause giving the Respondent the unlimited discretion to discharge employees for cause, it would only agree to a grievance/arbitration proposal if it included that employees could be immediately discharged for certain "capital offenses". Thereafter, when the Union believed that agreement had been reached on the definitions of the capital offenses and on what constituted reasonable denial of employees' requests for leaves of absences, the Respondent refused to include such language in the contract. Accordingly, this proposal served to foreclose the Union from any representative role in major decisions affecting the employees, leaving them unrepresented when such decisions were made. *Altorfer Machinery*, supra at 148.

The Respondent refused to agree to a union security clause because the vote was close and it did not wish to impose a union on employees who did not vote for it. The Board has held that philosophical objections to a union security clause does not relieve an employer of the obligation to bargain over that subject. *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1043 (1996).

Although the Respondent agreed to the appointment of one steward and one alternate steward, it insisted that the steward's authority be limited to handling discipline-related grievances. The Respondent also refused to permit access to its warehouse to the business agent to investigate grievances. Instead, it unreasonably maintained that the agent could contact employees at home or present his request to Kuper who would decide if he could speak to an employee or investigate an issue. This would result in the Union surrendering its authority to act as the employees' representative.

The Respondent's denial of access to the Union's international representative prevents the experienced official from

gaining a complete understanding of the Respondent's operation and thus prevents the employees from getting the representation they voted for in the certification election. *C.C.E., Inc.*, 318 NLRB 977, 978 (1995).

In this connection, the Respondent has offered no valid business reason that the Union business agent could not have access to the warehouse. The only explanations were that no one is permitted in the warehouse and Craner's statement that "we know what they're there for." The Respondent's offer to have the employee brought to the office to be interviewed was predictably unacceptable to the Union. The Union's attempts to negotiate and find common ground for agreement by suggesting that advance notice be given to the Respondent was rejected out of hand.

Craner's statement that no contract would be reached and that ultimately the Union would abandon the shop illustrate the Respondent's bad-faith bargaining and strongly suggest that it had no desire to conclude a contract with the Union. *U.S. Ecology Corp.*, supra at 225; *Valley Oil Co.*, 210 NLRB 370 (1974);

To be sure, many of the above discussed factors would not, standing alone, support a conclusion that the Respondent failed to bargain in good faith. It is also true that the Respondent did not propose a reduction in existing benefits, did not withdraw proposals once made, and did not make regressive proposals. In fact the Respondent made concessions, agreeing to the Union's demands for a shift differential, the appointment of one shop steward and one alternate steward, and for inclusion of FMLA language. In addition, it made a wage offer which increased employees' wages and later increased that offer. It also agreed to the Union's non-discrimination and severability clause, and agreed to recognize the Union as the bargaining agent of the warehouse employees.

Nevertheless, the bargaining process must be viewed in its entirety. When viewed in its entirety I must find that the negotiations were not conducted by the Respondent with an effort to reach agreement. Thus, in addition to the unilateral change which would result in the destruction of the unit, the refusal to furnish information, the refusal to permit Union committeemen to attend one bargaining session, the Respondent did not possess a "sincere desire to enter into good faith negotiations with an intent to settle differences and arrive at an agreement." *Mid-Continent*, supra. In many instances the Respondent insisted on maintaining its current practices and terms and conditions of employment without explanation other than it wanted to continue them in effect.

Thus, when the Union sought to learn what objections the Respondent had to certain proposals, for example that supervisors not perform unit work, the Respondent in effect refused to bargain about such matters or consider the Union's efforts to find common ground in an effort to satisfy the Respondent's objections. Similarly, the Respondent's attitude on other issues amount to a stubborn refusal to consider or discuss any alternatives to what it determined it wanted. Despite the Union's attempts to satisfy the Respondent's concerns as to access for its business agent and a Union bulletin board, the Respondent insisted upon Kuper's unlimited discretion in granting limited access and the posting of notices.

Based upon the totality of the Respondent's conduct I cannot find that it entered negotiations with a "spirit of cooperation" in which it intended to reach an agreement. I accordingly find and conclude that the Respondent has engaged in conduct indicative of surface bargaining as alleged.

D. The Union's Request for a Section 8(a)(3) Finding

In his closing argument and again in his brief, counsel for the Union urged that a finding be made that the Respondent's conduct in transferring unit work to the agency employees and systematically reducing the number of unit employees was inherently destructive conduct in violation of Section 8(a)(3) of the Act, relying on *International Paper*, 319 NLRB 1253 (1995). The Respondent opposes such a finding.

The charge and the two amended charges alleged that the Respondent transferred unit work to the agency employees in retaliation for their union activities in violation of Section 8(a)(3) of the Act. However, the complaint does not contain an allegation that such conduct violated Section 8(a)(3) and the General Counsel expressly stated that this case involved a violation of Section 8(a)(5) only, and denied that animus was a part of her theory.

Inasmuch as the complaint has not embraced the Section 8(a)(3) theory urged by the Union and the General Counsel has not endorsed it, I cannot make such a finding. "It is well established that the General Counsel's theory of the case is controlling, and that a charging party cannot enlarge upon or change that theory." *Raley's*, 337 NLRB 719 (2002).

CONCLUSIONS OF LAW

1. St. George Warehouse, Inc., is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. Merchandise Drivers Local No.641, International Brotherhood of Teamsters, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. At all material times, the Union has been, and is, the exclusive representative of the employees in the following appropriate collective-bargaining unit within the meaning of Section 9(a) of the Act.

All full-time and regular part-time warehouse employees employed by the Respondent at its South Kearny, New Jersey location, but excluding all temporary agency employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

4. By failing to give the Union an opportunity to bargain collectively concerning the Respondent's decision to transfer unit work to temporary agency employees, the Respondent violated Section 8(a)(5) and (1) of the Act.

5. By failing to furnish certain information to the Union concerning temporary agency employees and the agencies which supplied them, the Respondent has violated Section 8(a)(5) and (1) of the Act.

6. By delaying in furnishing to the Union information concerning the amount of premiums paid by the Respondent for its employees' health insurance coverage, the Respondent has violated Section 8(a)(5) and (1) of the Act.

7. By increasing the use of temporary agency employees rather than directly hired unit employees to perform unit work

and by unilaterally transferring such work from unit employees to the temporary agency employees, and by preventing employee bargaining committee members from attending negotiations, and by proposing an overbroad management-rights clause, and by refusing to provide, and delaying in providing the Union with information relevant to the collective-bargaining negotiations, and by failing to provide explanations for its counterproposals, and by advising the Union that a contractual agreement would not be reached, the Respondent has engaged in conduct indicative of surface bargaining in violation of Section 8(a)(5) and (1) and 8(d) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent has unlawfully unilaterally transferred bargaining unit work to temporary agency employees, I find that it must be ordered to rescind its unlawful unilateral action and bargain with the Union concerning the transfer of unit work to temporary agency employees.

In addition, I believe that an additional affirmative remedy is necessary in order to restore the status quo ante to remedy the Respondent's unilateral failure to hire direct employees and replace them with agency employees to perform unit work. *University of Pittsburgh Medical Center*, supra at 444. Inasmuch as the Respondent has had a past practice, prior to the election, of employing agency employees to supplement its direct hires, that practice should continue. Accordingly, a restoration of the status quo should be the reinstatement of the employment complement as of the time of the election, prior to the time that the Respondent unlawfully transferred unit work to the agency employees.

Therefore, I shall recommend that the Respondent restore its employee complement to the date of the election, at which time 7 agency employees and 42 direct hires were employed, for a total of 49 employees. However, it appears that the Respondent's work force increased since that time. Thus, as of June 14, 2002, 44 agency employees and 8 direct hires were employed.

I believe that the most proper way to restore the status quo ante is to recommend that the Respondent maintain the proportion of agency to direct hires that existed at the time of the election. Thus, agency employees consisted of 7 of 49, or one-seventh of the total number of employees employed at the time of the election. Accordingly, it shall be recommended that the Respondent hire agency employees and direct hires in a proportion of 1 to 7. Thus, for each agency employee employed, the Respondent must employ 7 direct hires.

This recommendation is to be implemented immediately. The Respondent may hire direct employees either from outside its work force or it may choose to offer direct hire status to agency employees. In any case, the directly hired employees must be included in the certified collective-bargaining unit.

The complaint requests a remedy pursuant to *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962). The Board has long held that where there is a finding that an employer, after a union's certi-

fication, has failed or refused to bargain in good faith with that union, the Board's remedy should ensure that the union has at least 1 year of good faith bargaining during in which its majority status cannot be questioned. *Mar-Jac Poultry*, supra. However, a shorter period of time is sometimes assigned depending upon the circumstances. They include the nature of the violations found, the number and extent of collective-bargaining sessions, and the impact of the unfair labor practices upon the bargaining process, and the conduct of the Union during the negotiations.

In evaluating these factors, I conclude that a 1-year extension of the certification year is appropriate. Such extension shall start from the date of resumption of bargaining between the parties. The Union was certified in October 2000. Following court enforcement of a Board order requiring bargaining nearly one year later in August 2001, bargaining finally began in October 2001. Seven bargaining sessions were held between October 25, 2001, and May 8, 2002.

As set forth above, the Respondent engaged in conduct indicative of bad-faith bargaining following the election by undermining the Union's representational status in its transfer of unit work to nonunit temporary agency employees. Such conduct continued during the course of the bargaining.

In addition the Respondent will be ordered to resume negotiations with the Union upon request and bargain collectively in good faith concerning wages, hours, and other terms and conditions of employment, and for 1 year thereafter, and if an understanding is reached embody it in a written agreement.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹³

ORDER

The Respondent, St. George Warehouse, Inc., Kearny, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to give the Union an opportunity to bargain collectively concerning its decision to transfer unit work to temporary agency employees.

(b) Failing to furnish certain information to the Union concerning temporary agency employees and the agencies which supplied them.

(c) Delaying in furnishing to the Union information concerning the amount of premiums paid by us for our employees' health insurance coverage.

(d) Engaging in conduct indicative of surface bargaining.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with Merchandise Drivers Local No. 641, International Brotherhood of Teamsters, AFL-CIO, as the collective-bargaining representative of the employees

in the appropriate unit as to their terms and conditions of employment, including the transfer of unit work to temporary agency employees. Such bargaining shall be conducted as if the initial year of certification has been extended for an additional 12 months from the commencement of bargaining and, if an understanding is reached, embody the understanding in a signed agreement. The appropriate unit is:

All full-time and regular part-time warehouse employees employed by the Respondent at its South Kearny, New Jersey location, but excluding all temporary agency employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Rescind the unlawful unilateral action of transferring unit work to temporary agency employees.

(c) Restore the status quo ante by the following: Respondent shall hire agency employees and direct hires in a proportion of 1 to 7. For each agency employee employed, the Respondent must employ 7 direct hires. The Respondent may hire direct employees either from outside its work force or it may choose to offer direct hire status to agency employees. The directly hired employees must be included in the certified collective-bargaining unit.

(d) Provide the Union with the requested information concerning temporary agency employees and the agencies which provided them.

(e) Within 14 days after service by the Region, post at its facility in Kearny, New Jersey, copies of the attached notice marked "Appendix."¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 2000.

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

Dated, Washington, D.C. October 22, 2002

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

¹³ 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.

¹⁴ 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."

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail to give the Union an opportunity to bargain collectively concerning our decision to transfer unit work to temporary agency employees.

WE WILL NOT fail to furnish requested information to the Union concerning temporary agency employees and the agencies which supplied them.

WE WILL NOT delay in furnishing to the Union information concerning the amount of premiums paid by us for our employees' health insurance coverage.

WE WILL NOT engage in conduct indicative of surface bargaining.

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

WE WILL on request, bargain with Merchandise Drivers Local No.641, International Brotherhood of Teamsters, AFL-CIO, as the collective-bargaining representative of the employees in

the appropriate unit as to their terms and conditions of employment, including the transfer of unit work to temporary agency employees. Such bargaining shall be conducted as if the initial year of certification has been extended for an additional 12 months from the commencement of bargaining and, if an understanding is reached, embody the understanding in a signed agreement. The appropriate unit is:

All full-time and regular part-time warehouse employees employed by us at our South Kearny, New Jersey location, but excluding all temporary agency employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL rescind our unlawful unilateral action of transferring unit work to temporary agency employees.

WE WILL restore the situation as it existed at the time of the election in April 1999, by the following: WE WILL hire agency employees and direct hires in a proportion of 1 to 7. For each agency employee employed, WE WILL employ 7 direct hires. WE MAY hire direct employees either from outside our work force or WE MAY choose to offer direct hire status to agency employees. WE WILL include the directly hired employees in the certified collective-bargaining unit.

WE WILL provide the Union with the requested information concerning temporary agency employees and the agencies which provided them.

ST. GEORGE WAREHOUSE