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Saint-Gobain Abrasives, Inc. *and* International Union of Automobile, Aerospace & Agricultural Implement Workers of America, Region 9A, AFL–CIO. Cases 1–CA–39789 and 1–CA–40476

October 29, 2004

DECISION AND ORDER

BY MEMBERS SCHAUMBER, WALSH, AND MEISBURG

On April 27, 2004, Administrative Law Judge David L. Evans issued the attached decision. The General Counsel, the Charging Party, and the Respondent filed exceptions and supporting briefs, and the Respondent and the Charging Party filed answering briefs.

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

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

The judge found that the Respondent did not violate Section 8(a)(5) and (1) of the Act by implementing an interim health insurance program in November 2002. We agree with this finding. In *Stone Container*, 313 NLRB 336 (1993), the employer notified the union during negotiations for a first collective-bargaining agreement that, based on its annual review of wages and benefits, it could not afford to give employees a wage increase that year. The employer made its proposal in time to allow for bargaining over the matter, but the union made no counterproposal concerning the wage increase and did not raise the issue again during negotiations. Reasoning that the annual wage review was a discrete event that coincidentally occurred while contract negotiations were in progress, the Board concluded that the employer satisfied its bargaining obligation regarding the wage increase and was not required to refrain from implementing the change until an impasse had been reached in bargaining for a collective-bargaining agreement as a whole. See also *Brannan Sand and Gravel Co.*, 314 NLRB 282 (1994).

The health insurance program changes at issue here are similar to the annual wage increase involved in *Stone Container*. The record shows that the Respondent had an annual process of reviewing and adjusting its health insurance programs. Accordingly, the Respondent was not obligated to refrain from implementing its proposed changes until an impasse was reached in bargaining for a collective-bargaining agreement as a whole. *Brannan Sand and Gravel Co.*, supra. See also *Nabors Alaska Drilling, Inc.*, 341 NLRB No. 84 (2004). We adopt the judge's finding that the parties were at impasse on November 15, 2002, when the Respondent announced its intention to implement its final interim health insurance proposal. Under these circumstances, we find that the Respondent did not violate Section 8(a)(5) and (1) of the Act by implementing an interim health insurance program in November 2002.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Saint-Gobain Abrasives, Inc., Worcester, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C., October 29, 2004

Peter C. Schaumber, Member

Dennis P. Walsh, Member

Ronald Meisburg Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] In adopting the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act by changing the scheduled work hours of bargaining unit employees without prior notice to and bargaining with the union, we rely on the judge's finding that there was no past practice of reducing the hours of bargaining unit employees in response to the Respondent's annual, end of the calendar year slowdown in business. In these circumstances, it is unnecessary to pass on whether the change in hours would have been lawful if a consistent past practice had existed, and we therefore find it unnecessary to rely on *Eugene Iovine, Inc.*, 328 NLRB 294 (1999), enfd. 1 Fed. Appx. 8 (2d Cir. 2001).

Member Walsh agrees with the judge's analysis and application of *Eugene Iovine*.

[2] The Respondent's motion to expedite the decision is denied as moot.

[3] We do not reach the issue of whether the Respondent was required to negotiate to impasse before implementation, because it is unnecessary to the disposition of this case. We also find it unnecessary to rely on the judge's discussion of *R.B.E. Electronics of S.D.*, 320 NLRB 80 (1995).

In Member Walsh's view, impasse in bargaining is a prerequisite to lawful unilateral implementation of a bargaining proposal in situations governed by *Stone Container*.

Kevin Murray, Esq.,for the General Counsel.
Laurence Levien, Joshua Waxman, and *Andrew Herzig, Esqs.*, of Washington, D.C., for the Respondent.
Thomas W. Meiklejohn, Esq., of Hartford, CT, for the Charging Party.

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This case under the National Labor Relations Act (the Act) was tried before me in Boston, Massachusetts, on November 18-21, 2003. On March 8 and November 18, 2002,[1] International Union of Automobile, Aerospace & Agricultural Implement Workers of America, Region 9A, AFL–CIO, (the Union), filed the charges in Cases 1–CA–39789 and 1–CA–40476, respectively, against Saint-Gobain Abrasives, Inc. (the Respondent). After administrative investigation of the charges, the General Counsel of the National Labor Relations Board (the Board) issued a complaint alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by unilaterally changing employees' hours of work and by unilaterally changing employees' medical insurance plans. The Respondent duly filed an answer to the complaint admitting that this matter is properly before the Board but denying the commission of any unfair labor practices.

Upon the testimony and exhibits entered at trial,[2] and after consideration of the briefs that have been filed,[3] I make the following findings of fact and enter the following conclusions of law.

I. JURISDICTION AND LABOR ORGANIZATION'S STATUS

The complaint alleges, and the Respondent admits, that at all material times the Respondent, a corporation with an office and place of business located in Worcester, Massachusetts, is engaged in the manufacture and sale of grinding wheels. Annually in the conduct of that business, the Respondent sells and ships from its Worcester facility goods valued in excess of $50,000 directly to purchasers located outside Massachusetts. Therefore, at all material times the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. As the Respondent further admits, the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent is a French concern that has over 100 facilities and 20,000 employees in the United States and Canada. The Respondent's American headquarters is in Valley Forge, Pennsylvania. At its Worcester facility, the Respondent employs about 800 production and maintenance employees (the unit employees). In an election that the Board conducted on August 23–24, 2001, the unit employees selected the Union as their collective-bargaining representative. The Respondent filed objections to conduct affecting the results of that election, but those objections were overruled by the Board on December 20, 2001.[4] Bargaining between the parties began in February 2002, but no collective-bargaining agreement has resulted.

The complaint alleges two discrete violations of Section 8(a)(5). Chronologically, the first allegation is that "[o]n or about January 5, 2002, the Respondent reduced the scheduled hours of employees in the Mix and Mold Department from 8 hours to 7 1/2 hours per shift" without bargaining with the Union. The second Section 8(a)(5) allegation is that "[a]bout mid-November 2002, the Respondent implemented an interim health insurance program for the calendar year 2003" also without bargaining with the Union.

A. The Unilateral Change in Medical Insurance

1. Background

Over the years, the Respondent has offered employees a "Flexible Benefits Program" that includes medical insurance, dental insurance, disability insurance, life insurance, and other benefits. The Flexible Benefits program allows employees the opportunity to select a package of benefits during an annual reenrollment period. The Respondent credits each employee with a certain amount of dollars to allocate among the benefits that he or she selects. The medical insurance component of the Flexible Benefits Program allows employees to select a medical insurance plan from among several options. The Respondent has offered 2 self-insured plans on a national basis, both of which are administered by Cigna Corp. and which are known respectively as the "Cigna POS" (point of service) Plan and the "Cigna PPO" (preferred provider organization) Plan. Other plans are offered regionally. For each of its localities, including the Worcester area, the Respondent has established certain standards which a medical insurance plan must meet in order to be included in the Flexible Benefits Program. (This is called the plan design.) Medical insurance carriers are invited to quote premium rates for their plans that meet the localities' plan designs. Each plan that is offered in the Flexible Benefits Program package must offer four options to the employees: employee only, employee and spouse, employee and children, and family coverage . Of course, the premium rates charged by the insurance companies have varied, depending upon the type of coverage selected, with employee-only coverage being the least expensive and family coverage being the most expensive.

The insurance companies that have submitted qualifying plan designs (that is, those that contained the coverages that were specified by the Respondent when it solicited bids) have had

[1] Unless otherwise indicated, all subsequently mentioned dates are in 2002.

[2] Certain passages of the transcript have been electronically reproduced; some corrections to punctuation have been entered. Where I quote a witness who restarts an answer, and that restarting is meaningless, I sometimes eliminate without ellipses words that have become extraneous; e.g., "Doe said, I mean, he asked . . . " becomes "Doe asked . . . . when quoting exhibits, I have retained irregular capitalization, but I have sometimes corrected certain meaningless grammatical errors rather than use "(sic)." All bracketed entries have been made by me.

[3] All parties submitted briefs; I allowed reply briefs, which the parties have also submitted. I grant the General Counsel's unopposed motion on brief to correct the transcript, p. 798, L. 20, to change "discussion" to "discretion."

[4] *Saint-Gobain Abrasives, Inc.*, 337 NLRB No. 8.

differing copays, deductibles and other elements, and, of course, they have had differing premiums. Each year, the plan with the lowest premium has been called "the low-cost plan." Prior to 2000, the Respondent's practice throughout the United States was to fund 100 percent of the low-cost plan for each type of coverage (self, family, etc.). Thus, if an employee selected the low-cost plan, the Respondent would pay the entire premium cost. If an employee selected another, more expensive plan, he or she would be required to pay the difference. In 1999, the Respondent's corporate headquarters announced a goal of reducing its contributions to healthcare premiums to an amount equal to 85 percent of the premium of the low-cost plan in each area, and the employees would pay the balance of the premium for any plan that he or she selected (15 percent for the low-cost plan and a greater amount if the employee selected a more expensive plan).

The Respondent did not immediately impose its 85 percent funding objective at the Worcester plant. Rather, beginning in calendar year 2000, the Respondent moved Worcester to a 90-percent funding basis. That is, for each type of coverage, the Respondent contributed the equivalent of 90 percent of the cost of the low-cost plan. If the employee selected the low-cost plan, he or she would pay 10 percent of the premium for coverage under that plan. If the employee selected a more expensive plan, then the Respondent would contribute the same amount of dollars (an amount equal to 90 percent of the low-cost plan) and the employee would pay the balance. This employer-contribution basis of 90 percent of the low-cost plan was in effect at the time that the Union was certified as the collective-bargaining representative of the unit employees, and it remained in effect through 2002.

In the Worcester area in 2002, in addition to Cigna POS and Cigna PPO, the Respondent offered to its employees two plans that were underwritten by an area insurance company, Fallon Community Health Plan. Fallon's plans were nominally different, one being named "Fallon Plus," and the other being named "Fallon Affiliates." Fallon Affiliates had a somewhat wider network of physicians and hospitals, but there was little practical difference between Fallon Affiliates and Fallon Plus. Employees were designated as being participants in Fallon Plus or Fallon Affiliates depending on which primary care physician they selected. The benefits and premiums were the same, and employees could freely change from a physician in one plan to a physician in the other. Therefore, as far as the employees were concerned, there was only one Fallon plan before 2003. Of the approximately 800 unit employees, 410 selected either Fallon Plus or Fallon Affiliates during 2002.

In the past, renewals in the medical plans were essentially automatic. If an employee subscribed to a plan, he or she did nothing to renew in that plan for a succeeding year. If, however, a plan was not to be reoffered for some reason, employees who had subscribed to it were informed that they needed to reenroll in another. Employees who failed to make a new selection would be assigned by default to a "catastrophic plan" offered by Cigna. The catastrophic plan was a lower-cost plan which was only employee-only (i.e., no family, spouse, or children options) and provided lesser benefits, had higher copays and deductibles, and the employee would be charged 10 percent of the premiums for that plan. (The catastrophic plan, because of its limited coverage, had lower premiums than all of the other plans, but its costs were disregarded in figuring employer contributions under the low-cost plan system).

In the past, upon receipt of bids for various qualifying plans, the Respondent's headquarters in Valley Forge began negotiations with the carriers for final rate quotes. These negotiations included presentations at the local levels, such as at Worcester. After the local presentations, and after further review by the Respondent's headquarters, final rate quotes for the different plans that were to be offered to employees were determined. Although in the past rates were determined only by negotiations between the Respondent and the carriers, in 2002, of course, the Respondent had a duty to negotiate with the Union about medical insurance (as well as a duty to negotiate with the Union about other terms and conditions of employment, including specifically all of those benefits that fell within the Respondent's Flexible Benefits Program).

The Respondent has historically used a third-party vendor to conduct the processes of annual reenrollments of employees in the Flexible Benefits Program. Prior reenrollment periods usually began with the vendor's distribution to employees of enrollment packets. This distribution was usually conducted about 10 days in advance of reenrollment periods. The reenrollment periods usually began in mid-October and lasted about 4 weeks. (Employees could enroll or change options by telephone or through the vendor's web site.) After a reenrollment period concluded, it usually took about 6 weeks for "back end processing" by the vendor which included processing the employees' selections of medical insurance plans and issuing new employee identification cards for those plans. The employees' selections of plans always took effect on January 1 of the following years. Before 2002, the Respondent's vendor for annual enrollments was Sykes Health Plan Services; on July 1, 2002, however, the Respondent engaged a firm called "Citystreet" as the vendor.

Events prior to August 29

At the collective bargaining that began in February, the Union's chief spokesperson was Carol Knox, Sub-Regional Director of the UAW. Knox was assisted by Joe Santos, an international representative of the UAW. Knox and Santos were assisted by several employee members of the Union's bargaining committee. The Respondent was represented by attorney Thomas Smith who was assisted principally by Dennis Baker, who is the Respondent's senior vice president of human resources, and Mark Stacey, who is the Respondent's manager of human resources at the Worcester facility. As the bargaining proceeded, each party distributed flyers to employees to state their respective views and positions. The Union's flyers were entitled "Table Talk"; the Respondent's flyers were entitled "Bargaining Update."

The parties initially agreed to discuss "language" items before economic items such as medical insurance. At a bargaining session that was conducted on May 20, Smith stated that the Respondent was beginning to solicit bids from insurance companies for 2003 healthcare coverage for the unit employees. At a June 6 bargaining session, Knox asked Smith to solicit a bid

from Blue Cross/Blue Shield (Blue Cross) because some of the employees wanted that plan. Blue Cross had been offered to the employees in the past, but not since 1997. Baker replied that the Respondent had already solicited a bid from Blue Cross and that the Union would be informed when Blue Cross responded. By letter dated June 17, Blue Cross replied to the Respondent that it would not be submitting a bid to insure the Worcester employees. Blue Cross stated that the reason was that the Respondent's low-cost-plan "contribution strategy favors the least expensive plan offered" which would decrease the likelihood that 70 percent of the employees would chose Blue Cross, which is the target of Blue Cross's underwriting guidelines.

Also on June 6, an article in the local newspaper stated that Fallon had announced that, beginning July 1, "it will replace its existing plan with two new versions. . . . " The article named the new plans as "Fallon Direct" and "Fallon Select." Stacey testified that this article was his first notice that Fallon Plus and Fallon Affiliates would not be offered in 2003. Stacey further testified that representatives of Fallon came to the plant on June 24 and described the new plans. The representatives described Fallon Direct as being a plan with a smaller network of physicians than Fallon Select and, therefore, less expensive than Fallon Select. The representatives also stated that Fallon Direct would have lower copays for office visits and drugs.

At an August 20 bargaining session, Smith told the Union that during the next session the Respondent would be making a presentation and proposal on healthcare (even though all language issues had not been resolved).

The August 29 bargaining session

Robert Morsilli is an associate in Smith's law firm. Morsilli took detailed notes of all bargaining sessions, and the Respondent offered a complete set of those notes for the 19 bargaining sessions that were conducted from August 29 through November 25. The parties stipulated that Morsilli took the notes "as verbatim as possible." Also, the General Counsel offered extracts of Morsilli's notes as they pertained to discussions about the medical insurance issue. Both exhibits were received without objection. A testament to the accuracy of Morsilli's notes is the fact that, with rarest of exceptions, the witnesses did not dispute their content in any way. During the course of the proceeding, the Respondent furnished each party with 3 computer disks that collectively contain an electronic copy of all of Morsilli's notes.[5] Rick Zeena, a member of the Respondent's North American human resources staff, attended the bargaining sessions and also took some notes that were received in evidence. As well, some of the employee members of the Union's bargaining committee attended and took notes, some of which were received in evidence.

The 2002 medical insurance policies that covered the bargaining unit employees were scheduled to expire on December 31. This presented no particular problem for the employees who had subscribed to Cigna POS and Cigna PPO during 2002; they would be automatically re-enrolled in those plans unless they wanted to choose another. However, because Fallon Plus and Fallon Affiliates were being discontinued on January 1, 2003, the approximately 400 unit employees who had subscribed to those plans in 2002 would have to choose one of the plans that was to be offered in 2003 or be relegated to the catastrophic plan by default.

At a bargaining session that was conducted on August 29, Smith asked the Union to participate in interim bargaining on the issue of employee medical insurance. Smith prefaced a presentation on the issue by stating:

> Often in first contract negotiations, we need to have interim bargaining on issues that arise. That's how we view this. We have some issues arising, including obligations to the insurers. We have commitments to make. There is open enrollment for employees. Even though this will be effective on January 1, we can't do it in December. Basically, we are proposing to follow the practice that has been in effect in the past with respect to insurance, specifically medical insurance. We're going to provide you with a number of details. We must reach agreement on this because if we do not, people may find themselves in plans that they don't want because their plans do not exist. We don't have any discretion in this area.

After discussions of other issues such as manager rights, Stacey began a slide-show and handout presentation entitled "Flex Benefits 2003—Reenrollment and Report on Healthcare." The second slide/page of the presentation states that for 2003 the Respondent was proposing to continue funding of "90 percent of low-cost plan." After then mentioning the Respondent's proposals to continue its practices on dental insurance, life insurance, accidental death and dismemberment insurance, and limitations, the second page concludes: "Reenrollment period is 10/21—11/15." Stacey's August 29 presentation recited that Blue Cross was "Gone–They wouldn't even quote this year." The presentation then recited that Prudential and Harvard/Pilgrim plans were also "gone." The remaining possible plans the Respondent listed as "Cigna–Our 2nd year" and "Fallon--The only mainstay, 25 years."

A section of Stacey's August 29 presentation entitled "2002 vs. 2003 Costs" (the costs section) listed plans that the employees had been offered in 2002, the number of employees who had enrolled in each 2002 plan, the total costs of each 2002 plan, the employer/employee splits of the 2002 costs, the plans that the Respondent proposed to offer the unit employees in 2003, the total costs of the 2003 plans and the proposed employer/employee splits of those costs.[6] The 2002 plans, and the number of employees who were enrolled in each were: the "Fallon HMO" plan, 410 employees; the Cigna POS plan, 393 employees; the Cigna PPO plan, 17 employees; and the Cigna catastrophic plan, one employee.

The costs section of Stacey's August 29 presentation disclosed that in 2002 the monthly premium of Cigna POS was $586.00; Cigna PPO was $670.00, and the Fallon plan(s) was (were) $589.68.[7] Therefore, Cigna POS was the least expen-

[5] For the possible purposes of facilitating review, I hereby receive one set of those disks as Administrative Law Judge's Exhibits 1(a), (b) and (c).

[6] G.C. Ex. 9, pp. 20–21.

[7] All of the figures that I list here apply to family coverage, which was the coverage that most employees selected. (Stacey's August 29

sive of the plans that the Respondent offered in 2002, and it had therefore been designated as "the 2002 low-cost plan" by the Respondent. The cost section of Stacey's August 29 presentation disclosed that in 2002, the Respondent paid $527.40 of the $586.00 cost of Cigna POS (90 percent), and the employees who selected that plan paid the balance, $58.60 (10). Of the $670.00 cost of Cigna PPO in 2002, the Respondent paid $527.40 (90 percent of the low-cost plan, Cigna POS), and the employees paid $142.60 (the balance, which works out to be 21.2 percent of the premium for Cigna PPO). Of the $589.68 cost of the 2002 Fallon plan; the Respondent paid $527.40 (again, 90 percent of the low-cost plan, Cigna POS), and the employees paid $62.28 (the balance, which works out to be 10.6 percent of the 2002 premium for Fallon).

The costs section of Stacey's August 29 presentation proposed that in 2003 the Respondent would offer Fallon Direct, Fallon Select, Cigna POS, Cigna PPO and catastrophic plan. The monthly premium for family coverage was listed as $598.50 for Fallon Direct, $684.06 for Fallon Select, $654.00 for Cigna POS, and $741.00 for Cigna PPO. Therefore, among the plans that the Respondent proposed for 2003, Fallon Direct had the lowest cost. The splits that the Respondent proposed for 2003 were: of the $598.50 monthly premium for Fallon Direct, the Respondent would pay $538.65 (90 percent) and an employee who selected Fallon Direct in 2003 would pay $59.85 (10 percent); of the $684.06 for Fallon Select, the Respondent would pay $538.65 (90 percent of the cost of Fallon Direct, the low-cost plan) and the employee would pay $149.41 (the balance, which works out to be 21.8 percent of the 2003 premium for Fallon Select); of the $654.00 for Cigna POS, the Respondent would pay $538.65 (again, 90 percent of the cost of Fallon Direct, the low-cost plan) and the employee would pay $115.35 (the balance, which works out to be 17.6 percent of the 2003 premium for Cigna POS); and of the $741.00 for Cigna PPO, the Respondent would pay $538.65 (again, 90 percent of the cost of Fallon Direct, the low-cost plan) and the employee would pay $202.35 (the balance, which works out to be 27.3 percent of the 2003 premium for Cigna PPO).

Stacey's August 29 presentation further contained charts that compared the coverages and copays of Fallon Direct, Fallon Select, Cigna POS and Cigna PPO and concluded with (in large type):

> Employees Must Re-enroll Each Year, Otherwise Benefits "Rolled Over."
>
> Fallon members must choose another plan, otherwise default medical will be assigned:
>
> –Catastrophic PPO, employee only.

Knox asked Stacey if Fallon Select was most similar to the 2002 Fallon plan; Stacey replied that both Fallon Direct and Fallon Select were similar, the essential difference being that Fallon Select (and the 2002 plan) had access to a wider network of physicians than Fallon Direct. Stacey ended his presentation with:

> Employees must re-enroll each year through our outside vendor. If an employee does not re-enroll, benefit selections from the prior year will be extended into the next year. However, for Fallon members, because the current Plan will be eliminated, they must select another health plan. Otherwise, the catastrophic plan will be automatically assigned. The catastrophic plan offers a greatly reduced level of benefits and does not cover family members. Again, the reenrollment period this year is October 21 through November 15.

The session ended with Knox stating that the Union would review the presentation and would have questions later, and that the Union would be working on medical insurance, but: "We will not be ready on that by next time."

The September 9 bargaining session

At a bargaining session that was conducted on September 9, Knox asked for certain information about the plans that the Respondent proposed, including summary plan descriptions, drug prices, hospitals and doctors that would be available under each plan, and the correspondence that the Respondent had had with all plans. Knox further stated:

> In general, you proposed an interim agreement on healthcare. We are not interested in that. This is a top-three issue for the membership. We feel there is plenty of time to get this done, and we are not going to do it piecemeal.

Smith replied:

> This is not something that we can do in December. The reason we put this on the table in advance is because we need time. We must do it soon. We have followed the established practice with respect to healthcare in this Company. We are willing to talk to you about this, but we don't want you to lose sight of that. We have every legal right to continue to do that. If we don't have an agreement, the people who haven't elected -- and we can't make Fallon offer the plan that they offered last year -- those people will be defaulted. That would be negative for everyone. That is another reason that we put this out there now. I have no interested in piecemeal bargaining. But given my experience and the timing, I don't believe we have enough time to reach an agreement for this year and going forward. We are very concerned about the timing, even for interim healthcare. This is a very significant economic piece. We can't stop you, if you don't want to talk about this on an interim basis. But I don't think we have enough time to wrap up the contract before we have to decide what to do about health insurance.

Knox testified that she initially refused to engage in interim bargaining on health insurance because the parties had made substantial progress on language issues by the time that the Respondent proposed interim bargaining, and:

> We had really focused on trying to conclude the bargaining on the significant language issues, and it felt like everything was moving in that direction; so internally in the Union, we were preparing to put our economic propos-

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presentation and proposal also listed the cost splits for employee only, employee and spouse, and employee and child; the ratios are constant.)

als on the table in a couple of weeks. So I thought that November 1st was more than realistic for getting a whole contract. I didn't think it would make sense to segregate the healthcare in light of that.

The Union's September 11 Table Talk

On September 11, the Union issued a Table Talk that claimed that Fallon Direct was substantially inferior to the 2002 Fallon plan because it offered access to fewer physicians and hospitals. The Union represented Fallon Select as "comparable" to the 2002 Fallon plan. The Union further stated that by offering Fallon Direct as the low-cost plan, and offering to play only 90 percent of that (allegedly inferior) plan the Respondent was shifting the bulk of the 2003 increases in healthcare costs to the employees. The September 11 Table Talk[8] contained a table that supports this contention.

In the September 11 Table Talk, the Union further equated Fallon Select with the 2002 Fallon plan. With that proposition as a given, the Union's table reflects that the employees who selected Fallon Select for 2003 would be faced with a monthly increase (over, again, the cost of the 2002 Fallon plan(s)) of $83.13;[9] employees who selected Cigna POS would be faced with an increase of $56.75;[10] employees who selected Cigna PPO would be faced with an increase of $59.75;[11] but employees who did select Fallon Direct (the allegedly inferior plan) would have a reduction in monthly premium costs of $2.43.[12] Thus under the Respondent's proposals, according to the Union, the employees were faced with accepting an inferior plan (Fallon Direct) or bearing as much as $83.13 per month in increased medical insurance costs if they selected some plan other than Fallon Direct, while the Respondent would bear only $11.25 in increased costs, no matter what other plan an employee selected. The Union concluded the September 11 Table Talk with: "The Company's proposal is totally unacceptable."

Stacey testified that the September 11 Table Talk was "misleading," but he did not testify how it was misleading, except to say, generally, that Fallon Direct "was really a good plan."

The September 12 bargaining session

At a bargaining session that was conducted on September 12, Stacey delivered to Knox a letter stating that (1) he was attaching a listing of drugs for the Cigna and Fallon plans; (2) the summary plan description for the Cigna plans and the 2002 Fallon plan had been delivered to the Union in February; (3) Fallon had not by that time produced a summary plan description for its 2 new plans; (4) he was attaching a listing of the provider networks for the 2003 plans; the network for the 2002 plans had been provided in February; and (5) he was attaching the correspondence relating to providers of 2003 plans. The last item was the June 17 letter from Blue Cross, declining to bid for 2003, as mentioned above. The list of drugs was not offered, but Knox testified that it was unintelligible because it listed drugs by general classifications and the Union's bargaining committee members could not tell if drugs that employees used were included in any of the classifications. Knox denied that the Union had received the 2002 Fallon summary plan description in February (and she testified that she did not receive it until the November 8 session). Knox testified that the listing of provider networks that she was furnished in February was later shown to be inaccurate for 2003 (and she testified that she did not receive a listing for the 2003 Fallon network until November). Knox testified that the lack of information, or misinformation, made bargaining difficult for the Union, but she did not give examples of how that was so. (The complaint does not allege that the Respondent violated Section 8(a)(5) by failing to furnish relevant bargaining information.)

The September 18 bargaining session

At a bargaining session that was conducted on September 18, Stacey told the Union that the benefits of Fallon Direct were essentially the same as the 2002 Fallon Plus plan, but he conceded that Fallon Direct had a smaller network of physicians and hospitals available to employees. (Because Fallon Direct and Fallon Select had different premiums, of course, employees would not be able to shift between Fallon Direct and Fallon Select in 2003 as they had been free to do between Fallon Plus and Fallon Affiliates in 2002.) Stacey further pointed out that Fallon Direct still had a large network and that it had lower copays than Fallon Select; employees could therefore save money in that regard, as well as by having premiums that were (slightly) lower than those of Fallon Plus and Fallon Affiliates in 2002. Stacey further stated that, no matter what healthcare plan is adopted, healthcare costs were rising rapidly and Fallon Direct was still better than anything that other area employers were offering.

The Respondent provided the Union with the correspondence from healthcare providers that the Union had requested, and promised, again, to provide the 2003 Fallon summary plan descriptions when they were received.

Bill Viano, an employee member of the Union's bargaining committee asked: "Would it be fair to say that the more expensive the plan, the less [percentage] the Company funds?" Stacey replied: The Company funds 90 percent of the low-cost plan. If the employee picks a higher cost plan, they pick up the additional cost. That's the best way to answer the question." (That is, Stacey evaded Viano's question; the answer was, as explained infra, yes.)

The Union's September 22 resolution

At a September 22 meeting, the Union presented to the membership a list of about 50 bargaining demands which were approved. One of those demands was "Maintain all other insurance plans, fringe benefits and past practices at the same or better level of benefits at no additional employee cost." On the

[8] R. Ex. 3(a).

[9] The 2002 employee share of the Fallon plan was $62.28, and the Respondent was proposing that for 2003 the employee share of the cost for Fallon Select would be $145.41, as mentioned above.

[10] The 2002 employee share of Cigna POS was $58.60, and the Respondent was proposing that for 2003 the employee share of the cost for Cigna POS would be $115.35. (Again, Cigna POS was the low cost plan in 2002).

[11] The 2002 employee share of Cigna PPO was $142.60, and the Respondent was proposing that for 2003 the employee share of the cost for Cigna PPO would be $202.35.

[12] Again, the 2002 employee share of the Fallon plan was $62.28, and the Respondent was proposing that for 2003 the employee share of Fallon Direct would be $59.85.

same date, the membership passed a resolution that is introduced by several "Whereas" clauses, one of which was "Whereas the Company has threatened to move ahead with its healthcare proposal in November." The resolution was that "if the Union and Company have not reached a tentative agreement on all outstanding matters by November 1, 2002, the Union membership shall meet promptly to determine the appropriate course of action to secure a fair contract for all."

The September 27 bargaining session

At a bargaining session that was conducted on September 27, after discussion of several other topics, Smith brought up the topic of the Respondent's annual health fair. As Smith described the practice to Knox, the Respondent each year conducts a program of distributing information about health and giving flu shots. Smith stated:

> We would like you to reconsider your position on health insurance. But we are going to be running health fairs in October. We will also be giving flu shots at the health fairs. The question is whether you want us to make those health fairs available to bargaining unit employees. We could do a separate health fair later on. People will not be signing up for insurance at the health fairs. [Again, employees re-enroll by going online or using a toll-free telephone number.] Our practice is to include everyone. We suggest that we continue to do that. But if you don't want us to do that, then you should tell us.

Stacey then told the Union that health fairs would begin on October 21 and that healthcare providers were scheduled to attend to answer employee questions about plans that will be available to them in 2003. Stacey added: "Basically, the health fair is an opportunity to get general information about the benefits."

"Reenrollment packets" are compendia of documents relating to the benefits, including healthcare, that are annually offered to the Respondent's employees as part of their Flexible Benefits Program. Employees review the reenrollment packets when deciding which options, including healthcare providers, that they wish to take for the following year. After Stacey described the health fair practice, Smith added:

> We usually send a notice 10 days in advance with the enrollment packages. That's another issue. Unless we have agreement, our intent is not to send the enrollment packages out to the bargaining unit employees. Unless you tell us differently. But there is no reason why they cannot participate in the health fair.

The words "10 days" is not contained in Morsilli's notes; however, Zeena had such an indication in his notes, and Zeena testified that he also remembered Smith making the "10 days" comment. Knox was not called in rebuttal to deny Zeena's testimony on the point, and I found Zeena's testimony to be credible.

The September 30 bargaining session

At a bargaining session that was conducted on September 30, after several other topics had been discussed, Knox was required to leave the session because of a family emergency. Santos took over for her. Santos told Smith that the Union had no objections to the unit employees participating in the health fair. Smith stated that, at the fair, if there was no interim agreement on healthcare, the Respondent would issue reenrollment packets only to non-bargaining-unit employees, unless the Union indicated that it wanted the Respondent to issue the packages to the bargaining unit employees (even absent an interim agreement on healthcare). Santos replied that he would have Knox give Smith a telephone call on that matter. Smith replied:

> Fine. The theory is that we suggested that we do . . . what we proposed on health insurance. We said that we are not going to have an overall agreement in time. We don't want to deprive employees of health insurance. Carol's response was two-fold. First, she said that you wanted to bargain about what we offer to employees. Second, she said that you are not interested in an interim agreement on health insurance. That's what I understood. Therefore, if we send out the reenrollment packets to employees, it's almost direct dealing. We are not going to do that. We would like to reach an interim agreement on health insurance. I continue to have concerns that bargaining unit people are not going to have health insurance. But there are time concerns here. On January 1, the current Fallon Plans disappear. We want people to have coverage. It's your call on that.

Santos asked: "Are you saying that as of January 1, if there is no agreement, there will be no health insurance?" Stacey replied: "If an employee doesn't make changes during the open enrollment period, the previous-year elections will roll over. But with the Fallon Plan being eliminated, employees must reenroll. If they don't re-enroll, they will be defaulted to the catastrophic plan." Smith concluded the session by stating:

> I will make one more plea for you to agree on interim healthcare. This is too risky not to agree. We know about November 1st and all of the other pressures. This is not worth making into a bargaining chip.

The October 4 bargaining session

At a bargaining session that was conducted on October 4, the Union and the Respondent agreed that agreement on all aspects of the Flexible Benefits Program was necessary before any enrollment period began because it made no sense to offer the employees partial reenrollments in that program. Stacey then stated:

> We've talked a little bit previously about passive reenrollment. If people don't make any changes, then their benefits simply roll over in the next year. However, we have an issue with Fallon changing plans. Therefore, if the people who are currently in Fallon do not elect medical insurance, they will be defaulted into the catastrophic plan. I said the other day that the people in Cigna may be okay because that plan hasn't changed. But as we discuss it, we do not have an agreement here at the table. They may also be defaulted.

Knox proposed that the Respondent should use its bargaining power with Fallon and seek to have Fallon extend the 2002 plan into 2003. Smith expressed doubt that Fallon would do such a thing, when Fallon policies at all other employers were expiring by January 1. Knox told Smith that Fallon would be more inclined to grant an extension if a collective-bargaining agreement were in place, that a complete contract was probably not possible by October 21 (when the Respondent planned to start the health fair), "but January is reasonable." Smith replied that it was not "realistic" to assume that there would be a collective-bargaining agreement even by January and again appealed to the Union to start interim bargaining on the issue of medical insurance. Smith stated:

> It doesn't mean it will be in the collective bargaining agreement. And you are not stuck with it. We can continue to bargain over the healthcare in collective bargaining agreement. That is a reasonable option. It's one that many unions agree with. Don't hold healthcare hostage to a collective bargaining agreement. It's too important an issue.

Knox replied: "We are more than willing to sit down and negotiate healthcare. But we're not just going to roll over. We should give bargaining a chance."

After that, Knox stated: "We would like to present our economic proposals starting with wages and classifications." The proposal that Knox presented covered, at least generally, every conceivable economic aspect of the employment relationship. Knox extensively explained these proposals, never indicating that any of them were for benefits to be instituted on an interim basis. (In fact, part of the "Wages and Classifications" proposal was: "Provide guaranteed annual across-the-board increases in wages and pay bands.")[13] The medical insurance portion of the proposal was:

> 1. Maintain or improve the level of benefits and choice of healthcare providers available in 2002 at no additional cost to the employee.
> 2. Offer a 100 percent Company paid comprehensive health plan: specifically, offer Fallon Direct at no cost to employees.
> 3. Maintain all deductibles and copays, including prescription copays, at 2002 levels or better.
> 4. Increase the amount paid to employees who decline coverage through the company from $1000 to $2000.[14]

(In the second paragraph of the proposal, the clause that begins with "specifically" does not appear in a copy of the proposal that was attached to R. Ex. 1(h). It does appear, handwritten, on the copy that was introduced as G.C. Ex. 15. Knox testified that she amended the proposal in this regard orally when it was presented. Knox's testimony is supported by Morsilli's notes of the session which attribute to Knox the statement: "In Item 2, we propose that the Company pay 100 percent of the Fallon Direct Plan. For other plans, we propose that the Company maintain the current contributions at the 2002 rates.") There was no discussion of any of the Union's proposals. The session closed with observations by Knox that the Respondent's proposals for medical insurance were far too expensive for the employees, in terms of copays and drug prices, as well as premiums.

The October 10 bargaining session

At a bargaining session that was conducted on October 10, the Union argued that the Respondent's drug-benefit proposals were far too expensive for the employees. Smith acknowledged that the Respondent's proposals were expensive for the employees, but he argued that they were still better than what most employees in the area had to pay for drugs. Stacey then stated:

> Many employees are saying that the Union says reenrollment is not a big deal and there is plenty of time. That is just not true. I have been in Human Resources for 14 years. I've done 14 reenrollments. All of them have been successful. This one is in trouble. We are running out of time. Let me talk about the process a little bit. First, we assemble the individual packets and then we mail them to the homes. Employees need time to review the packets and do research. Typically, the vendors send information to the homes also. Then we have reenrollment. You know that it is scheduled for October 21st, but you may not know that it is a two-step process. Employees have a certain amount of time to either log in online or phone in their reenrollment choices. After that period of time, the system is shut down for one week. Citystreet, our vendor, then generates the reports. Those reports are mailed to the employees. Employees have an opportunity to review their choices, look at the cost and any errors they may have had. Then we open up reenrollment to employees again for any changes. The reports are then generated again and sent home. After that is done, the vendors need time. The first step takes about four weeks in total. The second step takes about six weeks. That is a very tight schedule. We are running out of time. We made a fair and reasonable proposal on August 29th. The Union did not respond with anything until October 4th. So we lost a month right there. Since then you still refuse to discuss an interim agreement on healthcare. That doesn't even include the other benefits.

Stacey then handed a letter to Knox again urging interim bargaining on the topic of medical insurance. In part, the letter states:

> Despite your indication that you might do so, to our knowledge you have not made a counter proposal with respect to interim health insurance.
>
> As we have told you, the Union's position could cause the possible disruption of benefits for bargaining unit employees and their families, particularly with respect to medical insurance coverage. You are aware that the Company's open enrollment period begins on October 21, and much needs to be done between now and January 1 *when current benefits are scheduled to expire:*
>
> Reenrollment packages must be assembled and distributed to employees.

[13] See R. Ex. 1(h).

[14] This provision relates to Respondent's policy of offering a cash payment to employees who decline all coverage by any Employer policy because they have coverage through their spouses.

> Employees need time to review the material, consider their options, and determine which plans best fit their personal and family needs. During this time, the providers normally mail information to employees to help them have a full understanding of their program.
>
> Our two-step enrollment process allows employees to enroll, receive a confirmation of their choices and costs, and then employees have the opportunity to change their choices or correct errors. This process takes at least four weeks.
>
> After selections are final, the providers need about six weeks to process the information and deliver benefit materials, including ID cards, to employees.
>
> As you can see, there is a lot that needs to be done, with very little time remaining to complete this process. ... Again, we urge you to agree immediately to an interim agreement for the Flexible Benefits Program. Thank you.

(The emphasis was Stacey's.)

Knox replied that the Union appreciated the Respondent's administrative problems, but the Union was not going to accept an insurance plan that cost the employees as much Fallon Direct did. Smith replied that the employees, not administrative problems, were the Respondent's principal concern. Smith added that the administrative problems would be handled by the Respondent's headquarters in Valley Forge and by the vendor (Citystreet, as mentioned above).

Baker then addressed Knox and stated:

> We have offered you a reasonable package. It's one of the best in the country. We offered you this package on August 29th. You haven't responded. Instead, you're trying to blackmail this Company. I can tell you we won't buckle. This is a serious issue and the bottom line is that no Company can cover 100 percent of every situation. The point is that under the proposal that we made, health insurance will cost our employees less than it will cost most employees at most companies. Given the economic condition and our competitive situation, we think this is quite good.

Baker used some other language that was quite forceful, and the meeting broke up shortly afterwards.

The Respondent's October 16 and 17 communications

On October 15, the parties conducted a bargaining session during which healthcare was not discussed. On October 16, the Respondent issued a Bargaining Update that stated, inter alia, that at the October 15 session the topics of layoff and recall, seniority, hours of work and overtime and educational assistance were discussed, but: "The Union again did not make a counterproposal to the Company's August 29 proposal on interim healthcare."

By letters dated October 17, the Respondent informed the employees, inter alia, that "On August 29, the Company proposed an interim healthcare plan to the Union that would ensure employees have medical insurance coverage and other benefits on January 1, 2003. The Union to date has refused to make a proposal on interim healthcare, and [has] informed the Company that it is only willing to address healthcare as part of an agreement for a multi-year contract."

The October 21 bargaining session

At a bargaining session that was conducted on October 21, after discussions of matters such as seniority and educational assistance, Knox took issue with the Respondent's October 16 statement that the Union had not responded to its interim proposal for healthcare. Knox stated:

> That is not accurate. We told you that your proposal was unacceptable. We made a proposal on healthcare and all economic issues. We haven't heard from you on that yet. In addition, we said that you should maintain people in their existing plans.

When asked by Smith what she was talking about, Knox replied:

> We want you to keep the current plans at the current contribution rates. Fallon is carving out a lesser plan [Fallon Direct], but Fallon Select is the equivalent of the current Fallon HMO. This plan [Fallon Select] gives people and their families the choice of doctors as their primary care physician. We want you to keep the copays and deductible at the same levels they are now. Nothing has changed about that plan. It does provide a wider choice because U-Mass Memorial is within the plan [network]. We have a big problem with ... prescription copays and the increased deductibles. The biggest issue is the increased cost. Worst case scenario, leave people where they are. We'll take the Fallon HMO.

Smith replied:

> We are going to have more on this for you in the near future. But for now, we want to say that we don't agree with your characterization that you proposed the equivalent of the Fallon HMO. You also mentioned your economic proposals—it was actually a combination of proposals and concepts.

Smith added that the Respondent was doing a cost analysis of all of the Union's economic proposals, and would have that analysis in a few weeks.

The October 23 Table Talk

On October 23, the Union issued another Table Talk in which it first said that it was "simply not true" that the Union had not responded to the Respondent's August 29 healthcare proposal. (The Table Talk did not mention that the August 29 proposal by the Respondent was on an interim basis.) The flyer then repeated the Union's October 4 offer and stated:

> In the meantime, we have told the Company to maintain the current health plan at the current level of benefits, copays and deductibles while we are negotiating. The Company claims that its hands are tied because Fallon is requiring employees to choose between Fallon Direct and Fallon Select. In fact, Fallon Select is the equivalent of today's Fallon HMO. Under Fallon Select, just as under Fallon HMO, employees and their families are free to choose primary care physicians from either the Fallon [Di-

rect] or from over one thousand [physicians in] Fallon Affiliates. Under Fallon Select, copays and benefits remain the same as under Fallon HMO. There is absolutely no reason why the Company cannot maintain Fallon Select, Cigna POS and Cigna PPO while we negotiate.

The October 24 bargaining session

At a bargaining session that was conducted on October 24, after discussions of subjects such as subcontracting, Smith referred to the October 23 Table Talk and asked if it meant that the Union's October 21 proposal on health insurance had been on an interim basis. Knox replied, "I think so. Why don't you tell us what you believe our position is?" After Smith stated what he thought Knox had meant on October 21, Knox replied that the Union wanted the medical insurance benefit to be what Fallon had offered in 2002 and that the Union believed that Fallon Select for 2003 was essentially the same. Knox added that, as best the Union could tell without having received the summary plan descriptions of Fallon Direct and Fallon Select, just the outline of benefits and copays, Fallon Select was a better program for the employees because it had a broader network of physicians and lower drug copays. The parties argued whether Fallon Direct offered a significantly more narrow network than Fallon Select. Smith asked if Knox was proposing that the Respondent offer Fallon Select on an interim basis. Knox replied that the Respondent should maintain Fallon Select and the 2 Cigna plans, and: "The pricing structure should be based on 90 percent of the lowest cost plan of those three." Smith asked if the Union was proposing that the Respondent "use the 2002 costs in 2003." Knox replied: "That's our proposal." When Smith asked where that left Fallon Direct, Knox replied that. "Our proposal on Fallon Direct is that you pay 100 percent."

When Smith asked what portion of the Table Talk was for an interim healthcare proposal, Knox replied, "I'm not sure what you mean when you draw a distinction between interim and contract healthcare." When Smith repeated himself, Knox replied:

> Our proposal is what is listed in Nos. 1 through 4 [of the Union's October 4 proposal] plus the rest of the contract promptly. I hope that's clear. In addition, on the assumption that we don't have a contract, you need to maintain the status quo. With Fallon splitting their plans [to Fallon Direct and Fallon Select], that means using Fallon Select.

Then ensued the following colloquy:

> SMITH: You said, I thought, "in the meantime" [apparently quoting from the October 23 Table Talk] keep the status quo, put in Fallon Select, the Cigna POS and Cigna PPO Plans at the 2002 rates and the 90 percent should be based on whichever one is the low-cost plan, using the 2002 rates. My question now is that you said the company should pay 100 percent on Fallon Direct. My question is are you suggesting that the company do that on an interim basis?
>
> KNOX: Probably not. But if the company asks if we want Fallon Direct as an option at 100 percent, [employer payment] then we would say yes. We think that's a good thing. It would save employees money and it would save the company money. But it doesn't really fit into this structure.
>
> SMITH: With respect to the three plans that you propose at the 2002 rate, what about the 12 percent increase in healthcare costs. Are you proposing that the company eat that?
>
> KNOX: Right.

Knox added that the Respondent had found a low-cost but inferior plan, Fallon Direct, and by using that plan as a basis for its computations of the employee's share of all plans, it had "dumped all of the costs on the employees' backs." Smith and Stacey repeated that the network provided by Fallon Direct included the doctors used by 70 percent of the employees who had subscribed to the Fallon plan in 2002. Knox replied that that statement was inconsistent with prior statements that the Respondent had made.

The October 29 bargaining session

At a bargaining session that was conducted on October 29, the parties engaged in extensive discussions about medical insurance in which they essentially repeated their respective positions about the plans that the Respondent was offering for 2003. To respond to the Union's objections to the drug-coverage part of the plans, Smith invited Knox to find an independent drug plan and offer that. Knox responded: "What I said was [that] this is not out of your control. You can look at different options. You don't have to pass on the increases to employees." The repetitions culminated in:

> KNOX: Look at Fallon Select. Under the current Fallon Plan, an employee pays $62.28 per month for a family plan. Under Fallon Select, the employee is going to pay $145.41 per month for a family plan. Our objection is that you say you are going to pick up $11 per month more. That is a huge increase for employees. You are saying that you will pick up 90 percent of Fallon Direct, but you can't get us the information. That plan may not fit people's needs. Our members must pay a whole lot more, both in terms of premiums and drug costs, and if they have the PPO, in terms of the deductible also. It comes down to money. We are not saying that we don't understand that the costs go up. We think you should give us a proposal. It seems like instead you are trying to develop your case before the National Labor Relations Board.
>
> SMITH: That is not what we are trying to do. We think our proposal is reasonable. Even with the increased costs, our employees still do better than employees at other manufacturers. We can't fail to look at the other manufacturers. We're going to end up like Tyrolit if we fail to do so. Healthcare is more expensive. If people cannot afford to pay the increases, they have an option -- Fallon Direct. Fallon is the best system in the country. Or they can do what the employees everywhere are doing—pay the increased costs.

During this session, Smith argued again that the Fallon Direct network was still large enough to serve all of the bargaining unit employees' healthcare needs.

The Union's November 3 strike vote

The Union reported in a Table Talk dated November 6: "Disturbed by the news that the Company has not moved off their original proposal on healthcare and [the news that the Company] seems intent on imposing substantial cost increases on employees, the members voted 92 percent in favor of requesting strike authorization." Further in the Table Talk, under a caption: "Summary of Company Proposed Healthcare Changes for 2003," the Union repeated its September 11 analysis of the Respondent's August 29 proposals. Under a caption of "Union Healthcare Proposal," the Union repeated verbatim its proposals of October 4 (again without stating that its proposals had been made on an interim basis).

The November 6 bargaining session

At a bargaining session that was conducted on November 6, the Respondent tendered a proposal entitled: "Company Interim Medical Insurance Proposal (Alternative)" (herein, the Respondent's alternative proposal). Smith emphasized that the Respondent's alternative proposal did not supercede the Respondent's August 29 proposal which was still being offered. Smith introduced the Respondent's alternative proposal with:

> Historically, we have always offered all of the Fallon plans available. We are doing the same thing this year. If we go back to the 2002 plan design level in certain areas, such as prescription copays, to make the design the same as was offered in 2002, that has an impact on the cost. We can do that, but it is going to cost more. That's why we offer this as an alternative proposal. We can do that in certain areas. But there [are] going to be some more costs for employees. ... So that's the concept. Since it is more expensive, we offer it as an alternative. If you want the 2002 levels, you can have them. But you cannot have the 2002 levels in 2003 without some increase in costs.

The Respondent's alternative proposal was (as re-numbered here):

> 1. This proposal is effective on January 1, 2003 and is only for calendar year 2003.
>
> 2. Nothing in this proposal precludes the Company or the Union from negotiating contract language on medical insurance.
>
> 3. Given the myriad of circumstances beyond the Company's discretion or control, including what plans are available, the design of the plans and increased healthcare costs, this proposal represents the Company's effort to continue the status quo with respect to medical insurance from calendar year 2002 to calendar 2003.
>
> 4. During the year 2003 the Company will offer a choice of the following medical insurance plans to bargaining unit members: (a) Fallon Direct Care; (b) Fallon Select; (c) Cigna POS; (d) Cigna PPO; Catastrophic PPO (default plan only).
>
> 5. The Company will fund 90 percent of the premium of the low cost medical insurance plan offered to bargaining unit employees. (Fallon Direct Care). Employee contribution rates are attached.
>
> 6. Copays, prescription copays, deductibles and other terms are set forth in Attachment B.
>
> 7. The reenrollment period shall begin on [blank space] and shall end on [blank space].

As Smith had indicated, the copays in the Respondent's alternative proposal were lower than those that were called for in the Respondent's August 29 proposal, but the premiums, and employee contributions, were higher.[15] After giving some of the figures, Smith stated:

> This would be in effect on an interim basis, effective January 1, 2003. By making this proposal, we are not proposing to lock you in with respect to a collective bargaining agreement. We do need to have something in effect on January 1. We don't know about the open enrollment at this juncture. We don't have an agreement on that. What we are looking at is November 25–29th. It would be toward the end of the month. It would probably be that week. Maybe it would go a little bit beyond because that is Thanksgiving week, but maybe not. We are not sure we can do that. Anyway, it would be toward the end of November. We will try to get something more precise to you.

Smith also stated that, although he had previously stated that Fallon Direct had 250 physicians in its network, it actually had 398. Smith concluded his presentation with: "In 2003, we will offer Fallon Direct and Fallon Select." Knox asked if the Respondent would get a separate quote for Fallon Select (i.e., without Fallon Direct). Smith replied, "I don't know. We'll caucus on that and get you an answer." Knox stated that the Union wanted the Respondent to furnish all prior Fallon handbooks (in lieu of summary plan descriptions which Fallon did not issue), and the Fallon handbook for 2003, if any, and, upon receiving that information she would have questions about the Respondent's alternative proposal.

Stacey testified that the Respondent offered its alternative proposal in an attempt to offer copays as close as possible to those that the employees had had in 2002, which was an objective of the Union. In order to do so, he worked with Fallon to come up with the numbers.

The November 8 bargaining session

At a bargaining session that was conducted on November 8, after extensive discussions on other topics, Smith asked Knox if the Union had any response to the Respondent's alternative proposal. Knox replied that the Union was still waiting for information. Smith then gave Knox the Fallon handbooks for 2003 and prior years and then asked if more information had been requested. Knox stated that the Union had asked the Re-

[15] The employee share of the premium for family coverage under Fallon Direct was proposed to be $0.43 higher than the employee share of the monthly premium for Fallon Direct as proposed in the Respondent's August 29 proposal; Fallon Select was $11.73 higher; Cigna POS was $9.17 higher; and Cigna PPO was $15.17 per month higher.

spondent to get a quote for Fallon Select only. Smith replied that the Respondent was doing what it had always done, offering employees all Fallon plans.

Later in the session, Smith stated:

> On the [alternative proposal] package that we gave you, there are a couple of things I want to note. The first is the reenrollment period. That is still blank. We do know that the last day has to be November 30th. The starting date will probably be November 25th, even though that is Thanksgiving week. We have been advised that it will be very difficult to complete the process if it is not done by November 30th because of the amount of time that this takes.

After Smith further argued the merits of Fallon Direct, Knox stated:

> We are not sitting here saying we have anything against Fallon Direct. For the portion of people who believe that is satisfactory healthcare, great. Mark [Stacey] did an analysis in his first presentation. We are not quarreling over which plans you are offering. Dispute is over how much that employees have to pay. You're shifting the cost to employees pretty dramatically. Even if our members follow the pattern, the majority will be in the more expensive plans. Those involve huge increases. It's not that we don't appreciate that people can save money on Fallon Direct, but Fallon Direct may not be a suitable plan for the majority of our members. ... You used to pay 90 percent of [the cost for Cigna POS, the low-cost plan in 2002]. In one fell swoop, you are only paying 80 percent of the costs [of Cigna POS] now. All of the increases are on the employees' backs.

Smith replied to this and other arguments by Knox by stating:

> Here's where the arguments that you are making—even if you don't agree with us in the interim—those arguments are okay with respect to bargaining for an overall agreement. But you can't stop the train. We must do something now. We understand your arguments. The problem is that we have an emergency situation. You're saying that Fallon Select should be the low-cost plan. Those are arguments that should be made for the [overall] collective bargaining agreement. We need to do something and we need to do it in the next couple of weeks so people have coverage in 2003. We understand that you may not like what we are proposing and we can talk about that. We think we have the right to do what we have done in the past which is fund 90 percent of the low-cost plan. ... We would love to reach agreement, but we are running out of time.

The Respondent called Union bargaining committee member Barry Lorian as its witness. Lorian acknowledged that his notes of the November 8 session that relate to healthcare include: "Union wants regular plan to be agreed upon, not interim."

Stacey testified that the Respondent incurred a $42,500 charge from Citystreet for that firm to agree to conduct the reenrollment period in 5 days (November 25–30), rather than 3 weeks (as had been done in prior reenrollment periods), and to train its staff to do all of the programming, soliciting and receiving employee choices, recording, and information-distributions necessary to effectuate changes in the employees' medical insurance plans.

The November 13 bargaining session

At a bargaining session that was conducted on November 13, Knox presented Smith with a document entitled "Interim Healthcare Proposal" which stated:

> In order to maintain the status quo during bargaining, the Union proposes that the Company offer Cigna POS, Cigna PPO, and Fallon Select, with copays and deductibles set at 2002 levels. The Company should fund 90 percent of the low-cost plan from among these three plans. (Note: The low-cost plan cannot be determined until Fallon provides a quote.)
>
> Alternatively, the Union proposes that the Company offer Cigna POS, Cigna PPO, Fallon Select and Fallon Direct, with copays and deductibles set at 2002 levels for Cigna and Fallon Select, and at 2003 levels for Fallon Direct. The Company should fund 90 percent of Cigna POS, and the same dollar value to the other three plans.
>
> Open enrollment immediately upon agreement.

As the proposal was distributed, Knox stated that the Union was also proposing that the rest of the Flexible Benefits Program remain as it was in 2002.

Regarding the Union's alternative proposal, Knox stated: "Fallon Direct is a brand new plan. There are [therefore] no copays for 2002. In that case, there is a slight variation in prices based on the copays and deductibles. Cigna POS would be the lowest cost plan." (In this statement, of course, by not conceding that Fallon Select was also a "brand new plan," Knox was continuing to maintain that Fallon Select was the same as the 2002 Fallon plan(s).)

Smith reviewed the Union's alternative proposal and stated that the Respondent would have a reply after a future caucus. Stacey then furnished more insurance booklets and explained that the ones that had been previously furnished were the last printed. Smith concluded: "There is no information that you do not have." Knox did not contest this assertion.

Later in the session, after discussions of other topics, the following exchange occurred:

> SMITH: Well, we will continue to evaluate the situation. You gave us two interim healthcare proposals today. The first one drops Fallon Direct. You are basically suggesting that we do the first proposal that we gave you without Fallon Direct. We have said to you that that is not consistent with what we have done in the past . . . .Because the first proposal does not include Fallon Direct and for other reasons, we reject that proposal. The second proposal would be fine except that it's like going to the candy store. You are proposing that we use 90 percent of the Cigna POS plan and you want—if I read this correctly—you want Fallon Direct at the 2003 levels, but the others at the 2002 levels. Some people may call this cherry-picking. I've talked about this before. The problem is . . . that you

> want as little cost increase as possible. The costs have gone up 12 percent across the nation. We already pay for family coverage, $6,400 per year. Whichever plan an employee chooses. We are in a competitive business and we are in a poor economy. Our employees pay less than most employees at other manufacturers. Coverage is probably better than most employees covered by your contract. We have no disagreement on the catastrophic plan or the flexible benefits. But the bottom line, at this time, is that we are rejecting your proposal. We will study it between now and Friday. I'm not trying to cut out discussion on this.
>
> KNOX: We feel our first proposal is the status quo. We know what you are claiming, at least what you are trying to claim in order to make your argument. . . . We gave you a proposal for healthcare in the contract. We have seen no response from you. And now you are rejecting our proposal. . . . I think all you've done is dilly-dally. You've put people up against the deadline. If you're sincere about wanting to get an agreement, put something on the table.[16]

When Smith stated that the Respondent had, at the request of the Union, gone to Fallon to seek an extension, had gone to Fallon to get possible adjustments on the copays, and had gone to Blue Cross to see if it would bid, and that the Respondent was doing then what it had done in the past, Knox replied: "That is ridiculous. You have never used the plan that is as restrictive as Fallon Direct as your base. You are attempting to shift the costs to the people." Smith concluded the November 13 session with:

> I understand your position. I think we can disagree and recognize our disagreements. We will continue to look at it. If there is something else, we can look at it on Friday.

The session ended shortly thereafter.

The Respondent contends that the Union's November 13 proposals were based on 2002 premiums costs. I disagree. The language of the proposals refers to 2002 only in regard to copays and deductibles, not premiums. Moreover, on cross-examination Smith initially testified that he believed that the Union's November 13 proposals were based on 2003 premium costs; then he testified that he had understood that the Union's proposal was based on 2002 premium costs; however, then he was asked and he testified:

> Q. Despite the fact that there was no 2002 premium rate for Fallon Select [because Fallon Select did not exist in 2002] it's your testimony that this proposal made by the Union was based on 2002 premium rates?
>
> A. I don't think it could have been in the case of Fallon Select; you're correct.
>
> Q. Was it your understanding in reading this proposal that the Union was proposing 2003 [premium] rates for Fallon Select and 2002 rates for Cigna PPO and POS?
>
> A. No. . . . I think they were proposing, as I said initially, 90 percent of the 2003 rates, but the cost to the company was no different than the October 4th proposal that they had made.

I therefore find that the Respondent knew that the Union's November 13 proposals for 2003 premiums were based on the 2003 premium costs that the Respondent had listed in its August 29 proposal, or those that the Respondent listed in its November 6 alternative proposal, or the 2003 premiums that could be later negotiated between the Respondent and Fallon (if a separate rate could be secured for Fallon Select).

Events of November 14

On November 14, the Union issued a Table Talk that repeated its alternative proposal of November 13 and stated: "At the end of the session the Company came back to the bargaining table and rejected both proposals. . . . We will continue to discuss this issue on Friday." Also on November 14, the Respondent issued a Bargaining Update stating that it had rejected the proposals because, inter alia, "The Company's proposal on healthcare is consistent with what we have done in the past years."

Stacey testified that, also on November 14, he received a telephone call from the Respondent's corporate benefit manager, Robert Pierce who:

> . . . told me that we needed to move by the next day, the 15th, on healthcare, that the only way to get the [reenrollment information] packets to employees prior to reenrollment was to have a decision on the [healthcare] plans on the 15th and that they [the Citystreet staff] had seven people on call, they were going to work [overtime through] the weekend to get the programming effort up and going . . . but they just couldn't get started until we knew the plan design and the cost.

Stacey further testified that he relayed this message to Baker, pointing out that "if they didn't work the weekend it wasn't going to happen for November 25th and complete enrollment by the end of the month, our schedule." To explain these statements, Stacey volunteered:

> I mean, you've got to understand, there were two issues; we had the fact that there was a huge programming effort to be done, number one; number two, the vendor had to find a window to do it. This is the worst possible time to have a special reenrollment. They were in their busiest season, wrapping up the reenrollment and getting that process all wrapped up for the rest of the 20,000 employees. So, in effect, what I told Mr. Baker was, "We've got the window and we've got to tell them tomorrow what needs to be done so they can work the weekend."

Baker relayed Stacey's message to Smith on the morning of November 15 as Smith arrived at the bargaining session scheduled for that date. As Smith testified:

> I was told was that we had no more time, that they needed to work over the weekend in order to insure that we would be able to insure that we could have open enrollment before December and that if we wanted open enrollment on November 25th then we had to give them the

[16] On cross-examination, when asked what she meant by "deadline," Knox replied, "I don't think I actually said that. What I said was, 'You put people up against a time frame.'" I do not credit Knox's denial.

information so that they could start the program that weekend meaning, the 16th and 17th.

The November 15 bargaining session

At a November 15 bargaining session (which began at 9:40 a.m., according to Morsilli's notes) Stacey presented the Union with riders to the 2003 plans which had just been published. The parties then engaged in long discussions of issues such as attendance and subcontracting. Then Smith stated:

> I have a question for you. Understanding that we have a disagreement on medical insurance, if you had to chose between the two options that we have offered, recognizing that you do not necessarily agree to either, but one with the 2002 copays and increased premiums versus one with the 2003 copays and lower premiums. We would be interested in knowing which one you would prefer. In the case of the alternative proposal, it is closer to the 2002 plan design, and virtually the same with respect to copays. But the premiums are higher. We want to give you an opportunity to weigh in. You don't have to if you don't want to.

Knox responded, only to the extent of asking if the Respondent had gotten a quote from Fallon for the premium for Fallon Select only, without Fallon Direct. Smith reminded Knox that the Respondent had rejected the Union's alternative proposal which included Fallon Select separately, and he indicated that the Respondent would not seek from Fallon a separate quote for Fallon Select.

After further discussions on other issues, and after a lunch break and other caucuses, the following colloquy occurred:

> SMITH: Anything on medical insurance?
>
> KNOX: You know our position. I am not going to reiterate it. We are also not going to tell how to break the law. If you impose, in our view, you are breaking the law. You have our proposal to maintain the status quo. We have also given you an alternative proposal that constitutes a change. Those would be acceptable to the Union. I'm not sure what to do. We also have a proposal regarding health insurance in the [overall] contract, which you haven't responded to.
>
> SMITH: You're basically saying that you are not going to make a choice. That's an option as I said before. Okay, at some point, we want to caucus briefly. Do you have anything for us on Union representation?

By that point, Smith had not said anything about implementing its proposals. Knox testified that she made her comment because: "From the question that [Smith] had asked me I thought the Company was going to impose one of their two plans on us. So that's what I felt that they were likely to do."

After further caucuses, and further discussions of other topics such as attendance and discipline, Smith stated:

> On the Medical Insurance issue, we are going to implement our alternative proposal on January 1, 2003. We don't think we can wait any longer. We are going to implement the alternative proposal, which we think is as close as we can get to the status quo given what Fallon did. We will have open enrollment from November 25 through November 30th, but not on Thanksgiving day. We will continue to talk about Medical Insurance and economics, but we must do something to make sure that people have medical insurance on January 1.

Knox did not respond. An employee member of the Union's bargaining team asked Smith to repeat the dates of the reenrollment period. Smith repeated those and then asked, "Anything else?" Knox replied: "Not today."[17]

As I discuss below, the ultimate issue is whether the parties were at impasse when Smith announced that the Respondent was going to implement the Respondent's alternative proposal on healthcare. On direct examination, Smith testified that he thought that the parties were at impasse on November 15, but he acknowledged that he did not use the word "impasse" when making the announcement that the Respondent was going to implement its alternative proposal. Smith testified that he did not feel it was necessary to use the word because he and Knox "had been dealing with each other for a long time. We were both experienced. She knew what that meant and I just didn't use it, I think, for those reasons."

During Knox's direct examination, the General Counsel asked her, and she testified:

> Q. Did the Union have room to move on the issue of health insurance?
>
> A. Yes; we did.

The General Counsel did not further ask Knox in what respect the Union had such room. On cross-examination, however, Knox was asked and she testified:

> Q. If you had room to move on November 15th, Ms. Knox, at more or less 2:15 in the afternoon, why didn't you make another proposal?
>
> A. When the company said that they were going to implement I thought at that point the only way to -- that's not right. I just thought that the thing to do was to file charges with the Labor Board at that point. I thought when they said that they were going to implement that that's what they were going to do.
>
> Q. You testified here this morning, in your mind you had room to move. But you never conveyed that information to the Company?
>
> A. I never conveyed the alternative. I never said this is our bottom line or our final position . . . .
>
> Q. Just answer my question please. You never conveyed that information to the company?
>
> A. I never said that to them,[18] that's correct.
>
> JUDGE EVANS: Why not?
>
> THE WITNESS: I don't know if the Comp—the Company never asked us. They never said that their proposal was final. I mean, just—so in the middle of this day they said we're going to implement. I was really—[Witness stopped herself.]

[17] November 15 was a Friday. The Union filed the charge in 1–CA–40476 on the following Monday.

[18] The transcript, p. 237, L. 12, is corrected to change "to them that" to "that to them."

JUDGE EVANS: I know, but when they [said], "We're going to implement that," why didn't you say, "Don't do that; I've got another offer" or "We have room to move"?

THE WITNESS: I don't know.

JUDGE EVANS: Next question.

November 19 and November 25 bargaining sessions

During a bargaining session that was conducted on November 19, Smith told Knox that the Respondent was holding informational meetings about the Flexible Benefits Program, including medical insurance, for non-bargaining unit employees and he asked if the Union had any objections to the Respondent's holding such meetings for the bargaining unit employees. Knox said that the Union did not. At a bargaining session that was held on November 25, the Union questioned the cost of the 2003 catastrophic plan that the Respondent was giving the employees in the informational reenrollment packets that the Respondent was distributing as part of the reenrollment processes. Stacey assured the Union that the Respondent was putting out corrections, and he noted that the catastrophic plan was not one that employees could chose anyway.[19] During these two bargaining meetings, the only ones that were conducted between Smith's November 15 announcement and the Respondent's commencement of the reenrollment period on November 25, the Union made no other proposals on interim medical insurance and it voiced no objections to the implementation. Nor, according to this record, did the Union make any proposal on interim medical insurance before the Respondent implemented its November 6 alternative proposal on January 1, 2003. Nor did the Union express any objection to the implementation, other than to file the unfair labor practice charge of November 18.

Analysis and conclusions on the health insurance issue

The general rule is that, absent the clearly expressed consent of employees' statutory representative, an employer violates Section 8(a)(5) by changing a term or condition of employment without first bargaining to impasse with that representative. Also, generally, when parties are engaged in negotiations for a collective bargaining agreement, the employer's duty is to refrain from implementing changes until an impasse has been reached in bargaining for the agreement as a whole. *NLRB v. Katz*, 369 U.S. 736 (1962). Notwithstanding these general rules, the Board in *Bottom Line Enterprises*, 302 NLRB 373 (1991), noted two exceptions: where a union engages in tactics designed to delay bargaining, and "when economic exigencies compel prompt action."[20] In *R.B.E. Electronics of S.D.*, 320 NLRB 80 (1995), a case in which the employer was alleged to have unlawfully laid off employees unilaterally during bargaining, the Board extended *Bottom Line* to hold that, where an employer is confronted with an economic exigency that compels prompt action short of the type that would relieve it of its obligation to bargain entirely,[21] that employer will satisfy its statutory obligation by providing the union with adequate notice and an opportunity to bargain. Once it does so, the employer is permitted to act unilaterally if the union fails to act promptly to request bargaining or if the parties, after good faith bargaining, reach an impasse on the exigent issue. The Board further held that, in time-sensitive circumstances, bargaining need "not be protracted."[22] In holding that interim bargaining need not be protracted, the Board cited *Dixon Distributing Co.*, 211 NLRB 241, 244 (1974), where the administrative law judge stated:

> Bargaining has never meant reaching agreement. Even with full-fledged bargaining for a contract going on, or during a contract term, matters arise where the exigencies and economics of a situation seem to require rather prompt action. In such circumstances, "bargaining" may well be in good faith, and lawful, without being protracted, and without any agreement being reached.

The bargaining in *Dixon Distributing*, which was over an exigent need of the employer to change delivery routes of represented drivers, lasted only 20 minutes, but the administrative law judge found that during those minutes:

The discussion of February 15 at the very least represented an airing of the matter, and an exchange of views. That it did not actually result in agreement is of no consequence, for an impasse in bargaining, as long as the bargaining has been in good faith, permits a company to effect whatever changes it had proposed to make.

All of which is to say, as did the Board in *RBE*, "Thus, the Board has recognized ... that the amount of time and discussion required to meet a bargaining obligation is dependent on the exigencies of a particular business situation."[23]

The complaint in this case alleges that the Respondent violated Section 8(a)(5) by unilaterally changing the 2003 medical insurance coverage of the unit employees before the parties reached impasse on that issue during interim bargaining. The policies of approximately half of the unit employees were set to expire on January 1, 2003, because on that date Fallon was going to eliminate the healthcare plans to which those employees had subscribed in 2002, Fallon Plus and Fallon Affiliates. The General Counsel does not dispute that, under *RBE*, the Respondent was therefore presented with an exigency that permitted it to insist on interim bargaining on medical insurance, separate from bargaining for the overall contract. The General Counsel contends that, even under the *RBE* exception, the Respondent could not act unilaterally until an impasse on that issue of interim medical insurance had been reached. The General Counsel further contends that the parties had not reached impasse before the Respondent, on November 15, announced its intention to implement its November 6 alternative proposal. The Respondent agrees that impasse on the issue of interim medical insurance coverage was required for it to act unilaterally, but it contends that the parties were at impasse on the issue when it announced its intention to implement its November 6 alternative proposal.

[19] Again, employees were placed in the catastrophic plan only if they failed to select another plan that was being offered.

[20] Id. at 374.

[21] Such cases usually involve an immediate threat to the vitality of the enterprise, a circumstance not alleged to be present here.

[22] 320 NLRB at 82.

[23] Id.

Some of the relevant factors used to determine whether an impasse exists are "the parties' bargaining history, the good faith of the parties in negotiations, the length of negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations." *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), affd. sub nom. *Television Artists AFTRA, Kansas City Local v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). Another factor that is considered is the parties' demonstrated flexibility and willingness to compromise in an effort to reach agreement. See, e.g., *Wycoff Steel*, 303 NLRB 517, 523 (1991). After considering all of these factors, the Board will still not find that an impasse existed at a given time unless there is "no realistic possibility that continuation of discussion at that time would have been fruitful." *AFTRA v. NLRB*, 395 F.2d at 628. The Board has held that an impasse can exist only if both parties believe that they are "at the end of their rope." *PRC Recording Co.*, 280 NLRB 615, 635 (1986). Also, as stated in *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1186 (5th Cir. 1982), "[F]or a deadlock to occur, *neither party* must be willing to compromise."[24] Impasse being a defense to the allegation of unlawful unilateral actions, it must be proved by the party asserting it, in this case the Respondent.[25] Although the requirements for establishing that an impasse has occurred are indeed stringent, for the reasons stated below I find that the Respondent has met its burden of proving that impasse existed on November 15 when it announced its intention to take unilateral action in regard to interim healthcare insurance for the unit employees.

The Respondent first proposed interim bargaining on the issue of 2003 medical insurance coverage for the unit employees at the August 29 session. To support the Respondent's request for interim bargaining, Smith reminded the Union that the employees' extant coverage was scheduled to expire on January 1, 2003, that Fallon Affiliates and Fallon Plus were no longer going to be available to employees, and that the approximately 400 employees (of the approximately 800-employee unit) would have to select new plans to avoid being defaulted into the catastrophic plan (which had no family coverage and had lesser benefits for individual employee coverage). Smith further made an interim proposal on medical insurance: Smith proposed to offer Fallon Direct to the employees as well as Fallon Select, Cigna PPO and Cigna POS; Smith proposed to continue funding medical insurance premiums on the basis of 90 percent of the low-cost plan among those plans, and Smith and Stacey made clear that Fallon Direct was the lowest in cost among the four plans that it intended to offer. Stacey's video presentation proposed a reenrollment period of approximately 3 weeks, "from October 21 through November 15." Smith, referring to the reenrollment period, stated, "Even though this [the 2003 insurance coverage] will be effective on January 1, we can't do it [the reenrollment period] in December." I therefore find that, as early as the August 29 bargaining session, Smith and Stacey plainly told the Union that the reenrollment period for 2003 employee medical insurance coverage had to be completed by November 30, and that 3 weeks before that date were needed to complete the reenrollment processes. The Respondent at the August 29 bargaining session further took the rigid position that Fallon Direct would be among the health insurance plans that it was going to offer to the employees.

At the September 9 bargaining session Knox informed the Respondent that the Union was "not interested" in interim bargaining on medical insurance. Knox testified that she did so because it was her opinion that an overall contract could be concluded by November 1. At that bargaining session Smith repeated: "This is not something that we can do in December." This was another clear statement that the reenrollment period had to be completed in November.

Immediately thereafter, beginning with the September 11 Table Talk and continuing throughout the bargaining on this issue, the Union advised the employees, accurately, that if Fallon Direct was going to be one of the competing plans to be offered to the employees their share of the premiums for any other plan selection would increase more than would the Respondent's share.[26] The Union, however, denounced Fallon Direct as an inferior plan because it had a smaller network of physicians and hospitals than that to which the subscribers to Fallon Plus and Fallon Affiliates had had access in 2002 and because under Fallon Direct the copays for some drugs for some employees would be dramatically increased. Although the smaller network of Fallon Direct could have been meaningful, at least to some employees, neither the General Counsel nor the Charging Party argue that the smaller network disqualified Fallon Direct as an adequate plan to offer the unit employees. And although Fallon Direct would have higher copays for some drugs for some employees, the proposal to include it among the plans to be offered to the employees in 2003 was, after all, an economic proposal[27] which neither the General Counsel nor the Charging Party argue was so harsh or unconscionable as to be unacceptable to any self-respecting union.[28] That is, neither the General Counsel nor the Charging Party contends that the Respondent was acting in bad faith when it proposed, then insisted upon, including Fallon Direct among the 2003 plans to be offered to the unit employees.

The Union, as well as the Respondent, formulated a hard economic position early in the process. As it stated in its September 22 list of bargaining objectives, the Union took the posi-

[24] Emphasis is original.

[25] *Sacramento Union*, 291 NLRB 552, 556 (1988)

[26] The costs section of Stacey's August 29 presentation, as detailed above, and the Union's quoted figures of its September 11 Table Talk, amply demonstrate the accuracy of the Union's analysis. (Or, to paraphrase Viano's cryptic, but incisive, September 18 question to Stacey: It would be fair to say that, under the Respondent's 2003 proposals, the more expensive the plan that an employee chooses, the lesser percentage the Respondent would fund, and the greater percentage the employee would be required to pay. Of course, this had also been true in 2000–2002 when the Respondent used the approach of funding only to the extent of 90 percent of the cost of the lowest cost plan that it offered.)

[27] As Knox said on October 29 when objecting to the Respondent's healthcare proposals, "It comes down to money." Or, as Knox stated on November 8, "Dispute is over how much that employees have to pay."

[28] Also, at bargaining the Union never argued with the Respondent's assertions that Fallon Direct would have been at least as good as any other plan offered in the Worcester area.

tion that the Respondent should "[m]aintain all other insurance plans, fringe benefits and past practices at the same or better level of benefits at no additional employee cost." This language was repeated, essentially verbatim, in the Union's October 4 proposal, and the Union did not deviate from the effect of that language throughout the bargaining. On October 4, the Union proposed that the Respondent: "(1) Maintain or improve the level of benefits and choice of healthcare providers available in 2002 at no additional cost to the employee; (2) Offer a 100-percent Company paid comprehensive health plan: specifically, offer Fallon Direct at no cost to employees, [and] (3) Maintain all deductibles and copays, including prescription copays, at 2002 levels or better." Although this was not an interim proposal,[29] the second paragraph was notice that the Union was rejecting the principle of the Respondent's funding employee medical insurance premiums at a rate equivalent to 90 percent of the low-cost plan, as the Respondent had done in the past and as the Respondent had proposed to do in 2003. Of course, the Union was not proposing that the Respondent pay 100 percent of Fallon Direct's premiums but contribute an amount equal to 90 percent of Fallon Direct's premiums to other plans. The Union was therefore necessarily rejecting any principle that 90 percent of the premium of the low-cost plan (which Fallon Direct was) would be used as a basis for computing the Respondent's premium contributions to other plans.

At the October 10 bargaining session, Stacey told the Union that "We are running out of time." Stacey then stated, orally and in writing (by his letter of that date), that the Union's failure to agree to interim bargaining on the medical insurance issue could have the disastrous consequence of forcing the 400 employees in the unit who had subscribed to Fallon Plus and Fallon Affiliates into the catastrophic plan. Stacey also plainly stated, orally and in writing, that even after agreement for 2003 health insurance was reached, the Respondent's vendor needed 10 weeks to assemble the needed paperwork and to secure the necessary information from the employees and process it before the effective dates of all new policies, January 1, 2003. Knox, however, continued to refuse to consider, on an interim basis or otherwise, any proposal that included Fallon Direct, unless that plan was offered at no cost to the employees. On October 21 Knox declared that Fallon Select was the equivalent of Fallon Affiliates and demanded that the Respondent offer Fallon Select at no additional cost to the employees, but she did not indicate that she was making that proposal on an interim basis. That is, Knox offered nothing on October 21 that she had not proposed, for an overall agreement, on October 4.

In its October 23 Table Talk, the Union stated that "There is absolutely no reason why the Company cannot maintain Fallon Select, Cigna POS and Cigna PPO while we negotiate." When, on October 24, Smith asked if that statement was an interim proposal, Knox coyly replied: "I think so. Why don't you tell us what you believe our position is?" Smith tried that, and Knox then indicated she had been making an interim proposal. The proposal was essentially what Knox had proposed for medical insurance on October 4 for an overall agreement: the Respondent would offer Cigna POS, Cigna PPO, and Fallon Select and, if it did offer Fallon Direct it would also pay 100 percent of Fallon Direct's 2003 premium; and the Respondent would treat Fallon Select as the low-cost plan (even if it cost more than Fallon Direct) and pay 90 percent of Fallon Select's 2003 premium, or the equivalent of 90 percent of Fallon Select's premium if an employee chose Cigna PPO or Cigna POS. But then, when Smith asked specifically if Knox was making all of that as an interim proposal, Knox replied: "Probably not." Knox then indicated that all that was acceptable to the Union was the Respondent's paying 100 percent of Fallon Direct's premium, if Fallon Direct was going to be offered at all, and that the Respondent should offer Fallon Select but pay all of whatever excess cost there was over the 2002 premiums for Fallon Plus and Fallon Affiliates (or "eat" all the 12-percent rise in healthcare insurance costs). Even then, Knox was evasive about whether she was making the Union's proposals on an interim basis.[30] In its November 3 Table Talk, the Union repeated its October 4 proposals for medical insurance, again without indicating that they had been made on an interim basis.

On November 6 the Respondent offered its alternative interim proposal for medical insurance, which was the same as its original proposal, with lower copays and deductibles and higher premium costs for both the Respondent and for the employees. In so doing, the Respondent emphasized that it was going to offer Fallon Direct and it was going to treat Fallon Direct as the low-cost plan (which, in fact, it was among the qualifying healthcare plans that the Respondent proposed to offer to the unit employees) for determining its 90 percent contribution to all healthcare insurance premiums. Smith also stated that the reenrollment period would be "toward the end of the month . . . toward the end of November." On November 8, Smith repeated that the last day of the reenrollment period had to be November 30 and that the reenrollment period must start on November 25 if a minimal amount of time was to be afforded to the employees, and to the Respondent's vendor, for the necessary processes. The parties repeated their respective positions; the Respondent wanted to offer Fallon Direct and treat it as the low-cost plan when computing its contribution to the premiums of all plans; the Union wanted Fallon Select to be treated as the low-cost plan, even if it was not the low-cost plan if Fallon Direct was to be offered, for purposes of computing the Respondent's contribution to the premiums for Fallon Select, Cigna PPO and Cigna POS, and the Union wanted the Respondent to pay 100 percent of Fallon Direct's premiums if it was offered to the employees.[31] And the Union was still being eva-

[29] As well as the fact that it included such long-term topics as retirement credits and annual wage increases, that the Union's October 4 proposal was not made on an interim basis is demonstrated by the fact that Knox did not attempt to dispute Stacey's October 10 statement that the Union was still refusing to discuss an interim agreement on medical insurance, and is demonstrated by the fact that the Union did not attempt to dispute the Respondent's statements to the same effect in its October 16 Bargaining Update and in its October 17 letter to employees.

[30] On brief, the Respondent calls Knox's conduct a "bob and weave" approach; I agree.

[31] In support of its proposal, the Union continued to argue that Fallon Select was the equivalent of the 2002 Fallon plan(s), something that the General Counsel did not prove.

sive about whether it was making its proposals on an interim basis rather than for an overall contract.

On November 13, however, the Union did make a healthcare insurance proposal on an interim basis. The Union's first November 13 proposal was a repetition of its prior proposals, except that it excluded Fallon Direct altogether. That is, by not mentioning Fallon Direct, the Union's first November 13 proposal was that Fallon Direct not even be offered to the unit employees. The Union's alternative November 13 proposal was to designate Cigna POS as the low-cost plan, even if Fallon Direct was to be offered, despite the fact that Fallon Direct had lower 2003 premium costs than Cigna POS. Aside from the fact that it was part of an interim proposal, the only arguably meaningful concession in this offer that was that, if an employee did select Fallon Direct, the higher 2003 deductibles and copays of that plan would apply.[32] Smith rejected both of the Union's November 13 proposals because they had not incorporated the Respondent's principle of using the qualifying low-cost plan, which was Fallon Direct, as the basis for computing all of the Respondent's obligations for premiums.

As Smith rejected the Union's proposals on November 13, he did say: "We will continue to look at it. If there is something else, we can look at it on Friday." On brief, the General Counsel argues: "By this statement, Smith was taking the position that, though rejected, the Union's counterproposal would be considered further." The General Counsel argues that the Union therefore logically expected another counterproposal from the Respondent at the November 15 bargaining session. And from that premise, the General Counsel argues that the parties therefore could not have been at impasse on November 15. I disagree. Smith's statement that the Respondent would continue to look at the Union's November 13 proposal was no more than an assurance that the Respondent would continue to conscientiously review what the Union had proposed. A contrary conclusion would discourage re-consideration of a position once taken during a bargaining session. Moreover, when Smith said that he would look at "something else" on November 15, he was necessarily referring to "something else" from the Union.

The Union, however, brought nothing new to the table on November 15. When Smith asked which of the Respondent's November 6 proposals the Union would prefer, Knox first evaded the question; then she told Smith that the Union would only accept either of its own alternative proposals. When Smith asked if the Union had anything further on healthcare, Knox replied that it did not. By both responses, Knox rejected both of the Respondent's November 6 proposals. The Union did so because both proposals included offering Fallon Direct to the employees and using its premiums as the basis for computing the Respondent's contributions to all 2003 healthcare insurance premiums. The Union had refused, and was continuing to refuse, to countenance the proposition that Fallon Direct would be offered as the low-cost plan, and the Respondent was not going to enter any interim agreement on healthcare insurance that did not include Fallon Direct as the low-cost plan. That is, each side had firmly rejected the other's proposals, and it is clear that neither felt it was able to compromise further.

In his opening statement the General Counsel stated

> The Employer never declared impasse during negotiations; and, in fact, no impasse existed. The Union had just made a counter-proposal and had room to move.

The General Counsel also led Knox to testify that on November 15 the Union had "room to move on the issue of health insurance." The General Counsel was intent on making this point because he knew that he had to prove that the Union, if not the Respondent, was not at the end of its rope on November 15. But Knox could not testify on cross-examination where the Union's "room to move" was or why she did not say to Smith that the Union had such room, or why she did not tell Smith that the Union could, or wanted to, make another proposal. If the Union had actually had room for movement on November 15, Knox at least would have said so to Smith, and she would have been able to testify at trial in what area that room for movement lay.

It is true that Smith did not use the word "impasse" when he announced the Respondent's intention to implement its November 6 alternative proposal. Knox, however, knew that Smith was not acknowledging that he was acting unlawfully and, as an experienced negotiator herself, Knox necessarily knew that Smith was claiming impasse.[33] Moreover, nothing in *Taft Broadcasting*, or other authority, requires the utterance of the word "impasse" before a unilateral implementation will be found to be lawful. The General Counsel cites *Corporation for General Trade (WKJG-TV 33)*, 330 NLRB 617 (2000), for the proposition that an express declaration of impasse is required before impasse will be found. In that case, the Board did note that the employer had not declared impasse before it acted unilaterally, but its holding of a violation was based more on the finding that "there had been substantial movement in negotiations immediately prior to and after the Respondent implemented its proposals," and the union in that case had not clearly rejected all of the employer's proposals before the employer took its unilateral action. In this case, the Respondent had offered a concession on November 6 by offering to provide coverage by the Fallon plans at higher premiums but lower deductibles and copays, but the Respondent continued to insist on offering Fallon Direct and using its cost as the basis for computing its contributions to all premiums. The Union, from the beginning until the end, rejected the low-cost plan approach by insisting that Cigna POS be deemed to be the basis of all employer premium contributions, even if Fallon Direct did have lower premiums than Cigna POS and all other qualifying plans. Therefore, the parties were at impasse on November 15, and Knox assuredly knew it. There logically can be no requirement

[32] According to exhibits that Knox identified in rebuttal, an effect of the Union's continuing to insist that Cigna POS be treated as the low-cost plan (even though it was no such thing) was that the Respondent would pay all but $.94 of the $194.44 monthly premium of Fallon Direct in 2003. Because the Respondent was determined to offer Fallon Direct, anything else that Knox described as a concession in the Union's November 13 alternative proposal would have been meaningless.

[33] Knox acknowledged that she has been negotiating collective-bargaining agreements for over 25 years, 20 years as a chief negotiator; she has negotiated "hundreds" of contracts, and "maybe 40 or 50" first contracts.

of an express declaration of impasse if the parties are, in fact, at impasse.[34]

The General Counsel and the Charging Party point out that Smith had indicated that bargaining could continue until "late November," and on November 8 Smith told the Union that the reenrollment period had to be completed by November 30. From this, the General Counsel and Charging Party strenuously argue that bargaining should have at least continued until November 25, when the reenrollment period for 2003 insurance coverage would have to begin. I disagree. As Smith and Stacey had made clear on October 10 (orally and in writing), and as the Union assuredly knew anyway (because Knox was an experienced union representative as well as negotiator), some preparation (assembling reenrollment packets, for example) for the reenrollment period was needed. Just how much time was really needed might be a subject for debate,[35] but at least part of the 10-day period between November 15 and November 25 would be needed for that preparation. Moreover, and again, by November 15 it was clear that the Respondent was always going to insist that it would offer Fallon Direct and that it would use that (lowest-cost) plan as the basis for its contributions for all 2003 employee premiums. And it was clear that the Union was not going to agree to the Respondent's offering Fallon Direct and using it as the basis for its contributions for other plans. It is therefore clear that a few further days of repetition of the parties' rigidly held positions would not have made any difference.

In 2002, about half of the unit employees had subscribed to Fallon Plus and Fallon Affiliates, and most of those employees subscribed to family coverage. Through no fault of the Respondent, however, those plans were scheduled to disappear on January 1, 2003. Without an interim agreement on medical insurance, the employees who had subscribed to Fallon Plus and Fallon Affiliates in 2002 were therefore on track to lose all of their family coverages because otherwise they would have been defaulted into the catastrophic plan.[36] Neither the Union nor the Respondent wanted this to happen, and the circumstance plainly presented an exigency that had to be acted upon; something had to be done to prevent the potentially devastating losses to the unit employees. If the holdings of *Dixon Distributing Co.* and *R.B.E. Electronics of S.D.* mean anything, they mean that the bargaining did not need to be protracted further just so that the Respondent could restate its firmly fixed position, or just so that the Respondent could be required to sit and listen to the Union restate its firmly fixed position.

The General Counsel does not argue that the Respondent lacked good faith in taking its firmly fixed position on this most important, and urgent, issue. The negotiations had lasted long enough for the parties to fully explain their respective positions, and the parties had demonstrated that they were unwilling to compromise from those positions. This was proved by the fact that at no time between November 15, the date of the Respondent's announced intention to act unilaterally, and November 25, the date that the Respondent began the reenrollment period, did the Union propose anything new.[37] Therefore, by November 15 the parties were necessarily at the ends of their respective ropes, and further bargaining would not have been fruitful, because neither party was willing to compromise further.

It is probable that Citystreet's November 14 communication to Pierce that it needed to get to work immediately on the reenrollment packets caused Smith to announce the Respondent's implementation plans at the bargaining session of November 15, instead of at the next scheduled bargaining session on November 19. Nevertheless, although the precise timing of the announcement may have been precipitated solely by perceived business exigencies, Smith was correct in assessing the situation at that point—neither the Respondent nor the Union was going to retreat from its position

On Fallon Direct; the parties were at impasse; and, again, a few more days of repetitions would not have made any practical difference in the matter.

Accordingly, under *Taft Broadcasting* and the other authorities cited above, I find that the parties were at impasse when the Respondent announced its intention to implement its final proposal on interim healthcare insurance. I therefore conclude that the Respondent did not violate Section 8(a)(5) by taking that action thereafter. I shall therefore recommend dismissal of this allegation of the complaint.[38]

[34] It is especially to be noted that in *Corporation for General Trade* there was "substantial movement" in bargaining after the employer announced its intention to take unilateral actions. In this case, however, there was no movement by the Union after the Respondent announced on November 15 its intention to begin the reenrollment period on November 25.

[35] On October 10, Stacey told the Union that 10 weeks (in 2 steps, one of 4 weeks and one of 6 weeks) were needed once agreement on interim health insurance was reached and the reenrollment processes were begun. Also on September 27, Smith told the Union that the Respondent usually got the packets to the employees, for their reviews, 10 days in advance of the beginning of a reenrollment periods. These estimates may have been exaggerated but, even so, 10 days to prepare for the reenrollment period and 5 days to conduct it do not seem unreasonable, as the Union assuredly realized.

[36] Even if some of the 2002 Fallon subscribers had wanted only individual coverage in 2003, they were on track to lose the greater benefits of Fallon's individual coverage, again because they would have been defaulted into the catastrophic plan which had fewer benefits even for individuals.

[37] In fact, throughout negotiations, the Union proposed no plan but Blue Cross (which had refused to bid on the Respondent's 2003 business).

[38] Beginning August 29, the Respondent repeatedly and forcefully requested, for perfectly logical reasons which were plainly stated, that the Union engage in interim bargaining on the issue of health insurance. The Union, however, refused to make an interim proposal until November 13 for no better reason than that it (of course) wanted an overall collective-bargaining agreement. (As late as November 8, union committee member Lorain stated in his notes: "Union wants regular plan to be agreed upon, not interim.") *Bottom Line Enterprises* excuses employer unilateral actions when a union fails to request bargaining after being notified of an employer's exigency. A strong argument could be made that, as well, an employer should be excused for unilateral actions on an exigent issue when it requests interim bargaining on such issue and the union unduly delays the process by unreasonably refusing to enter into such bargaining.

B. The Unilateral Reduction of Work Hours

There are no factual disputes involved in this issue. For a great number of years before September 2000, the Respondent's production employees were regularly scheduled to work 7.5 hours per day. (A one-half hour unpaid meal period was, and continues to be, taken during the day.) Thomas Oliver, the general supervisor for the Respondent's Plant 8 Mix and Mold Department, testified that in June 2000 Sheldon Zaklow, the Respondent's plant manager, installed a new production system which came to require overlaps between the Respondent's three shifts.[39] To accomplish the overlaps, the Respondent began in September 2000 to schedule the production employees for 8 hours per day. Oliver characterized the Respondent's scheduling of employees for 8 hours as an "opportunity" to work 8 hours per day. If employees wanted to be scheduled for only 7.5 hours per day, they were accommodated without discipline. Some employees did express such a wish.

The Respondent's business is cyclical; fewer personnel hours are needed during the winter months to keep up with the backlog of orders. Oliver testified that prior to 2001 the Respondent reduced personnel hours by conducting voluntary furloughs. In January 2001, the Respondent conducted 2 such furloughs, for 2 weeks each. Of the approximately 120 employees in the Mix and Mold Department, 17 employees volunteered for the first furlough, and 20 volunteered for the second. (Some employees volunteered for both furloughs.) On February 2, 2001, according to Oliver, in a further effort to reduce personnel hours, the Respondent began scheduling the Mix and Mold Department employees for 7.5 hours per day. Oliver testified that the employees thereafter did not have the opportunity to work 8 (paid) hours per day, even if they so desired.

Business picked up, as usual, in the spring of 2001, and on April 7 the Respondent began again scheduling the Mix and Mold Department employees for 8 work hours per day. As noted above, the production and maintenance employees selected the Union as their collective-bargaining representative in a Board election that was conducted on August 23–24, 2001. On December 17, 2001, the Respondent announced to the Mix and Mold Department employees that, beginning the week ending January 5, 2002, their scheduled hours would be reduced to 7.5 per day "[d]ue to changing business conditions." As the parties stipulated, the Respondent did not give notice, or opportunity to bargain, to the Union prior to reducing the scheduled hours of the Mix and Mold Department employees.[40] The complaint alleges that the Respondent's reduction of the work-hours of the Mix and Mold Department employees was a unilateral action in violation of Section 8(a)(5).[41]

Analysis and conclusions on the hours-reduction issue

As concisely stated by the General Counsel on brief:

> The Board has long held that an employer acts at its peril in making changes in terms and conditions of employment during the period that objections to an election are pending and a final determination by the Board has not been made. *Mike O'Connor Chevrolet-Buick-GMC Co.*, 209 NLRB 701, 703 (1974), enf. denied on other grounds, 512 F. 2d 684 (8th Cir. 1975); *Dole Fresh Vegetables, Inc.*, 339 NLRB No. 90, fn. 11 (2003). During this period, the employer has an obligation to bargain over layoffs and changes in employees' work schedules over which the employer had previously exercised unlimited discretion. *Adair Standish Corp.*, 292 NLRB 890 fn. 1 (1989), enfd. 912 F.2d 854 (6th Cir. 1990).

In *Eugene Iovine, Inc.*, 328 NLRB 294 (1999), enfd. 1 Fed Appx. 8 (2d Cir. 2001) (unpublished), the employer reduced the hours of its employees without bargaining with their newly certified bargaining representative. The employer defended its unilateral action on the ground that it had previously reduced hours for various reasons. The Board rejected this "past practices" defense, citing *Adair Standish* for the proposition that, "despite [a] past practice of instituting economic layoffs, [an] employer, because of [the existence of a] newly certified union, [may] no longer continue unilaterally to exercise its discretion with respect to layoffs." The Board's holding in *Eugene Iovine* therefore equated reductions of hours with layoffs, and that case stands as the law that employers are no more free to exercise unfettered discretion in regard to the former than they are to the latter.

The Respondent defends its 2002 unilateral reduction of the hours of the Mix and Mold Department employees on the grounds that: (a) it had no discretion to act otherwise; (b) the employees were not required to work 8 hours per day when the Respondent had previously scheduled them to do so; (c) the Union did not request bargaining over the issue; and (d) *Mike O'Connor Chevrolet* should be overruled, anyway, because employers who are not shown to possess a motive prohibited by Section 8(a)(3) should not be sanctioned for acting unilaterally between the date of a Board election and the date of any certification that may issue. These defenses must be rejected.

Adair Standish and *Eugene Iovine*, as they draw upon the principles of *Mike O'Connor Chevrolet* and *NLRB v. Katz*, supra, clearly state the law that reductions of hours, as well as layoffs, are "precisely the type of action over which an employer must bargain with a newly certified Union."[42] On brief, the Respondent essentially argues that its reduction of the scheduled hours of the Mix and Mold Department employees in January 2002 was not discretionary because in February 2001 it reduced hours in response to the seasonal decline in business. The Respondent had not reduced hours before 2001. Even under the cases cited by the Respondent, a once-only event has never been held to constitute a binding precedent. But even if the Respondent had proved a consistent pattern of hours-

[39] On brief, p. 11, the Respondent states that the September 2000 change from 7.5 to 8.0 hours per day was "to deal with the increased business demands." As well as being contrary to Oliver's testimony, this statement is not supported by the record.

[40] The employees' workweek that ended on January 5, 2002, began on December 31, 2001, which is therefore the effective date of the Respondent's action in question.

[41] The parties further stipulated that the Respondent received actual notice of the Union's December 20, 2001, Board certification on January 7, 2002.

[42] NLRB v. Katz, 369 U.S. at 746.

reductions (which it did not), in 2002 it could have reduced hours sooner or later than it did, or not at all. Or the Respondent could have laid off or furloughed employees to meet its lower production requirements, as it had always done before 2001. Therefore, to say that the Respondent had no discretion in the matter is patently false.[43] Second, the issue in this case is the scheduling of employees for 7.5 hours per day instead of their previous 8; the fact that the employees had once been allowed to work less than 8 scheduled hours per day if they so chose is simply irrelevant. Third, the General Counsel was not required to show that the Union requested bargaining after the Respondent's unilateral change in the work-hours of the unit employees.[44] Finally, the Respondent's argument that *Mike O'Connor Chevrolet* should be overruled is a contention that may be properly addressed only by the Board.

CONCLUSIONS OF LAW

1. The Respondent, Saint-Gobain Abrasives, Inc., of Worcester, Massachusetts, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

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

3. By the following acts and conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act:

(a) Failing and refusing, since December 31, 2001, to recognize and bargain with the Union as the collective-bargaining representative of the employees in the following unit of employees, which unit is appropriate for bargaining under Section 9(a) of the Act:

> All full-time and regular part-time production and maintenance employees who work in the Abrasives branch (including Superabrasives) at the Employer's Greendale complex in Worcester, Massachusetts, including material management specialists, production support specialists, technical specialists, "facilities" employees, shipping, packing, receiving and traffic employees, group leaders, blottering employees, and powerhouse employees, but excluding all other employees including ceramics branch employees, exempt employees, office clerical employees, research and development employees (except for the production operator), confidential employees, professional employees, sales/marketing specialist, senior design technicians, managerial employees, guards, and supervisors as defined in the Act.

(b) Changing, on or about December 31, 2001, the scheduled work hours of the unit employees without prior notice to and bargaining with the Union.

4. The Respondent has not otherwise violated the Act as alleged in the complaint.

THE REMEDY

For the changes of scheduled work hours that I have found to have been unlawfully implemented, the Respondent shall be ordered to rescind them, on request by the Union, and to make any employee who was adversely affected by those changes whole for any loss of earnings or other benefits, as prescribed in *Ogle Protective Service*, 183 NLRB 682 (1970), enfd. 444 F. 2d 502 (6th Cir. 1971), plus interest as computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[45]

ORDER

The Respondent, Saint-Gobain Abrasives, Inc., of Worcester, Massachusetts, its officers, agents, successors, and assigns, shall:

1. Cease and desist from

(a) Changing the scheduled work hours of the unit employees, or changing any other term or condition of employment of the unit employees, without prior notice to and bargaining with the Union.

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

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

(a) On request by the Union, rescind all unilateral actions found to have been effected in violation of Section 8(a)(5) and make whole, in the manner set forth in the remedy section of this decision, any of its employees for any loss of earnings or other benefits that they have suffered as a result of those unilateral actions.

(b) On request, bargain collectively and in good faith concerning rates of pay, hours of employment and other terms and conditions of employment with the Union as the exclusive collective-bargaining representative of its employees in the above-described unit, and embody in a signed agreement any understanding reached.

(c) Preserve and, within 14 days of a request, or within such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

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[43] The Respondent's contention that *Iovine* can be read to hold that an employer is excused from unilateral actions if it acts "consistent with its conduct in prior years" is a disingenuous extraction of language from that decision. The Board majority did use that phrase, but only in answer to a factual premise of the dissent. The holding of *Iovine* is as I have indicated above.

[44] See *Ciba-Geigy Pharmaceuticals Div.*, 264 NLRB 1017, 1016 (1982), enfd. 722 F.2d 1120, 1126–1127 (3d Cir. 1983) ("most important factor" dictating finding that employer's announcement of change was "fait accompli" was that it was made without "special notice" in advance to the union, the union's officers "having become aware of this merely because they themselves were employees").

[45] 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.

(d) Within 14 days after service by the Region, post at its Worcester, Massachusetts, facility copies of the attached notice marked "Appendix."[46] Copies of the notice, on forms provided by the Regional Director for Region 1, 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 December 31, 2001, the approximate date of the first unfair labor practice found herein.

(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.

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

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 a 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 or refuse to meet and bargain collectively with International Union of Automobile, Aerospace & Agricultural Implement Workers of America, Region 9A, AFL–CIO (the Union), as the representative of our employees who are employed in the following bargaining unit:

> All full-time and regular part-time production and maintenance employees who work in the Abrasives branch (including Superabrasives) at the Employer's Greendale complex in Worcester, Massachusetts, including material management specialists, production support specialists, technical specialists, "facilities" employees, shipping, packing, receiving and traffic employees, group leaders, blottering employees, and powerhouse employees, but excluding all other employees including ceramics branch employees, exempt employees, office clerical employees, research and development employees (except for the production operator), confidential employees, professional employees, sales/marketing specialist, senior design technicians, managerial employees, guards, and supervisors as defined in the Act.

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

WE WILL, on request by the Union, rescind all our changes in the scheduled work-hours of the employees employed in the above-described bargaining unit, and WE WILL make whole any of our employees for any loss of earnings or other benefits that they have suffered as a result of those changes.

WE WILL, on request by the Union, bargain collectively and in good faith concerning rates of pay, hours of employment, and other terms and conditions of employment with the Union as the exclusive collective-bargaining representative of our employees in the above-described unit, and WE WILL embody in a signed agreement any understanding reached.

SAINT-GOBAIN ABRASIVES, INC.

[46] 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."