

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
BRANCH OFFICE  
SAN FRANCISCO, CALIFORNIA**

**PIRELLI CABLE CORPORATION**

and

Cases 20–CA–30624-1

**JOHNIE W. TOMLIN, An Individual**

and

20–CA–30687-1

**INTERNATIONAL BROTHERHOOD OF ELECTRICAL  
WORKERS, LOCAL UNION NO. 2343, AFL-CIO**

*Jonathan W. Seagle*, San Francisco, California, for  
the General Counsel.

*Charles P. Roberts, III*, Winston-Salem, North Carolina, and  
*W. Melvin Haas, III*, Macon, Georgia of *Constangy, Brooks &  
Smith*, for Respondent.

*George Rainsbarger, Jr.*, President/Business Manager, *IBEW,  
Local Union 2343, AFL-CIO*, Colusa, California, for the  
Charging Parties

**DECISION**

Statement of the Case

**JAMES M. KENNEDY, Administrative Law Judge:** This case was tried in Sacramento, California on September 25-26, 2002, <sup>1</sup> based upon separate complaints issued June 28 and July 30 (later amended) by the Regional Director for Region 20. The underlying unfair labor practice charges were filed by Johnie W. Tomlin (Tomlin), <sup>2</sup> an individual, on April 9 and by the International Brotherhood of Electrical Workers, Local Union No. 2343, AFL-CIO (the Union), on May 24, subsequently amended on September 11. The complaints were consolidated on July 30. Together they allege that Pirelli Cable Corporation (Respondent) violated §8(a)(1), (3)

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<sup>1</sup> All dates are 2002 unless stated otherwise.

<sup>2</sup> The spelling of Tomlin's given name as shown here has been corrected from that shown in previous documents.

and (5) of the National Labor Relations Act. The §8(a)(3) portion asserts that Respondent unlawfully placed its employee Tomlin on disability leave because of his union activities. The §8(a)(5) allegations contend Respondent made unilateral changes in the grievance-arbitration time frames resulting in the refusal to arbitrate about 53 grievances.<sup>3</sup> Respondent denies the allegations and offers several defenses. With respect to the Tomlin matter it asserts a failure of proof. For the unilateral change allegations it argues 1. there was a continuing obligation for each party to bargain over arbitration time frames unaddressed by the collective bargaining contract; that it sought to bargain over the issue but was rebuffed; 2. reasonable time limits may be inferred from the silence of the collective bargaining agreement and since it used a reasonable period no modification occurred; and 3. the Union's approach was a bad faith effort to jam up the arbitration system, privileging Respondent's conduct.

### Issues

The principal issue insofar as the Tomlin incident is concerned is whether union animus may be inferred from the surrounding circumstances. Certainly the General Counsel has offered no direct evidence of union animus and Respondent correctly observes that absent this element, no §8(a)(3) allegation can be sustained. With respect to the modification of the arbitration time frames, the analysis depends on how one perceives the parties' approach to grievance processing in general. Is it a process having no limitations, leading to abuse, or is it a process obligating each party to exercise responsible restraint?

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the both the General Counsel and Respondent, I make the following

### Findings of Fact

#### I. Jurisdiction

Respondent is a Delaware corporation which operates a factory in Colusa, California, where it manufactures copper wire. It admits that it annually purchases and receives at its Colusa facility products, goods and materials valued in excess of \$50,000 directly from points outside California. As a result, it admits and I find that it is an employer engaged in commerce within the meaning of §2(2), (6), and (7) of the Act. It also admits and I find that the Union is a labor organization within the meaning of §2(5) of the Act.

#### II. The Alleged Unfair Labor Practices

##### a. Johnie Tomlin

There is really no factual dispute concerning Johnie Tomlin. Respondent placed him on indefinite medical leave of absence on January 30. Facially, the decision was based upon Respondent's receipt on January 29 of a (redacted) report by a workmen's compensation physician which stated that Tomlin was precluded from performing "repetitive overhead work and repetitive forceful work with the dominant shoulder" and also precluded from "repetitive forceful gripping".

Tomlin is a longtime employee, having been hired in 1971. Since 1978 or 1979 he has been a maintenance journeyman, i.e., one of five or six plant mechanics responsible for maintaining factory equipment and machinery. The tasks of the plant maintenance journeymen require the incumbents to perform certain physical acts in order to carry out their duties. These

<sup>3</sup> The record shows the actual number to be about 100.

include lifting heavy parts and equipment and utilizing hand tools such as screwdrivers and wrenches. Sometimes these duties must be performed in awkward positions, e.g., working with arms raised over shoulder level.

5 Tomlin's workmen's compensation issues began sometime in January 1999 when he  
underwent surgery on his right shoulder for a torn rotator cuff, a condition connected to his daily  
work. He received workmen's compensation benefits for a period of time and returned on light  
duty with some restrictions. He remained on light duty for a little over a month and then  
10 resumed work without any medical restrictions. From July 1999 until November 2000 he  
worked without restriction, although he was having some difficulty with a wrist condition that had  
been bothering him since 1998, also connected to his work. In November 2000, Tomlin  
underwent surgery on his left wrist to correct a carpal tunnel syndrome debilitation due to  
repetitive squeezing, gripping and twisting while utilizing the hand tools. After the surgery he  
was on medical leave for about 6 weeks. When he returned, his wrist had been repaired and he  
15 was able to work without any restriction, nor had any been imposed by the workmen's  
compensation treating physicians.

Sometime in 2001, Tomlin, through his attorney, sought additional workmen's  
compensation payments. As a result of the supplemental claim he was referred to Dr. Conrad  
Clifford, an orthopedist, who examined him shortly thereafter. Neither the supplemental claim  
20 nor the referral was known to Respondent. By letter dated November 30, 2001, <sup>4</sup> Dr. Clifford  
issued his report to Tomlin's attorney and to Respondent's workmen's compensation insurance  
company, Travelers Property Casualty Corporation. The 8th page of the report contains  
Dr. Clifford's "preclusions" noted above. On January 28, 2002, a Travelers Insurance  
workmen's comp specialist e-mailed Respondent's Colusa safety manager asking whether  
25 Respondent would be able to accommodate Tomlin's work preclusions which included both the  
right shoulder and the left wrist. This communication was the first notice Respondent had ever  
received concerning any limitations upon Tomlin's physical capacity. Respondent asked  
Travelers for additional information. Limited by state privacy laws, Travelers faxed only the 8th  
page of Dr. Clifford's report, redacting everything from that page except for the physician's  
30 descriptions of the preclusions.

Receipt of this page resulted in a discussion between human resources manager Bob  
Witcher and Tomlin's immediate supervisor, Skip Kunde. Witcher asked whether the restrictions  
noted by Dr. Clifford could be accommodated on a permanent basis. Kunde told Witcher they  
35 could not. Kunde testified that after he thought about the work that needed to be done in the  
maintenance department he realized it all required a lot of force and gripping. ". . . [J]ust almost  
everything you do, you are going to be doing with your hands and arms, and I just, I couldn't  
imagine accommodating those restrictions within the maintenance department." Indeed, Tomlin  
appears to agree. Tomlin says as a maintenance journeyman his job regularly requires him to  
40 grip with his left hand and to use his right shoulder to push and pull and to work overhead.  
Tomlin's actual disagreement is with Dr. Clifford's assessment and imposition of the restrictions.  
He observes that he had worked without difficulty since shortly after his wrist surgery.

On January 29 Witcher and Kunde both met with Tomlin, showing him the portion of  
Dr. Clifford's letter that they had received. <sup>5</sup> Witcher informed Tomlin that Respondent was  
45 unable to live with the restrictions being imposed by Dr. Clifford, and it would be necessary to  
place him on medical leave of absence. He told Tomlin that if Dr. Clifford would lift the  
restrictions, he could return to work. At no time since, has Tomlin made any effort to have

<sup>4</sup> The first page of the letter bears the November 30, 2001 date; the doctor's signature on  
50 the ninth page shows a date of December 7, 2001.

<sup>5</sup> Tomlin had already received Dr. Clifford's complete, unredacted, report.

Dr. Clifford remove the restrictions. Instead, on February 23, Tomlin's attorney petitioned the state worker's compensation appeals board for an even higher level of benefits. In order to obtain that higher level, Tomlin has accepted and participated in a vocational rehabilitation plan. This course has led him away from plant maintenance work into an entirely unrelated field, that of building inspector, although he had not sought employment in that field as of the time of the hearing.

In addition to being a longtime maintenance mechanic with Respondent, Tomlin's union membership and participation is nearly equally long-standing. He has been a union member since 1971 and has served in various union capacities since 1977. These include being shop steward from 1977 to 1979, chief steward from 1979 to 1984 and a second term as chief steward between 2001 and his being placed on medical leave in 2002. Since 1973 he has been a continuous member of the Union's executive board, serving as its chairman and has been the Union's vice president since 1977.

In these capacities he has played a relatively important role with respect to the grievance-arbitration procedures. Although as chief steward he occasionally filed grievances himself, he principally served as a conduit for the shift stewards as grievances they filed proceeded through the system. He also sits on the Union's committees as they attempt to resolve grievances in their early stages.

The General Counsel presented evidence, which it argues constitutes animus, that in December 2000 during a grievance meeting an incident occurred which suggests that Respondent had a motive to remove him from the grievance processing system. It occurred in the context of a marked increase in grievances following new plant manager Keith Myrick's arrival at the plant. Tomlin was part of the union committee, together with stewards Tim Lyttle and Gary McGuire. Apparently Lyttle and Myrick got into a heated discussion of some sort which Tomlin attempted to halt. He told Lyttle to "shut up." Myrick, believing Tomlin's interdiction to be more than ill mannered, told Tomlin that he should not tell anyone at the table to shut up. Tomlin coldly informed him that Lyttle was on his side of the table and he would tell his own people when to stop talking. Myrick declared the meeting over.

Shortly afterwards Myrick sought out union president/business agent/company employee George Rainsbarger, Jr., at his workstation. Rainsbarger testified: "[Myrick] came up to me and [said] that he didn't really appreciate what he had just heard in the grievance procedure, that Mr. Tomlin had told my chief steward, Tim Lyttle, to shut up. He wasn't going to stand for that, you know, he was kind of rambling because he was really upset. And said 'I will fire John Tomlin.'" <sup>6</sup> After chuckling over Myrick's concern, Rainsbarger explained that wide latitude was permitted in such meetings, that Myrick should calm down, and Rainsbarger would speak with Tomlin. No further incident of that nature occurred and no discipline was ever levied upon Tomlin. It appears to have been entirely forgotten. There is no evidence that between that incident in late 2000 and Tomlin's placement on leave in early 2002 that Tomlin and Myrick had any disagreement whatsoever. In fact, at one point in late 2001 Myrick, perceiving that Tomlin was avoiding him for reasons he did not understand, sought to clear the air. They spoke of their

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<sup>6</sup> Myrick denies ever saying that he wanted to discharge Tomlin. He does agree that he told Rainsbarger that one employee telling another to shut up was unacceptable conduct and could result in discipline. He wanted Rainsbarger to rein in such behavior before it reached a level where discipline would need to be considered.

respective roles, agreed that each was simply doing his job, and that there was nothing personal between them. They shook hands. Thus, not only did the incident occur over a year before the imposition of the medical leave, there was an intervening truce, together with a lack of a evidence that it was dishonored.

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### Analysis

The leading case in assessing a §8(a)(3) discharge allegation is *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Its doctrine was later approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). In *Wright Line* the Board laid out the burden-shifting components of a §8(a)(3) case. Yet the doctrine's essence only requires the General Counsel to prove by a preponderance of the evidence that union animus was 'a motivating factor' in the termination decision. *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). To do that, the General Counsel must prove several elements. They are: (1) there must have been, or perceived to have been, union activity by the discriminatee; (2) the employer must have knowledge of the discriminatee's union activity; (3) the employer must be shown to harbor animus or hostility toward employee union activity; and (4) there must be a nexus of those elements to the discharge, usually timing. Here, I find, under *Wright Line*, that the General Counsel has failed to meet the burden of establishing a prima facie case.

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There are several shortcomings to the General Counsel's case. The most glaring is a lack of animus. Furthermore there is really no connection between Tomlin's union activity and his being placed on medical leave. Instead, the credible connection is the notice given by the workmen's compensation insurance specialist about the physical limitations listed in Dr. Clifford's report. There is no suggestion that Dr. Clifford's assessment is either wrong or was an after-the-fact justification for this personnel decision.

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It is true that the General Counsel has offered what he argues is disparate treatment. That involves Respondent's manner of handling the conditions of long-term employees Michael Servenack and David Fite. Neither of these employees qualifies as a proper example of disparate treatment. Servenack's workmen's comp claim occurred in 1978 and reoccurred in 1998. In neither case did he undergo surgery nor did a physician place work restrictions upon him when he returned to work. The second individual, David Fite, suffers from emphysema, and often becomes short of breath on the job; certainly he seeks assistance whenever he needs to lift a heavy object. He has never informed Respondent of his disability and has never claimed any medical benefit concerning it. And, like Servenack, but unlike Tomlin, no physician has placed any medical restriction on him.

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In my opinion, Tomlin's circumstances have been shown to be quite different. Whatever treatment was given him is not comparable to what happened to the two exemplars offered by the General Counsel. Tomlin recently underwent two surgeries, one for his shoulder and one for his wrist. It is true that he received a temporary work restriction after the shoulder surgery, but after a healing period was able to return to work at full capacity. With respect to the wrist surgery, Tomlin simply returned to work and did so successfully for about a year. In neither case was he fully satisfied with the results, but he never told Respondent. Instead, he directed his attorney to seek additional workmen's compensation awards. That effort led to the most recent medical examination, performed by Dr. Clifford. The examination resulted in the report which notified the insurance company that it was medically inappropriate for Tomlin to continue utilizing his shoulder and wrist in the manner required by his job, for to do so risked aggravating those conditions. In turn, the insurance company advised Respondent of the risk. None of these things, of course, occurred in either the Servenack or Fite situations. Comparing them to Tomlin is a classic case of apples and oranges. No disparate treatment can be discerned here.

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Tomlin wants to compare his actual capabilities with those of Servenack and Fite, saying he knows that they have disabilities which Respondent has accommodated. The problem with the argument is that Respondent was unaware of Servenack and Fite's disabilities, at least until the time of the hearing. Moreover, the adjustments it has made for them are simply the types of accommodation it would make for healthy individuals; e.g., providing assistance with heavy or awkward objects. Tomlin's observation simply does not take into account ordinary work cooperation nor does it recognize Dr. Clifford's assessment of his circumstances as valid.

In addition, the General Counsel's argument fails to address the fact that Respondent's treatment of an employee in Tomlin's situation is consistent with its near-contemporaneous agenda to control its workmen's compensation expenses. Respondent's evidence, found in the record, is persuasive on the point. There is no need to recite it here, other than to say that it clearly is a nondiscriminatory effort to control a business expense, which in Colusa was becoming burdensome compared to what was occurring at its sister plant in Abbeville, South Carolina.

Thus, although the General Counsel has presented evidence that Tomlin had engaged in extensive union activity, including being an institutional participant in the upswing of grievance filing which began in 2000, he has failed to establish any connection between that activity and Respondent's decision to place Tomlin on a medical leave of absence in January, 2002. The only connection to that decision was the receipt of Dr. Clifford's work restrictions.

The year-old incident that had offended Myrick had nothing to do with it. Even standing alone, that incident had very little to do with protected activity; it had much more to do with a lack of civility. In essence it was Myrick's concern that one employee was treating another employee disrespectfully. Telling someone to "shut up", particularly in a formal meeting, qualifies as impolite at the very least. It is difficult to see how Tomlin's behavior qualifies as protected by §7. Myrick's response to the incident does not qualify as evidence of union animus. Moreover, since the incident occurred more than a year earlier, it is entirely stale, assuming that it ever qualified as animus in the first place.

Applying the rule of *Naomi Knitting Plant*, supra, the General Counsel has failed to offer proof that Tomlin's union activity or status in any way affected Respondent's decision to place him on a medical leave of absence. Accordingly, the §8(a)(3) allegation will be dismissed.

#### b. Alleged Interference with the Grievance-Arbitration Process.

##### 1. Introduction

This case presents two distinct views regarding the breakdown of the grievance-arbitration system. The General Counsel's evidence begins with human resources manager Bob Witcher's letter to union president/business agent George Rainsbarger of April 1, 2002. And, it is true that in the letter Witcher seems to impose some deadlines. Respondent, however, maintains that the April 1 letter is not the proper starting point but only one of Witcher's many attempts to overcome some obstacles built into the system. These impediments, argues Respondent, had come to light during 2000, but the Union, rather than trying to solve them, had exploited them, clogging the system.

The General Counsel begins his case with Witcher's April 1 letter and does not agree that the events leading to the letter have any relevance to defending the complaint. From his point of view, what Witcher did, or attempted to do, was a straightforward unilateral change, disrupting the grievance-arbitration procedures. Respondent, on the other hand, points to the Union's 2-year history of jamming up that machinery so that arbitral precedents could not be set. For Respondent, the situation obviously needs context; in its view, the General Counsel's approach is too narrow for full comprehension.

The complaint alleges that beginning April 1, Respondent did a number of things which violated the Act. In general, the complaint alleges that Respondent unilaterally imposed a policy to the effect that it would deem a grievance closed and refuse to arbitrate it if: 1. the Union did not pick an arbitrator within 10 days; or 2. the Union within 10 days of the selection of the arbitrator did not pick a date for arbitration. Then the complaint alleged, beginning April 25, Respondent both expanded those deadlines to 14 days, and added a third requirement that if an arbitration hearing had not been scheduled and held within 12 months of the event giving rise to the grievance, such a grievance, too, would be deemed closed and Respondent would not arbitrate it. The complaint concluded by asserting that since May 13, Respondent has refused to arbitrate about 53 grievances.

## 2. The Grievance-Arbitration Language of the Contract

The grievance-arbitration procedures are set forth in V. of the collective bargaining contract. In most respects it is relatively unremarkable. It does state that for a grievance to be valid it must be presented within 10 working days from the event (or 10 working days from the time the event becomes known) and provides that the aggrieved employee may attend all steps of the grievance procedure. This provision is the first of several deadlines which are set forth in the procedures. Step One requires the aggrieved employee or his steward to present the dispute orally to the supervisor or manager involved. If there is no satisfactory adjustment, the Union is required to reduce the grievance to writing within 7 working days and the supervisor/manager's response is to be reduced to writing within 4 working days and be heard within 5 working days at the Step Two level.

Step Two requires the plant manager (or his designee) to hear the dispute as presented by the Union's grievance committee (normally the Union's president or his designee and one other union representative). The next deadline requires the Corporation to answer the grievance in writing, together with its reasons within 7 working days. If no settlement of the grievance has been reached at that point, the provision establishes a 15 working day deadline for the matter to be heard at Step Three.

Step Three provides that the dispute shall then be heard by a representative of the Corporation and is to be presented by the Union's Business Manager (or his representative) and its grievance committee, optionally including an officer or representative of the International Union. And, if the matter is not settled at that stage within 10 working days the dispute is to be continued to Step Four. Step Four states:

**Section 5.05.** Step Four. The dispute shall then be referred to arbitration, and the parties shall mutually select an impartial arbitrator. In the event that the parties are unable to agree upon the selection of an arbitrator within five days, either party upon written notice to the other may, within three days thereafter, request the Federal Mediation and Conciliation Service to designate a panel of arbitrators from which the parties will alternately strike names until one arbitrator remains. This arbitrator will be selected. The arbitrator's decision shall be rendered in writing within thirty days after presentation of the dispute and shall be final and binding on all parties. The arbitrator shall not have the right to add or subtract from the terms of this Agreement. The expense of the arbitrator shall be shared equally with the Union and the Corporation.

It should be observed here that until 2001, section 5.05 had performed adequately as only a few matters had ever been referred to arbitration and even less were actually litigated. A stipulation demonstrates that between 1987 and 2001 approximately five cases were selected for arbitration and in selecting arbitrators, scheduling arbitration, and concluding the arbitration, no specific time frames were utilized. Each was treated on an ad hoc basis. While the parties

agree that two discharge cases were treated with some priority, the nondischarge cases had none. Yet even the two discharge cases did not go all that rapidly. The time between the filing of a grievance and holding the arbitration hearing ranged between 8 and 18 months. The 8-month case was one of the discharge cases, while the other discharge case took 13 months.

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### 3. The Union's Pre-2000 approach

Section 5.05, when dealing with arbitration scheduling, does not impose a time limit or time frame on the striking procedure for selecting the arbitrator from the FMCS panel, scheduling the arbitration or concluding the arbitration. Until 2000, that had not been a problem. As Respondent observes, the parties generally moved forward whenever arbitration was actually required. However, at one point during the year 2000, Respondent had selected an outside attorney, Mark Montobbio, as its representative. For reasons not clear in the record, that attorney did not promptly move forward with any of them and Union president/business manager Rainsbarger testified that he spent 6 to 7 months unsuccessfully seeking to schedule arbitrations so that they could move forward. Rainsbarger acknowledged that the delays involving Montobbio were of an unreasonable length:

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Q (By MR. ROBERTS) Well, what were your – I'd like to know what your concerns about Mr. Montobbio were?

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A (WITNESS RAINSBARGER) Okay, well, Mr. Montobbio, as I indicated, was \* \* \* Well, there was different communications and telephone calls and stuff, never really speaking with Mr. Montobbio, and \* \* \*

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Q My question has to do with you said that this was going to explain why you wanted Mr. Montobbio, why you were raising complaints to Mr. – [Myrick or Witcher]

A I hadn't heard from Mr. Montobbio since November of 2000 and now we're in May.

Q And you don't even have [any]thing scheduled --

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A I don't have anything going, so, you know, I'm sitting there asking the company and asking Mr. Witcher and Mr. Myrick because they're sitting at the table as well as I am trying to resolve some of these grievances. And so we got 10 issues here -- or, 10 grievances, individual; we have four issues, you know, if we're going to resolve them, fine; if we're not, then let's go ahead and arbitrate them. \* \* \* . . . [B]ecause we'd went *seven months or six months* without having the information, without being able to strike [from the list of arbitrators], without being able to move forward.

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Q *And that's pretty unreasonable, isn't it, Mr. Rainsbarger?* \* \* \*

A Yes. (Italics supplied; passage edited for continuity.)

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Rainsbarger's complaint about Montobbio to Myrick and Witcher (who had been transferred to Colusa in November 2000 to become the human resources manager),<sup>7</sup> resulted in the attorney's removal. Within a matter of 2 weeks, with Witcher now in full control of the company side of the grievance-arbitration process, four arbitrators were selected through the striking process.

Witcher says that during his discussions with Rainsbarger and Lyttle about the problems the Union was encountering, he 'committed' to the Union that "[We] would try to become more consistent, that we would do things in a timely manner, and that we would work to settle the grievances at the earliest possible step, and that we would provide due process throughout the grievance procedure." Whatever Witcher's commitment toward timeliness may have been, and despite the Union's insistence on moving forward, when the shoe was placed on the other foot, the Union did not meet the same standard of rapidity it had earlier demanded of Respondent.

#### 4. Events of 2000 and Thereafter

In the following 18 months, the system became jammed. As noted, during 2000 the number of grievances filed began a dramatic upswing. During that year at least 130 grievances were filed, while in 2001 about 154 grievances appeared. This contrasts dramatically with the 1999 figure of 50 to 70. It is a two- to three-fold increase.

When Witcher took control of the grievance-arbitration procedures in the Spring of 2001, he was faced with an already large backlog, one which was growing by the day. Most dealt with so-called "past practice" issues. These arose from a variety of work practices which Respondent was requiring of its employees and differed in some fashion from the manner in which they had been carried out in the past. Plant Manager Myrick had come to the plant in April 2000. He was not entirely attuned to the way things had been done at Colusa prior to his arrival; moreover, he had some ideas of his own. Good or bad, these differed from what the employees were used to. These changes drew grievances, whatever their merit. The gravamen of each was that the employee was being required to perform in a manner not consistent with 'past practice.' Past practice was an elusive concept and neither Myrick nor Witcher, when he came, could determine what those practices were in any given circumstance.

Realizing that he had a mountain of grievances to deal with, sometime in March 2001, Witcher began to tackle the problem. He describes what happened:

[WITNESS WITCHER]. . . eventually through the process of sitting down and I guess you'd say negotiating, we resolved those outstanding arbitration issues.

Q [By Mr. ROBERTS] Now during this time period that you were discussing all these 166 grievances, did you, did the union advise or was there any discussion about past practices within the plant?

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<sup>7</sup> In 1999, the Union's then Chief Steward William Lyttle twice complained by letter to Witcher's predecessor that the Company was not following the collective bargaining contract's time deadlines in processing grievances and demanding that the Company do so. Lyttle made a similar complaint to Myrick by letter dated July 24, 2000. One of Witcher's concerns when he arrived in November 2000 was to attempt to right the ship with respect to the grievance procedures. Initially, he sat in on grievance meetings, observing and trying to get familiar with the situation. As early as his second day on the job, Rainsbarger and Lyttle told him of a backlog of 166 unresolved grievances and about the accusations which were going back and forth. As a result, Witcher began scheduling meetings with the union officials to try to deal with those that had not yet reached to the arbitration level.

A Early on and I -- away from these grievances to some extent when I said earlier that the -- we still were having some grievances through the grievance steps that were being created during this time.

Q So new grievances --

5 A New grievances, not near to the extent, to the best of my knowledge, as before, but it seemed like that every time that we would get in a discussion or if we started to do something, past practice always come up. And --

Q Why, what would be said in that regard?

10 A That I was new to the plant, I didn't understand how they did things, that they didn't do it -- if I thought it went a certain way that wasn't the intent of the language of the contract --

Q That's what you're being told by the --

A Yes.

15 Q -- union?

A That I did not understand, they had a long-standing, outstanding past practice for this, that or the other, which got to the point where finally I started some correspondence to the union requesting that they notify me of what they considered to be any outstanding past practices. And we had some correspondence going back and forth, we wrote each other letters and never come to a resolution to where the final situation of the letters come up to where we were in the meetings that we discussed with [the Union's International Representative Lou] Cortopassi and *Mr. Cortopassi finally told the -- Mr. Myrick, the plant manager, myself, that they would be happy to provide for the company any outstanding issues of past practice, etc., if we would commit to the fact that we would not make any changes in the plant.*

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25 And that was sort of the, I guess you'd say, [the] last official act to several letters that George [Rainsbarger] and I wrote back and forth. (Italics supplied.)

As a result of their joint efforts, the 166 grievances Rainsbarger and Lyttle had referenced early on, together with those scheduled for arbitration, were eventually resolved during the late spring and early summer of 2001, albeit on a nonprecedential basis. However, despite those settlements, the past practice issues kept coming up and grievances continued to be filed unabated. Many of those grievances were advanced to the arbitration level. By this time, International Representative Cortopassi had retired and International Representative Art Jones came to the scene.<sup>8</sup>

35 Jones is a long-time International Representative, and when Cortopassi retired, Jones absorbed the Charging Party as one of the local unions over which he now had added responsibility. Rainsbarger acknowledges that he would not move forward on arbitrations without Jones's involvement. As noted, despite the settlement of the 2000-2001 grievances, similar grievances continued to be filed. By that time, it seems to have become the Charging Party's practice to push all of them to the arbitration level, whatever merits they may or may not have had. On October 11, 2001, the Union referred four grievances to arbitration; on October 31 three more; on December 17, thirteen grievances; on February 5, 2002, forty grievances; on February 20, ten grievances; on March 7, thirteen; on March 12, eleven more. By March 28, 2002 Witcher counted 98 grievances pending arbitration.

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45 Obviously, according to the collective bargaining contract, the Charging Party had the right to arbitrate them all. Indeed, Respondent's Witcher was willing to arbitrate them all, despite the large number which had been moved to that stage. The problem then became one of scheduling.

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<sup>8</sup> Neither Cortopassi nor Jones testified in this proceeding.

In evidence is R.Exh. 19, a package of correspondence between Respondent and the Union. Among other things it confirms that on March 12, Witcher made a proposal that the Company and the Union offer as many dates as possible over the next few months and try to arbitrate three grievances per week until the backlog was eliminated. On March 14, Witcher put the proposal in writing, closing with the comment, "With the time limits in our contract to resolve disputes, there is no reason why a grievance should not get resolved in a few months, otherwise the dispute should be considered a nonissue." He concluded by urging the Union to provide its dates. In a second letter that day, Witcher observed that nine grievances were pending before a selected arbitrator, but dates had been fixed for only three. Here, he took a different route, asking for dates the Union would not be available, saying that the remaining six could be scheduled based upon the arbitrator's availability. He asked for the unavailable dates to be submitted within a week so he could begin scheduling with the arbitrators. The Union did not respond. Certainly, the entire exhibit tends to show the difficulties Witcher encountered.

Without attempting to recount Witcher's testimony on the point, it is clear from the record that the difficulty of scheduling arbitrations falls not upon Witcher, but upon the Union. Rainsbarger would do nothing without Jones, but Jones would not make himself available for most of the arbitrations. Witcher and Rainsbarger had met several times to engage in the striking process and had selected many arbitrators. In fact, the arbitrators often went out of their way to provide alternative dates. The upshot was that no matter what Witcher did to arrange for hearing dates, Jones would not or could not move forward with any reasonable dispatch. He would only schedule about two per month.<sup>9</sup>

With the Union unwilling to move forward on the arbitrations with any reasonable speed, Witcher concluded that either the Union was abusing the arbitration system or the arbitration system was broken and needed to be fixed. He testified:

I -- what we were trying to do was to get the union to respond, for the union to step forward and help us start getting something done as far as scheduling the arbitrations. We wanted them to understand the urgency as much as us.

We were in a situation to where we'd had two cutbacks in the size of the work force the previous year. We'd cut back in the bargaining unit, and the grievances were getting old, they were getting stale, we were losing witnesses, and then it's my feeling you can't really, a year or two later, have a true, meritorious grievance if the people involved are nonexistent anymore.

So we were trying, if they were legitimate issues, we wanted to get them on the table and we wanted to try to get them resolved.

It was in this context that Witcher wrote the April 1 letter. Ten days later he had the opportunity to pursue the matter further.

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<sup>9</sup> Witcher: "It was about this time [late March] that we did start getting some of them scheduled, but it was only like two a month. There was no other availability. In fact, at one time I set down on the calendar and I looked; we had at that time two arbitrations scheduled for April, two scheduled for May, two scheduled for June, two scheduled for July, at one time. So I set down and I looked and I did a spreadsheet. And arbitrators had given us dates to where we could have had an arbitration any other date there in those, that four-month period. But what I was being told by the union at that time was that they were not available for arbitration. I'd even had some discussions to the fact that, as I alluded to earlier, that we were willing to pull in outside help if we had to."

On April 11, one of the rare arbitration hearings did occur. It was held at the Holiday Inn in Williams, California, one of their usual hearing sites, not far from Colusa. During that day, Witcher and Myrick had an opportunity to discuss the scheduling problems with Jones, Rainsbarger and possibly then Chief Steward Johnnie Tomlin. Witcher testified without  
5 contradiction:

Q (By Mr. ROBERTS) And tell us what was said during that conversation in reference to the issue of arbitrations being scheduled?

A We discussed a number of arbitrations and basically Mr. Jones took the position there was no way that he was going to arbitrate a hundred grievances, that he had no intention of  
10 doing it, that he presented some other alternate suggestions, like hearing the same grievances or, you know, if it was an overtime grievance, hearing the overtime grievance and if they -- there was a question that he would let that apply for future grievances, you know, that they'd hold the others in abeyance and these type things.

15 And we told him they weren't, in my opinion, they weren't the same issues.

He discussed, I know at this meeting or maybe [another] one, we had another meeting with him two weeks later, the discussions was over like having one arbitrator come up and hear several cases, different ways of getting, in their situation, different ways of, I guess,  
20 expediting the system to some extent. But not using the panel that we had struck or getting dates from those particular arbitrators, just a way of moving it up and speeding it. But --

Q Well, did you express what the company's view of that, those kind of proposals, were?

A Yes, I did. I --

Q What did you tell them in --

A Well, as I explained to him, that you select certain arbitrators for certain particular cases and in our opinion, even though the grievance might be an overtime grievance or something and it might appear to be similar or the same, that they were not, that they were completely  
25 different with a different set of circumstances and everything.

That there were various reasons. That what we would prefer to do is to schedule, to find out when they were available, find out when the company was available, and schedule them accordingly.  
30

And we got into a discussion about the availability of Mr. Jones, and basically what his position has been the whole time is that he's just extremely busy. He explained that he had taken over the other international rep and he said that he was performing two jobs and he just, you know, he didn't have time.  
35

So I told him, you know, I was fairly busy myself but if I needed to, it was important enough, that we would pull in outside help and do what was necessary, that if the issues were that great that we could do it.

40 And again he, you know, would allude to the fact that he wasn't going to arbitrate that many, he would prefer to meet with the company, that he wanted to sit down and discuss them.

*And I asked him if he had even looked at the merits of the grievances.*

*And he said no.* And he had some conversation about sitting down and meeting, discussing.  
45

We said we would not say that we wouldn't sit down to discuss but our position was it would have to be something different than last time, that we weren't interested in going back to where we were a year ago, to where we resolved and settled 166 grievances and in our opinion we were right back to where we were.  
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Q Did, now, when he said he was willing to sit down and meet with you, was that in regard to discussing a reasonable time frame for arbitrating these cases --

A No, sir. The -- *his position was that there was no such thing that bound them to any time frames.*

Q Okay, that the contract did not --

A Yes --

5 Q -- require them to do anything --

A -- no --

Q -- like that?

A -- did not require them to do anything like that.

10 Q What --

A He wanted to meet to try to resolve the outstanding grievance issues.

Q The actual merits of those grievances; is that right?

A That is correct.

15 Q *Did, so did he express his -- did he express the union's position that the contract in effect allowed them to take whatever time they needed to get a case to arbitration?*

A *Yes, sir, that has been his position as well as Mr. Rainsbarger's.*

20 Q Did he indicate any willingness to negotiate or discuss what was reasonable about in terms of a time frame?

A No, sir. (Italics supplied.)

This exchange confirmed for Witcher that the Union was simply being intractable.

25 5. Respondent Addresses the Arbitration Logjam

Although the April 1 letter had been written 10 days before this exchange, Witcher had earlier concluded that the Union would not move forward with the arbitrations which the Union appeared to be demanding. The April 1 letter makes the point fairly succinctly as he tried to generate responses from the Union.

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I quote the letter, addressed to Rainsbarger, in its entirety:

35 As you are aware, the Company has been earnest in its efforts to arbitrate all grievances; particularly those grievances that are now outstanding and nearing a year old. Of these grievances, several are in need of an arbitrator to be selected. We were unable to mutually select an arbitrator. Therefore, in accordance with section 5.05 of the agreement, we have been assigned a panel of arbitrators by the FMCS from which we are to alternately strike names to select an arbitrator. We believe ten (10) calendar days are reasonable in which to require the parties to select an arbitrator. The company stands ready to do so. If we do not hear from you within this time frame to select an arbitrator, we will deem the matters closed and settled.

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45 You were advised last Friday that a voice mail was left with arbitrator, Gary Axon. Unfortunately, he called back late Friday and stated we were too late [as] he had already committed the 30 (sic) and 31st. However, Mr. Axon did offer July 1 and 2 as alternate dates, as well as, keeping August 6, 7 and 8 for the rest of the week. The Company will accommodate the arbitrator's schedule and make itself available in July. Also, arbitrator, E. Maxwell has provided dates for May and June (two weeks). Arbitrator Joseph, has provided three additional dates they are May 13, June 6 and 14th. Arbitrator McCrory, requested dates from the Company and Union, which we need to provide this week. Despite the

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5 Company's attempts, arbitrator, David Jackson, has not been contacted. A delay in confirming these dates will result in the arbitrator's unavailability. If the Company does not hear from you by the end of this week, April 5, for Mr. Axon, Joseph, and Ms. Maxwell, regarding the dates they requested, we will deem those matters closed and settled. For the other arbitrators, unless we hear from you within ten (10) calendar days to schedule the dates for these hearings, we will deem these matters settled and closed.

10 The Union has been verbally advised of the need to strike the thirteen panels we have received. If the Company does not hear from the Union within ten (10) calendar days to strike these thirteen panels, then the Company will deem these matters closed and settled. However, the Company is flexible on the method in which an arbitrator is selected. The parties can either strike the outstanding individual panels or alternately pick (i.e. the Union choose an arbitrator and the Company choose an arbitrator). All of these grievances have been filed by the Union, individually; therefore, the Company intends to address each grievance individually. To this end, we are open to scheduling three (3) cases per week, if need be, in order to expedite the resolution of each of these grievances. April 15th is the only week the Company has asked to avoid; however, if the Union feels it is necessary to proceed during this week, we will accommodate.

20 To this point, the Company has done everything in its power to expedite the setting of hearing dates. We wish to resolve these issues before others arise. However, in my opinion, there has been an unreasonable delay in bringing Union grievances to arbitration. These delays amount to an unwelcomed burden for us that continues to create hardships in our effort to manage this facility and administer labor-relations grievances. In addition, it amounts to poor use of both the Union and Company's time and resources. It is past time for the Union to step forward and accept some responsibility in getting these issues resolved. If the Union does not respond in a reasonable time frame as requested, we will deem the matters closed and settled.

30 Again, as arbitrator[s], Axon, Joseph, Maxwell, have requested, we must have a response by the end of the week or we will consider these matters closed and settled.

35 By letter dated April 3, which Witcher received on April 4, Rainsbarger provided dates for four arbitrations, but rejected the 10-day deadlines. Rainsbarger protested the Company's effort to deem matters settled and closed within such a time frame because the collective bargaining agreement was silent on the point. He did say that the Union would be willing to meet to solve the selection method problem, proposing a discussion during the arbitration of April 11. On the following day, Witcher spoke with Rainsbarger, asking him what the Union thought might be a reasonable period, but Rainsbarger preferred to wait for Jones. Witcher did not implement the 10-day time frame set forth in the April 1 letter, and waited for the meeting with Jones. He also continued to try to schedule arbitrations.

45 The April 11 meeting is described above, but the upshot was that Jones, who knew nothing of their actual merits, said he had no intention of arbitrating the 100 grievances. That response triggers the question, 'What was the Union trying to accomplish by moving so many grievances to the arbitration stage without knowing their merits and without intending them to be resolved?'

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On April 18, Witcher wrote a handwritten memo to Rainsbarger, together with describing various communications with several arbitrators who, frustrated themselves, suggested that the parties give dates they were available rather than limiting themselves to offered dates. Rainsbarger did not respond in any meaningful way, suggesting only that the parties continue in the same manner as always.

On April 25, Witcher wrote Rainsbarger, first accusing the Union of abusing the arbitration system, and then pointing out that the year previously the Union had utilized a 14-day time frame for striking panels. He said the Company agreed that 14 days was a reasonable time frame and modified the April 1 letter; where it had set a 10-day time frame, he substituted a 14-day time frame. He also observed that since employee discipline, pursuant to the collective bargaining contract, remained in the employee's file for only 9 months, it was appropriate to conduct an arbitration hearing within 6 months of the event. Even so, he said that the Company would allow up to 12 months after the event for the arbitration to take place. He then listed thirteen grievances of particular concern. In a second letter dated that day, he identified ten more, one of which was a discharge in which an arbitrator had provided four dates. He asked the Union to select one of those four. If the Union did not, Witcher said he would consider the matter closed.

On April 26 a second arbitration hearing was conducted and the parties took advantage of that meeting to speak further about the problem. Jones repeated that he had no intention of arbitrating 100 grievances and reasserted that the Union was not bound to any time frames since the collective bargaining agreement was silent on the point. Before me, Rainsbarger agreed that during the April 26 meeting the Union's position was that since there were no time frames, it could take 5 years to arbitrate a grievance if it wanted to take that route. He also agreed that the Union was unwilling to discuss time frames with Witcher.

There was some additional correspondence in which Witcher insisted that the Union accept some dates an arbitrator had provided, together with replies that Jones was unavailable for additional arbitrations during May and June. Witcher closed a number of cases where the Union had not met any of the adopted deadlines. On May 13, Witcher wrote a letter closing 22 grievances because the Union had not acted upon them, but also brought up the discharge grievance in which an arbitrator had earlier been selected. He said he was waiting for the Union's feedback concerning the arbitrator's offered dates, but asked the Union to select one of the arbitrator's dates within a week or the Company would close the grievance.

After that, the only thing that occurred was that Rainsbarger met with Witcher on a number of occasions within the 14-day time frame in order to strike panels.<sup>10</sup> Nonetheless the Union refused to offer arbitration dates, now saying it was the Company's responsibility to obtain dates from the arbitrator which the Union would then 'consider'. Moreover, despite Witcher's warning of May 13, the Union did not respond to the arbitrator's proposed dates for the discharge case. As a result, Witcher closed it because of the Union's inaction. Later the Company closed thirteen grievances on May 29, seventeen on June 12, thirty-six on June 24, and twelve on July 29, all because of union inaction.

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<sup>10</sup> Prior to that, Rainsbarger had insisted upon sending the FMCS panels' names to the International for its recommendations. This procedure had further slowed the selection process, for it took 3 weeks or more for for the International's research department to respond.

## 6. Analysis and Conclusions

5 The General Counsel's theory here is straightforward. He observes that §8(d) of the Act states that no party to a collective bargaining agreement is required "to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract." Under this theory no party is permitted to insist upon the other party's bargaining over matters already contained in (or specifically rejected from) the collective bargaining contract. In that situation it is not a violation of §8(a)(5) and (1) if a party declines an invitation to bargain over matters arguably covered by the collective bargaining contract during its term. In some respects this is almost a per se argument, but does require an employer, for there to be a §8(a)(5) violation, to make some kind of change inconsistent with the collective bargaining contract. Here, Respondent did not really make any changes until April 25, 2002. At that point it imposed a 2-week time frame at several levels of the pre-arbitration hearing level, and also imposed a 1-year limit during which an arbitration hearing needed to be conducted. Facially, therefore, the General Counsel's theory of a violation appears to have merit. Curiously, the 14-day time frame appears that to be exactly that which the Charging Party had demanded of Respondent the previous May. It does seem difficult to say, in that circumstance, that what is sauce for the goose, is not sauce for the gander.

20 More to the point though, is what might be considered reasonable in a circumstance where the collective bargaining contract is silent with respect to time frames, and where some rapidity is important to the integrity of the contract itself. After all, the employees are the third party beneficiaries of collective bargaining,<sup>11</sup> and are entitled to have their grievances heard in a timely way. The Union's behavior here undermined that specific concern.

25 It is clear from the record that the Union had an entirely different agenda other than vindicating or litigating the rights of its employee-members at arbitration hearings. In actuality, the arbitration forum was not where the Union wanted to be. Given the relatively new management leadership at Respondent's Colusa plant, and its attendant desire to change at least some of the procedures under which the plant operated, both Rainsbarger and Jones saw that the contract itself might not protect the Union from such changes. Section 5.05 limited all arbitrators from deviating from the express terms of the collective bargaining contract. Therefore, any grievance that may have arisen but which did not have roots in the language of the collective bargaining agreement might well have been considered outside the arbitrator's jurisdiction. That could well result in an undesirable arbitral decision. The Union did not wish to risk such findings, for they would have had precedential value inconsistent with what it believed the past practice had been, a past practice with which its membership was satisfied. Moreover, arbitration hearings are not inexpensive and the collective bargaining agreement required the Union to share with Respondent the cost of such arbitrations. Here, given the sheer numbers of arbitrations that were pending, the projected expense was no doubt substantial. Undeniably, it was something to avoid. The best way to prevent those two negative happenstances from occurring was to evade arbitrating any grievance, or at least to go forward with as few as it could get away with.

50 <sup>11</sup> *Smith v. Evening News Assn.*, 371 U.S. 195 (1962). There, at 200, the Court specifically added that individual claims lie at the heart of the grievance-arbitration machinery. Also, *Woodell v. Electrical Workers (IBEW), Local 71*, 502 U.S. 93 (1991).

Furthermore, the Union in 2001 had successfully dodged that scenario by managing to negotiate settlements of outstanding arbitrations, none of which had any precedential value. Jones preferred that route, but from Witcher's point of view, the 2001 outcome had proved to be of limited value. It did allow for the elimination of over 160 grievances/arbitrations, but at the same time failed to prevent those same issues from arising again. And, arise they did. Although Witcher believed he had applied good faith to resolving those problems in 2001, when they recurred, he had second thoughts about the entire process. Having been stung once, he decided he would not be stung again.

At last Witcher had come to understand that the Union had moved the grievances to the arbitration stage without any genuine intent of arbitrating them. From Witcher's perspective, the Union was doing nothing to evaluate the merits of each individual grievance. Jones admitted as much. Furthermore, there seemed to be no end to the number of grievances and their repetitive nature. Based on that history, I must concur with Witcher's assessment.

It is not so much that the arbitration procedures were broken, as much as they had deliberately been jammed up with grievances as a device for avoidance. The Union's behavior here was a clear abuse of the bargaining process. Looking at it from an employee standpoint, its behavior might well be regarded as a breach of the duty of fair representation, for the result of this pretense was to deprive employees of having legitimate grievances processed at all. The Union's approach to the grievance-arbitration process was truly wrong-headed. It deliberately disrupted the dispute resolution system to preserve what it regarded as an inviolate status quo. It wanted no scrutiny from an outside arbiter for it feared that an outsider might disagree with its "past practice" refuge. Indeed, the only basis upon which it would provide a list of past practices to Myrick and Witcher was if they agreed, in advance, not to change anything. (Witcher: *'Cortopassi finally told the -- Mr. Myrick, the plant manager, myself, that they would be happy to provide for the company any outstanding issues of past practice, etc., if we would commit to the fact that we would not make any changes in the plant.'*)

Resolution of grievances is, of course, part of the collective bargaining process and is regulated by §8(d), requiring both parties to operate in good faith.<sup>12</sup> Even so, the Board has faced a large number of cases in which the grievance-arbitration system has been deliberately sabotaged. Disruption of the machinery has taken many forms. In fact, one of the major problems the Board faced in the early 1990s was grievance-arbitration logjamming by the Postal Service. The problem was so severe that the Board became obligated to impose an extraordinary remedy. See *United States Postal Service*, 309 NLRB 13 (1992). There, the Board set time limits of its own to streamline the backlog, even though the operative collective bargaining contract already had its own. Labor unions, too, have been guilty of disrupting or abusing the arbitral process. See *Newspaper Drivers Local 921 (San Francisco Newspapers)*, 309 NLRB 901 (1992) (a union's delay in turning over documents for arbitration proceeding violated §8(b)(3), the counterpart of §8(a)(5)); *International Brotherhood of Firemen (Diversity Wyandotte)*, 302 NLRB 1008 (1991) (same); *Local 29, Chemical Workers (Morton-Norwich Products)*, 228 NLRB 1101 (1977) (union's insistence upon tape recording grievance sessions, contrary to well-established past practice, and refusing to participate unless tape recording permitted, violated §8(b)(3) and §8(d)). Indeed, utilizing a normally protected procedure for the purpose of harassment has also been deemed to be improper. For example, a union demand that an employer provide information concerning wages, hours, or terms and conditions of employment, when used to harass, need not be honored. See *Hawkins Construction Co.*, 285 NLRB 1313 (1987) (citing rule at 1314), enf. den. on other grounds, 857 F.2d 1224 (8<sup>th</sup> Cir. 1988).

<sup>12</sup> *NLRB v. Wachter Construction, Inc., et al*, 23 F.3d 1378 (8<sup>th</sup> Cir. 1994).

It has been said in a number of different contexts that a labor union's misconduct in a bargaining framework may suspend an employer's duty to bargain or excuse what otherwise might be an employer's unfair labor practice. See for example, *Times Publishing Co.*, 72 NLRB 676 at 683 (1947) (union's bad faith precludes testing employer's good faith); *Continental Nut*, 195 NLRB 841 (1972) (same); *Phelps Dodge Copper Products*, 101 NLRB 360 (1952) (union's unprotected slowdown suspends bargaining obligation until unprotected conduct ends); *Arundel Corp.*, 210 NLRB 525 (1974) (union's strike contrary to no-strike extension of collective bargaining contract privileges employer's refusal to bargain); *Young & Hay Transp. Co.*, 214 NLRB 252 (1974), *affd.* 522 F.2d 562 (8<sup>th</sup> Cir. 1975) (union's intractable insistence on changing recognized bargaining unit privileged employer's unilateral changes proposed during bargaining); *Louisiana Dock Co.*, 293 NLRB 233, 235 (1989), *affd.* in part, 909 F.2d 281 (7<sup>th</sup> Cir. 1990) (same); *New Brunswick General Sheet Metal Works*, 326 NLRB 915 (1998) (union's improper exclusion of employer's attorney from negotiations privileged employer's unilateral changes as proposed during bargaining.)

Even more relevant is *Velan Valve Corp.*, 316 NLRB 1273 (1995). There the Board said that it is well settled that not every employer refusal to arbitrate violates §8(a)(5). It went on to say that an employer's refusal to arbitrate grievances on timeliness grounds is not tantamount to a wholesale repudiation of the parties' contractual arbitration provision where there is no evidence that the employer is announcing a broad policy of refusing to arbitrate grievances generally. It noted that the employer, at the same time that it refused to arbitrate on timeliness grounds, reassured the union that it remained committed to processing grievances under the contract and to the contractual arbitration provision.

Moreover, there is at least one case where a unilateral change was excused because of "union intractability". That case, *Double S Mining, Inc.*, 309 NLRB 1058 (1992), held that an employer's Christmas bonus grant of \$400, an increase over its proposed offer of \$300, was lawful not because of an impasse, but because of the union's intractable stance that a \$500 bonus was required as a matter of law.<sup>13</sup> A union's obduracy, therefore, can also insulate an employer from conduct which otherwise might be a §8(a)(5) violation.

This case presents a combination of nearly all of the above-recited factors. Clearly the

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<sup>13</sup> "We agree with the judge that it was the Union's intractable position on the Christmas bonus issue, and not a genuine impasse, which privileged the Respondent's unilateral payment of a \$400 bonus to its employees--even though its last offer was for a bonus of \$300. Thus, the Union's attorney at the December 9, 1991 negotiating session, and later in her December 16, 1991 letter to the Respondent's attorney, took the position for the Union that the payment and amount of the bonus were nonnegotiable, and that the Respondent had no choice under law but to "pay the same bonus of \$500 to the same employees as last year.

Our dissenting colleague, however, states that he agrees with the judge's supposed finding that the parties reached a genuine impasse on this issue. While we agree with our dissenting colleague that an impasse would have limited the Respondent's options, requiring it to act consistently with its final offer of \$300, we find, as did the judge, that no impasse was reached here because the Union was unwilling to negotiate at all with respect to this issue. In our view, genuine impasse requires that the parties have, at the least, mutually agreed that a subject matter is on the bargaining table, have discussed the matter, and, despite their best efforts to achieve agreement, neither is willing to move from its position. See, e.g., *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *affd.* 395 F.2d 622 (D.C. Cir. 1968). This standard was not met here; indeed it could not have been met because the Union simply refused to negotiate about the bonus." *Id.*

Union has deliberately undermined the efficacy of the grievance-arbitration procedure for reasons unrelated to the merits. It has deliberately sent to the grievance stage so many grievances that it cannot, itself, even begin to process them. Moreover, it has refused to take any steps to alleviate the problems it has caused. The logjam is of its own making and is  
 5 designed to prevent any discussion of changes within the factory. While perhaps not fairly characterized as "harassment," its approach has certainly had the effect of vexing Respondent by presenting it with an insurmountable hurdle aimed solely at protecting the status quo without regard to either the business merits of the changes or, more importantly under the Act, the question of whether Respondent was or was not actually violating the terms of the collective  
 10 bargaining contract. The Union just didn't want to deal with it.

It is unnecessary to determine, nor could I do so procedurally, whether the Union's conduct was unlawful under §8(b)(3), though it seems likely that it was. Cf. *United States Postal Service*, supra. I only need to find, as I do, that the Union's conduct here was so disruptive that it privileged Respondent to take reasonable steps to counteract it. Respondent's steps were not  
 15 aimed at unilaterally changing or substituting an entirely new grievance-arbitration procedure. Such an effort would, in general, be prohibited. See *TruServe Corp. v. NLRB*, 254 F.3d 1105 (D.C. Cir. 2001), cert. denied, sub nom. *Teamsters Local 293 v. TruServe Corp.*, 534 U.S. 1130 (2002). Instead, Respondent's steps were aimed at preserving, or perhaps recapturing, the system's integrity.

As in *Velan Valve*, supra, Respondent only refused to arbitrate grievances upon a timeliness basis; it never announced a broad policy of rejecting, or rejected, any broad class of grievances. It only rejected those the Union would not move forward. Unfortunately, because  
 25 of the Union's already well-perceived intractability, that meant most of them. That very obduracy, in my opinion, privileged Respondent's conduct. Certainly, at the very least, it allowed Respondent to impose reasonable limits upon the timeliness of arbitration processing. In fact, reasonableness can be measured by the Union's own earlier demands. That would include not only the 14-day deadlines, but also Rainsbarger's agreement that that attorney Montobbio's 6 to 7 month inaction was unreasonable. Respondent's selection of the time limits  
 30 that it eventually settled upon, after discussions with the Union, is entirely consistent with what the Union had previously demanded of it. Nor did it believe the Union had the right to unlimited delay as claimed by both Jones and Rainsbarger. If 6 or 7 months was unreasonable delay by Respondent, surely it was also too much by the Union. Respondent was only trying to keep Witcher's commitment to keep procedural delays from becoming unreasonable. The Board said  
 35 in *Young & Hay Transportation Co.*, "[T]he Union cannot be heard to protest the Respondent's unilateral actions, inasmuch as it was the Union's own acts which foreclosed effective negotiations." Supra at 253.

To fit this case, I would simply revise the Board's *Young & Hay* statement to: 'The Union cannot be heard to protest Respondent's supposed unilateral changes since it was the Union's  
 40 own stalling which produced this entanglement.' Respondent was only seeking a reasonable way out.

The case should be dismissed.

Based on the foregoing findings of fact and analysis, and the record as a whole, I hereby  
 45 issue the following

#### Conclusions of Law

1. Respondent is an employer within the meaning of §2(2), (6) and (7) of the Act.
- 50 2. International Brotherhood of Electrical Workers, Local Union No. 2343, AFL-CIO is a labor organization within the meaning of §2(5) of the Act.
3. The General Counsel has failed to prove that Respondent placed its employee Johnie

Tomlin on indefinite medical leave in violation of §8(a)(3) and (1) of the Act.

4. The General Counsel has failed to prove that Respondent violated §8(a)(5) and (1) of the Act.

5 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended <sup>14</sup>

ORDER

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The complaint is dismissed in its entirety.

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James M. Kennedy  
Administrative Law Judge

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Dated: April 21, 2003

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<sup>14</sup> If no exceptions are filed as provided by § 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in § 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.