Airflow Research & Manufacturing Corporation *and* Local 174, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO. Case 7–CA–35204

February 26, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On September 12, 1994, Administrative Law Judge Thomas R. Wilks issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting 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, and conclusions only to the extent consistent with this Decision and Order.

The principal issue in this case is whether the Respondent violated Section 8(a)(5) of the Act by refusing the Union's request to resume bargaining some 13 months after a lawful impasse had been reached in the negotiations for an initial collective-bargaining agreement. The judge found that the proposals set forth in the Union's request for renewed bargaining did not constitute significant modifications of the Union's preimpasse positions and were not advanced in a manner by which the Respondent could reasonably believe that further discussion would be fruitful. He dismissed the complaint. We disagree. For the reasons stated below, we find that circumstances had changed sufficiently since impasse had been reached to renew the Respondent's obligation to bargain with the Union. We conclude that the Respondent's failure to resume bargaining with the Union violated Section 8(a)(5) of the Act.

The essential facts are as follows. On March 9, 1992, the Union began negotiations with the Respondent for an initial collective-bargaining agreement. The Union was represented by UAW Service Representative Roy Melton. The Respondent was represented by its attorney, Frederick A. Stuart. The Respondent made its final offer on August 5, 1992, at the last of a series of 30 bargaining sessions. It is undisputed that the parties reached a lawful impasse when the Union rejected the Respondent's final offer.

Approximately 1 year after impasse, UAW Service Representative James Settles succeeded Roy Melton as the Union's agent responsible for contract negotiations with the Respondent. By letter dated August 13, 1993, to Stuart, Settles stated: ''We would like to continue the negotiation process. Listed below are open items [ ].'' The letter went on to list 16 proposals including that a cost-of-living adjustment (COLA) agreement be set up and that wages be increased 5 percent in the first year and 4 percent in the second and third year with a lump sum of $500 to be given each of the 3 years.

Some 6 weeks later, by letter dated September 14, 1993, Stuart responded to Settles' request to continue negotiations. He stated:

> As I have repeatedly and consistently advised you and your predecessors, the offer which the company submitted to the union on August 6, 1992, is the company's best and final offer to the union for a collective bargaining agreement. The company has no further concessions to make on any issue, and that continues to be the company's position. The union has rejected the company's final offer and has thus far not signaled any intention to us that it has changed its position. If your request to meet is for the purpose of accepting and executing the company's final offer, we will be happy to meet with you promptly for that purpose. However, we have no obligation to meet with you for the purpose of reopening any issue or of continuing to negotiate over any issue relating to a collective bargaining agreement, and we refuse to do so.

The letter went on to state that, with one exception (not relevant here), the Respondent had given the Union its final position on all of the items the Union listed as ''open.'' It also stated that the parties had reached tentative agreement on the leave-of-absence and wage increase items and these agreements had been included in the Respondent's final offer.

Settles responded for the Union by letter dated September 30, 1993. He stated:

> We were very disappointed by your letter of September 14, 1993, and your continued refusal to meet and work together to achieve a good contract both for our members and the Corporation. In another attempt to resolve this contract, we are making the following proposals which reflect major attempts on our part to achieve a fair contract with the Corporation.

The letter then listed proposals, some of which differed from the proposals set out in the Union's letter of August 13, 1993. The proposal for a COLA was withdrawn and the wage proposal contained no reference to lump sums.

Some 6 weeks later, by letter dated November 17, 1993, Settles again informed the Respondent that the Union was available for negotiations and suggested possible dates for meeting. Settles reiterated verbatim

the proposals set out in the September 30, 1993 letter as demands that were still unresolved. He also stated that he was hopeful that the Respondent would comply with the November 1993 settlement with the Board.[1]

By letter dated November 24, 1993, Stuart conveyed the Respondent's answer to both of the Union's letters. Stuart asserted that with the exception of one item demanding that the Respondent return an employee to work, all other issues raised by the Union in the letters had either been resolved through tentative agreement or were addressed by the Respondent's final offer to the Union. The letter stated:

> The company's settlement with the NLRB, to which, by the way, the union was not a party, does not require the company to reopen issues which have been fully negotiated and settled with the union or to change its position on any issue upon which the company, after negotiations, has taken a final position with the union.

The judge found that the Union's 1993 proposals did not constitute significant changes of its 1992 preimpasse positions and were not advanced in a manner by which the Respondent could reasonably believe that further discussion was fruitful. In this regard, the judge found that the Respondent was faced with demands from a union representative who was unfamiliar with past bargaining positions and made regressive bargaining proposals. We disagree with this analysis.

An impasse does not destroy the collective-bargaining relationship. Instead, a genuine impasse merely suspends the duty to bargain over the subject matter of the impasse until changes in circumstances indicate that an agreement may be possible.[2] Thus, an impasse is not the end of collective bargaining.[3] The Supreme Court has stated, ''As a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations 'which in almost all cases is eventually broken either through a change of mind or the application of economic force.'''[4]

Historically, the Board has not required major changes in circumstances to find that an impasse has been broken. Mindful of the Act's policy of reducing industrial strife through promoting collective bargaining directed toward reaching an agreement between the parties, the Board has held that a substantial change in bargaining position will revive the employer's obligation to bargain over the subject of the impasse.[5]

A number of factors must be considered in determining whether circumstances have changed sufficiently to break a lawful impasse and revive an employer's obligation to bargain over the subjects of the impasse. The Court of Appeals for the Fifth Circuit, in enforcing the Board's finding that impasse had been broken, summarized these factors in the following manner in *Gulf States Mfrs. v. NLRB*:

> Anything that creates a new possibility of fruitful discussion (even if it does not create a likelihood of agreement) breaks an impasse: a strike may; . . . so may bargaining concessions, implied or explicit . . . the mere passage of time may also be relevant. [Citations omitted.][6]

We find that there are sufficient factors present in the instant case to warrant a finding that the impasse was broken. Initially, we note that much time had passed since the impasse. It had been over a year since the parties had broken off discussions. This was clearly a sufficient period for cooling off and taking a second look at earlier positions.

The possibility for a break of the deadlock was further heightened by the change in the person representing the Union for negotiations. The Union had been represented by Melton during the earlier bargaining which led to impasse. A year later, Settles took over the role of representing the Union. This change created the possibility of a new approach toward the subjects of the earlier impasse.[7]

Finally, we find that the Union's 1993 proposals indicate willingness by the Union to reduce some of its demands. In its September 30, 1993 letter, the Union made no demand for a COLA and made no reference to lump sum payments in the wage proposal, both of which had been included in preimpasse proposals.[8] Further, the wage proposal changed from the

[1] This refers to the Board settlement of a complaint against the Respondent in Case 7–CA–33830, issued in November 1992, which alleged unlawful elimination of an alleged past practice of semiannual bumping privileges regarding shift preferences.

[2] *Providence Medical Center*, 243 NLRB 714 fn. 2 (1979).

[3] *Circuit-Wise, Inc*., 309 NLRB 905, 921 (1992) (citing *Hi-Way Billboards*, 206 NLRB 22, 23 (1973)).

[4] *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404, 412 (1982) (citing *Charles D. Bonanno Linen Service*, 243 NLRB 1093, 1093–1094 (1979)).

[5] See, e.g., *Webb Furniture Corp*., 152 NLRB 1526, 1529 (1965).

[6] 704 F.2d 1390, 1399 (5th Cir. 1983).

[7] The judge found that Settles failed to accurately apprise himself of past bargaining positions and was generally unfamiliar with past negotiations. While it might have been preferable to have a well-informed representative, Settles' unfamiliarity with past negotiations does not indicate that no fruitful discussion with him could take place. At the very least, the Respondent could be assured that Settles was not unalterably wedded to negotiating positions assumed by the Union in prior bargaining sessions.

[8] The judge found that even assuming the absence of reference to a lump sum in the Union's September 30 letter constituted a withdrawal of the lump sum proposal, it amounted to a concession of negligible substance because it had been proposed only as a ratification bonus and the incentive to give such a bonus evaporated when the Respondent implemented its last wage offer. We disagree with this conclusion. Assuming the Respondent retains a good-faith desire to conclude a collective-bargaining agreement, the interest in convincing employees to accept such an agreement is as significant postimpasse as it was preimpasse.

preimpasse demand of increases of 10 percent in the first year and 3 percent in the second and third years, to a demand of 5 percent in the first year and 4 percent in the second and third years.[9] The Union also changed its preimpasse proposal on vacation time from that which the employees currently had, to acceptance of the Respondent's final offer on vacation.[10] Finally, the Union changed its preimpasse proposal on expungement of employee disciplinary records as of the date of ratification, to expungement of disciplinary records over 6 months' old.[11]

We believe that the passage of time, the selection of a new union representative, and the Union's proposal of some reduced demands constitute sufficient change in circumstances to break the impasse and require a meeting. We see nothing in the Union's proposals for renewed bargaining which requires a different result. First, the Respondent did not complain to the Union that its proposals were regressive or indicated little possibility of reaching an agreement. Instead, the Respondent simply stated that it had made its final offer a year ago and that it continued to maintain the position that it had no further concessions to make on any issue. It pointed to tentative agreements made with the Union and essentially stated it would only grant a request from the Union to meet for the purpose of accepting and executing the Respondent's final offer. The Respondent made it very clear that it had made a final offer at the 1992 impasse, and that its position has not changed.

Second, we do not agree with the judge that the Union's proposals would reasonably lead the Respondent to believe that there was little possibility of engaging in fruitful negotiations. Contrary to the judge, we do not believe that the Union made ''blunt regressive'' proposals. The judge found that the Union regressed from proposing the ''negligible cost'' of a conference room in 1992, to proposing the added expense of the use of a telephone in 1993. No evidence was adduced that the use of conference space is less expensive than the use of a telephone. In the absence of such evidence, we cannot find that the Union's demand for a telephone amounted to a regressive proposal.

With respect to the Union's proposal on insurance, the judge found the proposal was regressive because it proposed no employee copayment whereas the Union had proposed a 10-percent copayment in 1992. The Union's 1992 proposal, however, also included a proposal to fold into the employees' base wage rate the $25 annual supplement the employees had been receiving to defray the cost to employees of premium payments. This fold-in was proposed in addition to the wage increase proposal. The 1993 proposal dropped the fold-in of the $25 supplement and proposed no copayments for employees. The 1993 proposal, therefore, is not so far from the 1992 proposal as to be considered so regressive that there was little likelihood of fruitful discussion.

The process of collective bargaining has been stalled in this case for over a year. The entrance of a new union representative into this stagnant situation with the introduction of proposals showing movement from the Union's preimpasse positions creates a change sufficient to dissolve the impasse reached so long ago. Requiring the Respondent to meet face to face with the Union will impose no undue hardship.[12] Accordingly,

[9] The judge conceded that the evidence was silent on the question of whether the Union's wage proposal was prospective or retroactive. Nevertheless, he concluded that it was reasonable for the Respondent to assume that it was prospective and thus, in effect, covered a period of 4 years rather than 3 and therefore constituted an increase in preimpasse demands. We find, however, that there is no reasonable basis for such speculation and that it is clearly more reasonable to assume that the Union's proposal was retroactive and therefore constituted a reduction of its preimpasse wage proposal. Indeed, the Respondent appeared to view the proposal as applying to the same period as the Respondent's final offer when it argued in the September 14 letter to the Union that the parties had already tentatively agreed to 3 percent in the second and third years. In these circumstances, it cannot be said that the Union's wage proposals were prospective and thus indicated little possibility that further discussion would be fruitful.

[10] Although the judge conceded that the Union's withdrawal of its previous demand on vacation time and its acceptance of the Respondent's last offer on vacation time was a concession, he found that it was not a ''real concession'' and that the parties effectively remained at preimpasse positions. He relied on the fact that the Respondent had linked its last offer on vacation time to its holiday proposal. Because the Union did not accept the holiday proposal, the judge concluded that its acceptance of the vacation time offer was not an effective acceptance of an offer and did not amount to a real concession. We disagree. The question is not whether the Union made an effective acceptance, but whether the Union showed a willingness to move from its preimpasse positions. Clearly it did; it told the Respondent it was willing to accept less in vacation time.

[11] The judge found that although the Union's September 30 proposal on expungement was a change from its preimpasse position, it provided little incentive to the Respondent because the Respondent had implemented a new disciplinary system after impasse and would be faced with the burden of undoing the results of that system. Again, we disagree with the judge's approach. The central issue is whether the Union's proposal created a new possibility of fruitful discussion, even if there is little likelihood of an agreement. We find that it did. The Union previously wanted all prior disciplines expunged at the time of ratification of an agreement. It moved to a position of asking for expungement only of disciplinary actions over 6 months' old. Even assuming the new disciplinary system had been operating for a year, the Union's proposal would not require undoing all the results of that system. Six months of disciplines would remain on the records.

[12] In concluding that the Union's 1993 proposals did not dissolve the impasse, the judge relied on the fact that two of the Union's 1993 proposals were contrary to tentative agreements reached between the parties before impasse. Thus, there was a tentative preimpasse agreement to permit some use of temporary employees. (The parties were in disagreement only on the extent of the use.) The Union's 1993 proposal, however, demanded that all current temporary employees be made regular full-time employees and that only regular full-time employees be hired in the future. Similarly,

Continued

we find that the Respondent violated Section 8(a)(5) and (1) by refusing the Union's request to resume bargaining on the issues of wages, COLA, lump sum payments, vacation, and expungement of employee disciplinary records as alleged in the complaint.

CONCLUSIONS OF LAW

1. The Respondent, Airflow Research & Manufacturing Corporation, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Local 174, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time production and maintenance employees, including machine operators, floor persons, utility persons, inspectors, shipping and receiving employees, lab technicians and mold technicians, employed by Airflow Research & Manufacturing Corporation at its facility located at 7565 Haggerty Road, Belleville, Michigan; but excluding office clerical employees, professional employees, managerial employees, technical employees, confidential employees, casual employees, temporary employees, sales employees, drafting employees, engineering employees, guards and supervisors as defined in the Act.

4. On February 18, 1992, the Union was certified as the exclusive bargaining representative of all the employees within the above-described appropriate unit and since that time has been the exclusive collective-bargaining representative of the unit within the meaning of Section 9(a) of the Act.

5. Since September 30, 1993, by failing and refusing to meet and bargain collectively with the Union about subjects relating to the wages and other terms and conditions of employment of unit employees, including wages, cost-of-living adjustment, lump sum payments, vacation, and expungement of employee disciplinary records since September 30, 1993, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act by refusing to meet and bargain with the Union as the exclusive representative of its employees in an appropriate unit, we shall order that the Respondent cease and desist from engaging in such unfair labor practices and, on request, bargain collectively with the Union concerning wages, hours, and terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

ORDER

The National Labor Relations Board orders that the Respondent, Airflow Research & Manufacturing Corporation, Belleville, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to meet and bargain with Local 174, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO as the exclusive representative of the employees in the appropriate unit concerning terms and conditions of employment.

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

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

(a) On request, bargain with the Union as the exclusive representative of employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time production and maintenance employees, including machine operators, floor persons, utility persons, inspectors, shipping and receiving employees, lab technicians and mold technicians, employed by Airflow Research & Manufacturing Corporation at its facility located at 7565 Haggerty Road, Belleville, Michigan; but excluding office clerical employees, professional employees, managerial employees, technical employees, confidential employees, casual

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preimpasse agreement had been reached tentatively on a shift preference procedure that permitted bumping privileges to be exercised only once in a 12-month period. However, in 1993, the Union proposed bumping in April and August of each year.

We do not believe that the Union's movement away from these tentative agreements indicated a regressive stance that places an undue burden on the Respondent or reasonably would lead the Respondent to believe that there could be no fruitful discussions with the Union. The agreements had been reached over a year ago. The parties had gone for more than a year without a contract and with no further negotiations. In such circumstances, we find that their earlier efforts to reach an agreement did not forever bind them to positions then espoused. *Kenton Transfer Co.*, 298 NLRB 487, 489 (1990). After such a long passage of time with no exchange of ideas, we find that the change in previous agreements should not be viewed as a regressive action discouraging the reaching of a collective-bargaining agreement or placing an undue burden on the Respondent, particularly in light of other proposals that showed some concessions from the Union's 1992 proposals.

employees, temporary employees, sales employees, drafting employees, engineering employees, guards and supervisors as defined in the Act.

(b) Post at its facility in Belleville, Michigan, copies of the attached notice marked ''Appendix.''[13] Copies of the notice, on forms provided by the Regional Director for Region 7, 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.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

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

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

WE WILL NOT refuse to meet and bargain with Local 174, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO as the exclusive representative of the employees in the bargaining unit.

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

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time production and maintenance employees, including machine operators, floor persons, utility persons, inspectors, shipping and receiving employees, lab technicians and mold technicians, employed by us at our facility located at 7565 Haggerty Road, Belleville, Michigan; but excluding office clerical employees, professional employees, managerial employees, technical employees, confidential employees, casual employees, temporary employees, sales employees, drafting employees, engineering employees, guards and supervisors as defined in the Act.

AIRFLOW RESEARCH & MANUFACTURING CORPORATION

Ellen Rosenthal, Esq., for the General Counsel.
Frederick A. Stuart, Esq. (Stuart & Irvin), of Atlanta, Georgia, for the Respondent.
Betsey A. Engel, Esq., of Detroit, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge. The underlying unfair labor practice charge in this case was filed on November 12, 1993, by Local 174, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO (the Union) against Airflow Research & Manufacturing Corporation (Respondent). The complaint was issued by the Regional Director for Region 7 of the National Labor Relations Board. The complaint alleges that Respondent violated Section 8(a)(1) and (5) of the Act since about September 30, 1993, by failing and refusing to bargain with its employees' designated bargaining agent, the Union, concerning certain subjects of bargaining to the Union's request to do so. The Union's request to bargain is alleged to have been coupled with bargaining position modifications which effectively dissolved a preceding undisputed good-faith, 13-month-old bargaining impasse for an initial collective-bargaining agreement.

Respondent filed a timely answer which denied the commission of an unfair labor practice. Respondent admits to having refused to meet and bargain with the Union on and after September 30, 1983. Respondent contends that it was justified in doing so because the Union's proposed modification of its prior bargaining position did not constitute significant changes in position, were actually regressive in nature, and evidenced bad faith.

The issues in this case were litigated before me in trial at Detroit, Michigan, on March 16, 1994, at which all parties were given full opportunity to adduce all relevant testimony and other evidence. The parties chose to submit posttrial briefs rather than to rely on oral argument. Thereafter, all parties filed briefs, the last of which was received on May 17, 1994.

On the entire record of this case, including an evaluation of documentary evidence and testimony which was largely uncontradicted, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, Respondent, a corporation with an office and place of business in Belleville, Michigan (Respondent's facility), has been engaged in the manufacture of radiator cooling fans. During the 12-month period ending December 31, 1992, Respondent, in conducting its business operations, purchased and received at its Belleville, Michigan

facility goods and materials valued in excess of $50,000 directly from points outside the State of Michigan.

It is admitted, and I find, that at all material times Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

It is admitted, and I find, that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

1. Background

On February 18, 1992, the Union was certified by the Board as the exclusive bargaining agent for Respondent's Belleville, Michigan facility production and maintenance employees. It continued in that status thereafter. On March 9, 1992, the Union commenced negotiations with Respondent for a collective-bargaining agreement covering the unit employees. The last of a series of 30 bargaining meetings was held on August 5, 1992, at which time the Respondent proffered its final offer. It is undisputed that on the Union's rejection of that final offer, the negotiations were at good-faith bargaining impasse, and meetings ceased. Thereafter, Respondent implemented its wage increase proposal and, also later, on May 3, 1993, certain other sections of its final offer inclusive of certain ''Management's Rights'' sections, articles relating to ''Layoffs and Recall'' and ''Discipline and Discharge.'' The implementations were done pursuant to notification and are not alleged to be improper or done in bad faith.

The Union's negotiating team was led by its chief spokesperson, UAW Service Representative Roy Melton. The Respondent's chief negotiator was its attorney, Frederick A. Stuart, its counsel of record here. In August 1992, the Union assigned UAW Service Representative James Settles to service the unit in substitution for Melton who remained in its employ as a service representative. Settles had not participated in the negotiations, and his only knowledge of what had transpired there is based on what Melton or other negotiators had reported to him. Indeed, Settles was initially employed by the Union on June 20, 1992. By letter dated August 13, 1993, Settles communicated with Stuart. Settles testified that his letter constituted a union proposal consisting of position modifications. The letter itself contains a stated desire to resume negotiations and an enumeration of ''Union Proposals'' that was characterized there as ''open items.'' The letter itself does not actually reference those proposals as modifications of prior union positions.

By letter dated September 14, 1993, Stuart replied to Settles. He recapitulated the impasse status and reasserted Respondent's refusal to make further concessions. In that letter, Stuart further characterized the Union's position to be one that as of yet fails to indicate a significant change of position. On that explicit premise, he stated:

> We have no obligation to meet with you for the purpose of reopening any issue or of continuing to negotiate over any issue relating to a collective bargaining agreement, and we refuse to do so.

In the same response letter, Stuart accused Settles of factual misrepresentations as to the alleged open status of certain items. He cited as examples leave of absence, item 8 (claimed union position), ''Continue seven (7) leave of absence days,'' and item 12 (claimed union position of a wage increase of 5 percent, 4 percent, and 4 percent for the first 3 years, respectively, and three yearly ''Lump Sum'' payments of $500 for each of the 3 years). As to the two items Stuart cited as inaccuracies, he asserted in his letter to Settles that item 8 had been resolved with a tentative agreement on that which had last been proposed by Respondent and that tentative agreement had been reached on 3 percent of the second and third years' wage increase. The postimpasse, 3-year wage increases implemented in or about August 1992 by Respondent was 5 percent, 3 percent, and 3 percent.

Finally, Stuart accused Settles of introducing a completely new demand in item 7 of the August 13 letter, i.e., ''Bumping in April and August every year.''

In his September 14 response letter, Stuart offered to meet and negotiate the new issues raised by Settles with respect to the demand for reinstatement of unit employee Fred Seaver who had been discharged subsequent to the Respondent's last offer.

The complaint did not allege and was never amended to allege that Settles' August 13 letter constitutes a demand for bargaining, nor that Respondent unlawfully refused to negotiate with the Union at any time prior to September 30, 1993. The complaint alleges, and the General Counsel's brief argues, that by its proposals of September 30, 1993, reiterated on November 13, 1993, the Union, by letter sent from Settles to Stuart, substantially changed its preimpasse proposals, ''including proposals on discipline, COLA, lump sum payments to employees and vacations.'' The complaint did not allege nor was it amended to allege a modified position as to wage raises although the General Counsel and the Union argued that there was such modification. The Union argues that the August 13 enumeration of open issues contained wage increase proposal modifications. The General Counsel's brief limits its argument as to changes in the Union's position to Settles' subsequent letters of September 30 and November 17, 1993, as alleged in the complaint.

2. Alleged union bargaining demand modifications and Respondent's refusal to negotiate

Settles responded to Stuart by letter dated September 30, 1993. He was silent as to Stuart's accusations of inaccuracy as to open items in Settles' prior letter but, instead, expressed disappointment over the refusal to meet and bargain and accordingly enumerated 17 proposals he characterized as ''major attempts'' by the Union to reach agreement. In direct examination by counsel for the General Counsel, Settles testified with respect to the August 13 letter proposals of 16 items. Testimony was thereupon elicited as to how his September 30 proposals differed, i.e., constituted modifications of the Union's position as set forth in the August 13 letter, the presumption being that the August 13 letter was an accurate recital of the Union's preimpasse bargaining position. The theory of prosecution, at least in part, therefore is that the differences between August 13 and September 30 bar-

gaining positions were substantial enough to break the impasse and warrant negotiations. Settles testified that the September 30 modifications of the August 13 proposals consisted of an abandonment of the demands for COLA, annual lump sum payment, and the additional vacation time demand (item 15, August 13 proposal).

The General Counsel also argues that the September 30 item 1 (a duplicate of the August 13 item 1), proposal to expunge employees' disciplinary and attendance records of violations over 6 months' currency to be a modification of its August 1992 position of expungement of all violations on contract ratification. Both the General Counsel and the Union argue that the August 13, 1993, and September 30, 1990 wage increase proposals of 5 percent, 4 percent, and 4 percent substantially modify the August 1992 position of 10 percent, 3 percent, 3 percent, COLA, and $500 lump sum bonus. Both August 13 and September 30, 1993 wage increase proposals demanded raises of 5 percent, 4 percent, and 4 percent. However, the August 13 letter set forth a lump sum demand whereas the September 30 proposals were silent on that issue. It is argued by the General Counsel and the Union that silence must reasonably be construed as withdrawal. Respondent argues that because the Union explicated other changes especially stating, in so many words, a withdrawal of the COLA and additional vacation time, that silence is not equivalent to a statement of withdrawal.

By letter dated November 17, 1993, to Stuart from Settles, the Union reiterated verbatim the April 30 proposals and suggested dates for resumption of negotiations. The letter expressed hope that Respondent would comply with a November 1993 Board settlement of a complaint that had issued against Respondent in Case 7–CA–33830 in November 1992 which alleged unlawful elimination of shift preference opportunities, i.e., an alleged past practice of semiannual bumping privileges.

By letter dated November 18, 1993, to Stuart from Settles, the Union demanded production of certain information characterized by counsel for the General Counsel in her brief as necessary for the negotiation of a contract, despite tentative agreement by the parties to at least some of the articles to which the requested information related and the lawful implementation of others.

Settles' demeanor in cross-examination varied from belligerence to flippancy. Settles' understanding as to whether tentative preimpasse agreement had been reached in several important areas clashed with the testimony of Melton despite Settles' testimony that he consulted with Melton before drafting the August 13 and September 30 proposals. The Union thus suffered inaccurate or inadequate communication between its service representatives. For example, Melton testified to ''tentative'' agreement, i.e., subject to total contractual agreement on union recognition whereby the Board certification would be incorporated into the contract. Settles testified that although there was tentative agreement on the unit description, he was told presumably by Melton or another negotiator that there had been no agreement on the recognition clause and that it remained open. In any event, Settles explained that he needed the requested information to explain to unit members what had been agreed on or unilaterally implemented a year earlier. Thus his request for information is argued to have been made in good faith and not for harassment purposes. I cannot find Respondent's skepticism to be completely unwarranted.

By letter dated November 24, 1993, to Settles from Stuart, the Respondent addressed itself to the Union's preceding three letters. There, Stuart claimed that the Union had raised only one issue that had not been resolved either through preimpasse agreement in negotiations or ''by the [Respondent's] final offer to the Union of August 6, 1992,'' i.e., reinstatement of employee Seaver. Stuart claimed that the unfair labor practice charge settlement agreement alluded to by Settles, which was unilaterally approved by the Board (presumably by the Regional Director), did not oblige the Respondent to ''reopen issues which have been fully negotiated and settled,'' nor to ''change its position on any issue upon which the company after negotiations, has taken a final position with the Union.''

With respect to the information requests, some of it was provided, some promised, and, with respect to others, the Union was asked whether or not it had entered preimpasse agreement on the contract article to which it related, after which the Respondent would decide whether to comply or file an unfair labor practice charge against the Union. The balance of the November 24 letter consisted of notification of intended changes in certain conditions of employment, none of which, like the information requests, evolved into allegations of unlawful conduct by Respondent.

3. Analysis of the nature of the Union's proposed postimpasse proposal notification

Melton testified that the Union considered the major areas of unresolved issues at the August 1992 impasse to have been rejected demands for the $2000 annual employee educational tuition reimbursement as provided under past practice, holidays, cost-of-living allowance (for which it had proposed a yearly 50-cent limit or cap), wage increase, medical insurance, leaves-of-absence days, vacations, and expungement of disciplinary records.

There were 17 items or bargaining proposals enumerated in the September 30, 1993 letter. Many of these were concededly not a modification of the Union's position at bargaining impasse.

According to Settles' testimony, there was no union change in position with respect to the following listed ''open'' items, i.e., rejected union demands:

> 3. Immediate reinstatement of employee Cathy Kennedy.
> 4. Continuation of past practice of educational tuition reimbursement.
> 5. Employee use of personal radios in the plant.
> 10. Status quo of preimpasse bereavement benefits.
> 11. Right of employees to be transferred to the site of any relocated operations.
> 12. Union shop clause.
> 15. Time and one-half pay for work in excess of 8 hours, and for Saturday, and double time for Saturday work.

Item 17 was admittedly a new proposal, i.e., the conversion of all current temporary employees to regular full-time status and future nonemployment of temporary employees. Melton testified that in the spring of 1992, the parties had

agreed and set a deadline date in April 1992 for the submission of any new contract proposal. Settles was unaware of such agreement.

Melton testified that there had been a preimpasse agreement to permit the use of temporary employees by Respondent but that disagreement remained only as to the extent of their use. Thus Settles' demand for ultimate elimination of all temporary employees constitutes no mere modification of a prior bargaining position. It is a complete regression from an explicit agreement to permit to some extent the use of temporary employees by Respondent.

Settles testified in cross-examination that his November 30 letter was intended to identify all outstanding issues. However, he admitted in further cross-examination that although his silence as to the lump sum payments in item 13, wages proposal, was intended to be a withdrawal, there were other open issues to which his letter did not allude. He identified as such an open issue the rejected union demands for voluntary nonrepresentational, political action use dues checkoff known as ''V-caps,'' as well as a dues-checkoff provision. When pressed in cross-examination, Settles then insisted that any union proposal not identified in his September 30 letter was intended to constitute a withdrawal. Neither the General Counsel nor the Union advanced that argument. The issue of silence on other unresolved issues, except for the lump sum payments, was ignored. Thus there is some justification for Respondent's confusion on whether the lump demand was in fact withdrawn.

The remaining seven demands in the September 30 letter must now be evaluated as to whether they are modifications of, reiterations of, or regressions from the Union's prior position at impasse.

Item 1 on both Settles' August 13 and September 30, 1993 letters—the expungement of employee disciplinary annotations from personnel records—is a change in position from the Union's position at impasse. However, the context must not be ignored. At impasse, a new formal disciplinary procedure was under negotiation. Melton testified that once the contract was ratified, new rules and procedures were to take effect and, therefore, the Union wanted all employees' records expunged and, so to speak, start with a clean slate. Because of the impasse, the Respondent implemented those rules and procedures, and the employees had been subjected to them for more than a year. Thus the motivation and significance for the proposal was dissipated. The reduction in disciplinary time frame by the 1993 demand provided little incentive for Respondent's acceptance because it would have to assume the burden of undoing a year's worth of the new disciplinary system which it had lawfully implemented without the expungement tradeoff.

Item 2 on the August and September 1993 letters identically calls for union access to a telephone in Respondent's facility for union business and the use of a filing cabinet. The Union's very first demand was for a furnished office. Its demand at impasse was limited to a filing cabinet and access to a Respondent facility conference room for union business. Thus, although the Union withdrew the negligible cost use of the conference room, it now demanded that Respondent bear the somewhat added expense of use of a Respondent telephone for union business.

Item 6 dealt with the medical-dental-life insurance coverage proposals. At impasse, the Respondent's proposal consisted of continuation of the then current insurance programs already enjoyed by unit employees with some modifications. Some of the proposed changes involved a discontinuance of a $25 weekly premium supplement that had been paid to employees. The proposal also included payment of 80 percent of the employees' premium by Respondent. The Union's position at impasse was that Respondent would pay 90 percent of the premium on condition that the insurance plans remain unchanged and that the $25-a-week supplement be ''folded into the base wage.'' Melton was not certain whether another cost element was also proposed by the Union to be folded into the base wage. Settles testified that he concluded that the Union's offer of folding in the $25 supplement effectively undermined the 5-percent pay raise and thus merely resulted in the shifting around of money with no net gain to the employees. Thus, in both the August 13 and September 30, 1993 letters, the Union now demanded an unchanged continuation of all the prior insurance programs and benefits without any copayment, i.e., any cost contribution by employees. Thus item 6 does not constitute either a reiteration of the impasse positions or a concession from an impasse position, but rather a significant regression.

Item 7 of the August 13 and September 30, 1993 letters set forth the following demand: ''Bumping in April and August every year.'' This relates to Settles' personal understanding of a past practice of semiyearly opportunity for employees to exercise seniority rights to change shifts. Settles testified that he had not been advised of any preimpasse tentative agreement between the Union and Respondent with respect to shift bumping opportunities. He testified he had discussed the status of the bumping issue with Melton but was not told that the parties had not only agreed, but signed off on a shift preference procedure. He testified that he first learned of that agreement when he heard Melton admit it during his preceding testimony that very date of the trial when Melton identified the document itself, initialed by Union Negotiator Williams, and never thereafter withdrawn. The entire agreement covered job vacancies, job posting, transfers, and shift preference (bumping) procedures. It limited bumping privileges to only one opportunity in a 12-month period of time. The settled complaint in Case 7–CA–33830 involved the allegation that Respondent refused to permit employee bumping in May and August.

Stuart's stated understanding in his September 14, 1993 letter that the Union had never before in bargaining demanded semiannual bumping rights was never denied orally or in writing thereafter. He was never disabused of that perception.

Item 8 of the 1993 union position letters demands continuation of a past practice of granting to employees 7 leave-of-absence days. Melton admitted that after extensive preimpasse negotiations, the parties had reached tentative agreement on ''most features'' of a leave-of-absence policy. No written initialed agreement was proffered into evidence for identification as such by Melton. Melton testified that the only thing not agreed on was the number of days an employee was entitled to an automatic leave of absence. The record evidence is insufficient to determine whether item 8 constitutes a recitation of the Union's impasse demand, a regression therefrom, or a concession. As neither Melton nor Settles identified it as a concession, I conclude that it must probably was not, and thus there was no sign of movement

by the Union on an issue that, according to Melton, consumed much negotiation time. Moreover, Stuart's stated perception in his September 14 response letter that a demand for 7 leave-of-absence days constituted a reopening of an issue settled by the preimpasse tentative agreement was never thereafter orally or in written response contradicted despite subsequent written proposal demands.

Item 13 dealt with wages. The absence of any reference one way or another to lump sum payments in the September 30 letter is noted above. With respect to the 5-percent, 4-percent, and 4-percent proposed wage increases set forth in both the August and September letters, Stuart responded in his September 14 letter that the parties had tentatively agreed in preimpasse negotiations to 3-percent raises in each of the second and third years. This stated perception was also unresponded to by Settles thereafter.

Melton was asked by the General Counsel what the Union's last wage offer was ''before the employer's final offer on the issue of wages.'' He responded that the Union's ''last'' progressive 3-year wage proposal was to increase wages 10 percent—3 percent—3 percent, ''with a $500 ratification bonus.'' Thereafter, he explained that the Union subsequently made a ''similar'' wage offer on August 4, 1992, but on August 5, amended it with a 50-cent annual cap on its pending COLA demand. He did not testify that the ''$500 ratification'' bonus was a one-time event as its title implies, or the $500 ''lump sum'' characterized by Settles as he set forth for each of 3 years in his August 13, 1993 letter. Nor did Melton testify that there was a bonus demand in the August 5, 1992 offer. I conclude that the $500 demand in the Union's preimpasse wage demand was, as he and fellow negotiator, Cynthia Wylie, testified to, in the singular, as a bonus for ratification of the negotiated contract by the unit members. Counsel for the General Counsel refers to it in the singular in her brief. Thus the August 13, 1993 wage demand tripled the former ''ratification'' bonus demanded for each employee over the life of the contract.

Adding to the confusion, in cross-examination Melton admitted that the Respondent made its final offer on August 5, 1992, and that the Union's counteroffer on that date was 3-year progressive wage increases of 5 percent—3 percent—3 percent. Again, he did not refer to any bonus demand in that August 5 counteroffer.

The Union's 1993 wage demand is also confusing as to what actual years the proposed wages cover. If the Union was proposing a retroactive contract from August 1992, indeed it arguably came closer to the Respondent's final offer, differing only by 1 percent for the second and third years. The evidence and the arguments of the General Counsel and the Union are silent on this point. The Respondent's brief interprets the 1993 demands to encompass a 3-year contract commencing on conclusion of agreement, and thus the first 5 percent would be prospective and would constitute not the 5 percent actually given in 1992, but rather the 1993 contract year for which the last offer of both parties was 3 percent. The third year would be 4 percent, again higher than the 3-percent last offers but with a commitment for another 4-percent raise in the fourth year, i.e., last year of the life of the proposed agreement. Absent an explicit concession from the Union that it was limiting its demands to be retroactively effective from August 1992, I conclude that it is reasonable to assume and for Respondent to have understood that the Union was requesting negotiations for a prospective agreement; and thus thereby raised its demands for 1993 and 1994 raises from 3 percent each to 5 percent and 4 percent.

It can hardly be argued that acquiescence in the lawfully implemented 1992 raise of 5 percent can reasonably be considered to be bargaining leverage for increased demands for 1993 and 1994, for which any success might be expected. By raising demands for subsequent yearly raises, the Union, in effect, attempted to renegotiate what had gone to impasse in 1992, i.e., the Union clearly attempted to recoup, at least in part, what it had lost in 1992 by asking for more in 1993 and 1994. Such position offers no incentive to the Respondent to reopen wage increase negotiations and, absent the abandonment of a one-time ratification bonus, is no concession from its preimpasse position, albeit it is a concession from the Union's August 13, 1993 regressive position for multiple annual bonuses.

With respect to whether the withdrawal of a $500 yearly lump sum bonus in September 1993 constitutes a concession, assuming it can be reasonably construed to be a withdrawal by virtue of silence, its nature must be evaluated. As already noted, there had been no demand for multiple annual lump sum bonuses prior to impasse. There had only been proposed a single ''ratification'' bonus. There was no ratification in 1992. The Respondent, by virtue of impasse, implemented its last wage offer. The incentive to pay employees a bonus to ratify, inter alia, an agreed-on economic package thus evaporated. The September 1993 withdrawal of that preimpasse demand, which by nature was integral to an agreement in August 1992, amounts to a concession of negligible substance. The only remaining concession is that of a 50-cent maximum COLA.

Item 14, holidays, is referred to in the August 13 letter and again in the September 30 letter as the ''same as before. Also Martin Luther King Birthday.'' Settles testified that he meant to refer to the 13 holidays enjoyed by the employees under past practice with the addition of 1 more day. It is not clear what the Union's initial and preimpasse offers were regarding holidays. Respondent's final offer provided for 12 holidays.

Settles' August 13, 1993 letter, item 15, requested additional vacation time, i.e., more than had been provided under past practice. The September 30 letter proposed a withdrawal of that demand and acceptance of the Respondent's last offer of August 6, 1992, thus appearing to be a significant new concession.

Melton testified that the Union's last offer on August 5, 1992, regarding vacation entitlement was to continue with the vacation time accrual under past practice as set forth in the preexisting employee handbook, whereas Respondent wanted to reduce it. Thus the September 30, 1993 modification from August 13, 1992, was not as dramatic as it appeared, although it did acquiesce to Respondent's last offer of vacation of less than that enjoyed under past practice.

Melton testified that at impasse, the parties had agree to all aspects of the holidays' and vacations' contract clauses except the number of holidays, their identity, and the amount of vacation time employees could accrue. He admitted that the Respondent had linked the two issues and related the number of vacation days it would agree on to the amount of vacation time the Union would agree on. He further admitted that it offered the Union two options whereby acceptance of

one necessitated acceptance of a package of holiday-vacation components not interchangeable with any component of the other option package. Settles testified that although he had consulted with Melton, he was not told about the linkage and thus he was unaware that Respondent's August 6, 1992 vacation offer was contingent on acceptance of its holiday proposal, which Settles continued to reject by asking for two more holidays than had been offered. One holiday option package offered 12 holidays; the other offered 10 holidays, both proportionately linked to 2 vacation options. Thus ''acceptance'' of Respondent's vacation option did not constitute an effective acceptance of an offer because the condition for its acceptance was not met. Thus the vacation issue was not mooted by a real concession, and the parties effectively remained at preimpasse positions.

B. *Analysis*

The General Counsel and the Union, with appropriate citation, correctly set forth the state of Board law to the effect that impasse is not a permanent state but can be dissolved by time, change of circumstance, substantial change of position, or even a modification of position that creates a possibility of fruitful discussion, if not agreement, when resumption of negotiations imposes no undue burden on the other party. *Webb Furniture*, 152 NLRB 1526 (1965). *Hi-Way Billboards*, 206 NLRB 22 (1973); *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404, 412 (1982); *Circuit-Wise, Inc*., 309 NLRB 905, 919–921 (1992).

It is a very difficult task to evaluate what might or might not have constituted movement sufficient to warrant a conclusion that a party to impasse breached its bargaining obligations under the Act by refusing to respond to a request to merely meet and bargain in good faith pursuant to the proposed change of bargaining position and attitude. It would be, as the General Counsel suggests, not an unduly burdensome task for the Respondent. As a premise of a remedial Order, that conclusion carries great appeal. To do so, it must be found that Respondent was in violation of the Act when it, in bad faith, refused to bargain with the Union. However, it is one thing for a third party to suggest that the parties get together and give it another try. It is another for one party, who has gone through 30 bargaining sessions to impasse, to return to the bargaining table, which is not exactly a cost-free undertaking, when that party's perception of the alleged new proposals reasonably conclude that they are premised on regression, bad faith, and give no encouragement by stated position or attitude that further talks would be fruitful.

In evaluating whether impasse exists, one of the many actors considered by the Board is the relative perceptions of the parties as to the other's bargaining positions. *Taft Broadcasting Co*., 163 NLRB 475, 478 (1987), enfd. sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). Furthermore, there must be the realistic possibility that further discussion might be fruitful. *Television Artists AFTRA v. NLRB*, supra. Surely, the same considerations must apply to an evaluation as to whether impasse has dissolved.

The Respondent here justifiably perceived itself as having been faced with demands to resume negotiations by a union representative who was so unfamiliar with past negotiations that he misrepresented, intentionally or otherwise, past union bargaining demands; was ignorant of past tentative agreements; failed, through his or another's fault, to accurately apprise himself of past bargaining positions; made blunt regressive bargaining proposals; failed to contradict or deny accusations of union regressiveness; and made informational demands of contract clauses agreed to or implemented over 13 months earlier for the purpose, according to the General Counsel, to bargain for a contract or to make, for the first time, explanations of those clauses to the unit employees. The General Counsel suggests that had Respondent met with the Union, much of Settles' misunderstanding might have been cleared up. Yet, Settles made no effort to address Stuart's accusations of regression during a 4-month period of correspondence. Nor did he request a meeting for the purpose of clarifying misunderstanding, nor did Settles resolve Stuart's accusations by discussing them with Melton, nor did he thereafter make clarification statements or conciliatory overtures to Stuart. It is not Respondent's obligation to educate the Union's bargaining representative as to the Union's own bargaining positions, nor is it responsible for the Union's agents' inaccurate understanding of past positions and its consequential lack of preparedness to negotiate intelligently.

I conclude that for the reasons already noted above, the Union's 1993 proposals did not constitute significant modifications of its preimpasse positions, nor were they advanced in a manner by which Respondent would reasonably believe that further discussion would be fruitful. It may be argued that it is no burden for Respondent to resume discussions. It may also be argued that it is no burden for the Union to make a request to bargain with proposed significant modifications to preimpasse positions which are clear and unambiguous in a manner which does not give rise to suspicions of its good-faith intent. On the state of this record, I cannot conclude that the Union had done so, regardless of its own actual good-faith intent to do so.

[Recommended Order for dismissal omitted from publication.]