APT Medical Transportation, Inc. *and* National Association of Government Employees

APT Ambulance Service *and* International Association of EMT'S and Paramedics. Cases 31–CA–21879 and 31–CA–21880

April 3, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On February 14, 1997, Administrative Law Judge Michael D. Stevenson issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondents filed an answering brief.

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

The Board has considered the decision and the record[1] in light of the exceptions and briefs and has decided to affirm the judge's rulings,[2] findings,[3] and conclusions[4] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

MEMBER LIEBMAN, concurring.

This case arises out of first contract bargaining. The complaint alleges bad-faith surface bargaining by the Employer. There is perhaps no more difficult problem in contemporary labor-management relations than achieving an initial agreement, and nothing more critical to establishing the new relationship than the tone and conduct of the first negotiations. The Board should therefore exercise special care in monitoring the first contract bargaining process and closely scrutinize behavior which "reflects a cast of mind against reaching agreement."[1] After careful review of this extremely close case, I have concluded, in agreement with my colleagues, that although there are factors indicating a lack of good faith, on balance, the evidence does not support a finding that the Respondents violated Section 8(a)(5). I write separately to highlight the Board's role in first contract cases.

General Principles

The Board has "wide latitude to monitor the bargaining process." *McClatchy Newspapers v. NLRB,* 131 F.3d 1026 (D.C. Cir. 1997), citing *Charles D. Bonanno Linen Service v. NLRB,* 454 U.S. 404 (1982). "It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining." *H. K. Porter Co. v. NLRB,* 397 U.S. 99, 107–108 (1970). "[T]he Board is authorized to order the cessation of behavior which is in effect a refusal to negotiate, or which directly obstructs or inhibits the actual process of discussion, *or which reflects a cast of mind against reaching agreement*." *NLRB v. Katz*, supra, 369 U.S. 736 (emphasis added).

"Enforcement of the obligation to bargain collectively is crucial to the statutory scheme. And, as has long been recognized, performance of the duty to bargain requires more than a willingness to enter upon a sterile discussion of union-management differences." *NLRB v. American National Insurance*, 343 U.S. 395, 402 (1952). The parties must "make a serious attempt to resolve differences and reach a common ground." *NLRB v. General Electric Co.*, 418 F.2d 736, 762 (2d Cir. 1969), cert. denied 397 U.S. 965 (1970), although the Act does not compel agreement. *NLRB v. American National Insurance*, 343 U.S. at 402.

"Obviously there is a tension between the principle that the parties need not contract on any specific terms and a practical enforcment of the principle that they are bound to deal with each other in a serious attempt to resolve differences and reach a common ground." *NLRB v. Insurance Agents' Union,* 361 U.S. 477 (1960). Yet, while the Board "may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements," *NLRB v. American National Insurance,* 343 U.S. at 404, nonetheless "[t]o some degree the Board often considers substance when regulating process. . . .

[1] After the issuance of the judge's decision, the official transcript was corrected on the motion of the General Counsel.

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

[3] In adopting the judge's finding that the Respondents did not bargain in bad faith, we find it unnecessary to rely on the Respondents' request for the presence of a Federal mediator during negotiations as affirmative evidence of good faith in the circumstances of this case.

The judge stated that a May 14, 1996 letter from the Union was an admission against interest under Rule 804(b)(3) of the Federal Rules of Evidence. Inasmuch as no hearsay objection was raised concerning the letter, we do not reach the issue of whether the letter is an admission against interest within the meaning of that rule.

[4] We agree with our concurring colleague that the Board should be especially sensitive to claims that bargaining for a first contract has not been in good faith. Thus, the fact that the bargaining is for a first contract, especially after a contentious election campaign, would be one of the circumstances to consider in evaluating the bona fides of the bargaining. However, Member Hurtgen does not necessarily endorse the concurrence with respect to the extent to which the Board should consider the substance of the proposals when evaluating the bona fides of bargaining.

[1] *NLRB v. Katz,* 369 U.S. 736, 747 (1962).

[T]he Board may consider the content of a proposal when making a determination whether the employer is engaged in 'surface bargaining.'" *McClatchy Newspapers,* 131 F.3d at 1034, citing *NLRB v. Pacific Grinding Wheel Co*., 572 F.2d 1343, 1348 (9th Cir. 1978). The Board has recognized that,

> [i]ndeed, the fundamental rights guaranteed employees by the Act . . . are meaningless if their employer can make a mockery of the duty to bargain by adhering to proposals, which clearly demonstrate an intent not to reach an agreement with the employees' selected collective-bargaining representative. The Board will not have fulfilled its obligation to look at the whole picture of a party's conduct in negotiations if we have ignored what is often the central aspect of bargaining, i.e., the proposals advanced by the parties.[2]

In examining contract demands, the Board focuses on whether they seem designed, not to reach agreement, but rather to frustrate one.[3] Unrealistically harsh or extreme proposals can serve as evidence that the party offering them lacks a serious intent to adjust differences and reach an acceptable common ground. *A-l King Size Sandwiches,* 265 NLRB 850, 858 (1982), enfd. 732 F.2d 872 (11th Cir. 1984), cert. denied 469 U.S. 1035 (1984). Bad faith is indicated when the proposals are so predictably unpalatable to the other party that the proposer should know agreement is impossible,[4] or when the proposals would leave the unions and the employees "with substantially fewer rights and less protection than they would have had if they had relied solely on the Union's certification."[5] When the employer's proposals, considered as a whole, vest nearly total discretion in the employer while offering little in return, this does not look like the conduct of an employer sincerely attempting to reach agreement, but rather is evidence that it is not seeking to bargain in good faith. *Hydrotherm, Inc.,* 302 NLRB 990, 995 (1991).

Analysis

Determining where "hard bargaining ends and obstructionist intransigence begins" is "an inescapably elusive inquiry." *NLRB v. Big Three Industries,* 497 F.2d 43, 46 (5th Cir. 1974). In this case, the tension between the statutory duty to bargain and the parties' right to engage in hard bargaining is highlighted because first contract negotiations are at issue. These negotiations "usually involve special problems."[6] The parties sit for the first time across the table from each other, often with residual bad feelings from acrimonious organizing campaigns and without significant experience in collective bargaining or any history to guide them. As the parties struggle to establish a newly created relationship, this first negotiation process will be critical in shaping their attitudes toward each other. How issues are handled will affect the tone of the developing relationship. The Board's role is therefore especially important in these cases where the doom or success of the fledgling relationship is at stake.

It is not the Board's function to *dictate* good relations between the parties. It is, however, within our authority, indeed it is our responsibility, to oversee the process so as to ensure fair dealing which will enhance mutual trust and confidence, so "basic to an effective and harmonious collective-bargaining relationship."[7]

The Board's role is an "especially delicate" one in "judging whether, in context, a strategy of bargaining is more likely calculated to obstruct agreement than to bring about the best compromise possible." *Eastern Maine Medical Center v. NLRB,* 658 F.2d 1, 10 (1st Cir. 1982). In this case, the Board's task is "especially delicate" because the surface bargaining allegations are based exclusively on the Respondent's substantive contract demands. Thus, the tensions between our statutory duty to insure that the parties are bargaining in good faith, and the Act's prohibition on our compelling agreement on any particular terms, are in play. While, as discussed, the Board may not sit in judgment of substantive contract terms, it may evaluate the proposals to determine whether, as the General Counsel contends in this case, they evidence an intent to frustrate agreement.

Here, the Respondents' insistence on certain positions suggests that they were bargaining in bad faith. Their approach to the Unions' proposal for union security strongly suggests an unwillingness to compromise. Initially, the Respondents rejected the Unions' proposal on the stated ground that it might give only union members the power to ratify a contract. In response, the Unions then proposed that all bargaining unit employees could vote on ratification, that a ratification election would be valid only if more than a specified minimum number of employees participated, and that representatives of the Respondents could be present when the ballots for ratification were counted. But, the Respondents still rejected

[2] *Reichhold Chemicals, Inc.,* 288 NLRB 69, 70 (1988), enfd. sub nom. *Teamsters Local 515 (Reichhold Chemicals) v. NLRB,* 906 F.2d 719 (D.C. Cir. 1990).

[3] See, e.g., *Viking Connectors, Inc.,* 297 NLRB 95 (1989); *Reichhold Chemicals, Inc.*, supra; *A-1 King Size Sandwiches,* 732 F.2d 872 (11th Cir. 1984), cert. denied 469 U.S. 1035 (1984); and *NLRB v. Mar-Len Cabinets,* 695 F.2d 995 (9th Cir. 1981).

[4] *NLRB v. Mar-Len Cabinets*, supra.

[5] *A-1 King Size Sandwiches*, 732 F.2d at 877.

[6] *N. J. MacDonald & Sons, Inc.,* 155 NLRB 67, 71 (1965).

[7] *St. Louis Typographical Union Local 8 (Graphic Arts Assn.),* 149 NLRB 750, 754 (1964) (concurring opinion).

the Unions' proposals and gave no reason for this wholesale rejection of the Unions' efforts. The Respondents' unexplained refusal to accept, or even address, the Unions' attempts to meet their stated concerns suggests that they had no serious intention to reach an agreement.

The Respondents also proposed a combination of a broad management-rights clause, a no-strike clause, and a purely internal grievance procedure. The combination of these proposals—predictably unpalatable to the Unions—also reflects bad faith. The proposed management-rights clause gave the Respondents the rights to, inter alia, increase or decrease operations, subcontract work, discipline employees for cause, increase or reduce the number of shifts and hours of overtime, and establish a drug/alcohol testing program. The Respondents also proposed a no-strike clause, but opposed the Unions' request for a grievance-arbitration procedure. Indeed, the Respondents' initial proposal for a grievance procedure gave ultimate control over the resolution of grievances to the Respondents' president, Ralph Smith. In response to the Unions' proposal for a grievance-arbitration procedure, the Respondents proposed an internal labor management council that would refer grievances, when consensus was not reached, to President Smith. He was the final authority on disciplinary matters, yet under the proposal he would also remain the final arbiter on disputes (including discipline) when the council could not reach agreement. He would also have the right to choose and remove the management representatives on the proposed council.[8] Viewed together, these proposals seem to vest in the Respondents total discretion over significant aspects of employment. In effect, by retaining final control over these matters, the Respondents sought to leave the Unions with fewer rights than they would have relying merely on their certification. *Hydrotherm, Inc.*, supra, 302 NLRB at 995. All of this favors an inference of bargaining with an intent to frustrate agreement.

Other record evidence suggests otherwise, however, and weighs against an inference of bad faith. The Unions stated that they viewed the Respondents' management-rights clause as a bargaining chip to be traded for arbitration or union security. They viewed the Respondents' proposal for a no-strike clause in the same way. Thus, the Unions would have accepted the no-strike clause in exchange for arbitration. Further, as the judge found, the Respondents indicated that they might have been willing to give up a no-strike clause in exchange for the Unions' foregoing of an independent arbitrator. Especially since the discussion of management-rights and a no-strike clause had not yet progressed very far, the presence of possibilities for exchange and compromise weighs against an inference of bad-faith bargaining.

Despite the lack of movement on management rights, the no-strike clause, and the Unions' requests for an arbitration procedure and a union-security clause, the Respondents did make concessions in other areas. At the Unions' urging, they did offer to delete the provision in the seniority clause that gave them sole discretion to determine whether skills and abilities were equal among employees so that departmental seniority would prevail. They also reached tentative agreements on such matters as rotation of overtime, supervisory duties, the definition of part-time employee, and job bidding. This movement, too, weighs against an inference that the Respondent had no serious interest in reaching an agreement.

Finally, and perhaps most importantly, the parties had not even started bargaining about economics. There might well have been room for the Respondents to back off from their positions on management-rights, a no-strike clause, the grievance procedure, and union security in exchange for favorable economic terms. That the parties had not reached the issue of economics where compromises might well have been made is a factor weighing against the inference of bad-faith bargaining.[9]

This is an extremely close case with evidence reflecting both an intent to frustrate agreement and room for compromise. On balance, however, I find that the weight of the evidence does not reflect a clear intent to frustrate agreement. Rather, the factors against an inference of bad-faith bargaining outweigh those favoring it. There may well have been more effective ways to seek agreement in this first contract dispute. And, the Respondents' approach to seeking common ground may not have been entirely conducive to achieving future harmony. However, in this difficult area, where lines are

[8] There is no testimony or documentary evidence in the record about how the management representatives to the labor management council proposed by the Respondents were to be selected. The Respondents' written proposal is silent on this question, and no witnesses testified about it. The judge asked how the management representatives would be selected, and a witness replied that that had not yet been proposed or discussed. However, the judge stated in his decision that "the Respondent offered to agree to a management-labor council with the management members apparently appointed by Smith and subject to his removal." No exceptions were filed to this finding. Further, the Respondents state in their answering brief (p. 5): "In response to the Union's proposal for binding arbitration, the Respondent offered to agree to a Management Labor Council, with management members appointed by Smith and subject to his approval."

[9] Contrary to the judge, I do not find that the Union's May 14, 1996 letter to its membership stating that the Respondents are bargaining in good faith favors a finding that the Respondents did not violate Sec. 8(a)(5). The determination of whether parties have bargained in good faith is based on objective factors. *Reichhold Chemicals, Inc.*, supra, 288 NLRB 69. The subjective view of the union is not probative of the respondent's good- or bad-faith bargaining. *San Isabel Electric Services,* 225 NLRB 1073, 1079 (1976).

hard to draw, I cannot conclude that the Respondents crossed the line from hard, but lawful, to hard (overly) but bad-faith bargaining. For these reasons, I join my colleagues in adopting the judge's dismissal of the complaint.

Ann L. Weinman, Esq., for the General Counsel.
John W. Harris, Esq., of Los Angeles, California, for the Respondents.
Harry F. Berman, Esq., of Ventura, California, for the Charging Parties.

DECISION[1]

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at Los Angeles, California, on August 26 and 27, 1996,[2] pursuant to an order consolidating cases, consolidated complaint and notice of hearing issued by the Regional Director for the National Labor Relations Board (the Board) for Region 31 on June 25, 1996, and which is based upon charges filed by National Association of Government Employees (NAGE) and International Association of EMT's and Paramedics (IAEP])(the Unions, NAGE, or IAEP) on March 18, 1996 (original for both cases), on April 22, 1996, in Case 31–CA–21879 (first amended), on May 15, 1996, in Case 31–CA–21880 (first amended), and on June 14, 1996, in both cases (second amended). The complaint alleges that APT Medical Transportation, Inc. (AMTI) and APT Ambulance Service (APT) (Respondents) have engaged in certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act).

Issues

Whether Respondents have failed and refused to bargain in good faith with the Unions as the respective exclusive collective-bargaining representatives of the AMTI and APT units (nonemergency and emergency units respectively).

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and to cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of Charging Party Unions and Respondents.[3]

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. RESPONDENTS' BUSINESS

Respondents admit that they are California corporations and that each maintains a place of business located in Los Angeles, California, where AMTI provides nonemergency medical transportation services and APT provides ambulatory and emergency medical care services in the Los Angeles, California area. They further admit that during the past year, in the course and conduct of their businesses that their gross revenues exceeded $500,000 and that annually APT purchases and receives goods valued in excess of $50,000 directly from entities located outside the State of California. In the case of AMTI, it receives goods valued in excess of $50,000 from entities located inside the State of California, which entities in turn purchase these goods in essentially the same form directly from entities located outside the State of California. Accordingly, they both admit, and I find, that they are employers engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

Respondents admit, and I find, that NAGE and IAEP are labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. The Facts

1. Overview

Respondents are charged herein with "surface bargaining based primarily on proposals" (GC opening statement, Tr. 23). Later in her opening statement, the General Counsel made it clear that her theory of surface bargaining was based not "primarily" but exclusively on proposal content (Tr. 27–29). In due course, I will consider the evidence. But initially it will be helpful to understand the concept of surface bargaining, a form of bad-faith bargaining, which when proven, will be found to violate the Act.

In three recent cases, the Board affirmed the decisions of the administrative law judges' findings that Respondents had engaged in surface bargaining in violation of Section 8(a)(1) and (5) of the Act. See *ConAgra, Inc.*, 321 NLRB 944 (1996); *Bryant & Stratton Business Institute*, 321 NLRB 1007 (1996); and *Horsehead Resource Development Co.,* 321 NLRB 1404 (1996). These decisions and other authorities along with my findings of fact will determine my decision herein. For now, I quote the judge in *Horsehead Resource Development Co.,* supra at 1416, who explains,

> The duty to bargain in good faith mandated in Section 8(a)(5) and Section 8(d) of the Act requires more than "going through the motions of negotiating"; it requires instead that both parties approach bargaining with a "serious intent to adjust differences and to reach an acceptable common ground." *NLRB v. Truitt Mfg.*, 351 U.S. 149, 155 (1956). But Section 8(d) of the Act makes it equally plain that good-faith bargaining "does not compel either party to agree to a proposal or require the making of a concession."[Footnote omitted.]
>
> The determination of whether a bargaining party has engaged in unlawful "surface bargaining," or has instead merely engaged in lawful "hard bargaining," is usually a difficult one, because (a) it involves, at bottom, a question of the "intent" of the party in question, and (b) usually such intent can only be inferred from the totality of the

[1] The two volumes of transcript prepared for this case are of exceptionally poor quality, possibly the worst I've seen. No party has presented a motion to correct transcript and I am not able to make corrections on my own motion since it would involve rewriting a large part of the transcript.

[2] All dates herein refer to 1995 unless otherwise indicated.

[3] In lieu of a brief, the General Counsel cited cases and made arguments during the hearing.

challenged party's conduct at the bargaining table, and not from any position it may take on any single bargainable issue or set of issues. Moreover, exactly what features within the challenged party's overall bargaining behavior may properly give rise to an inference that the party has no "sincere desire" to reach agreement has been the subject of ongoing debate within the Board.

Such questions were revisited by the Board in its original decision in *Reichhold Chemicals*, 277 NLRB 639 (1985). There, the Board reiterated that it is "not the Board's role to sit in judgment of the substantive terms of bargaining," and stated further that,

> [t]he Board will not attempt to evaluate the reasonableness of a party's bargaining proposals, as distinguished from bargaining tactics, in determining whether the party has bargained in good faith. [Id. at 640.]

But in a "supplemental decision" in *Reichhold Chemicals* [288 NLRB 69 (1988) (*Reichhold II*)] a differently constituted Board reconsidered the original decision, particularly the dicta just quoted. Finding these dicta "imprecise" as a "description of the process the Board undertakes in evaluating whether a party has engaged in good faith bargaining," the Board (Member Johansen dissenting) stated:

> Specifically, the quoted sentence could lead to the misconception that under no circumstances will the Board consider the content of a party's proposals in assessing the totality of its conduct during negotiations. On the contrary, we wish to emphasize that in some cases specific proposals might become relevant . . . . The Board's earlier decision is not to be construed as suggesting that the Board has precluded itself from reading the language of contract proposals and examining insistence on extreme proposals in [some instances].
>
> > That we will read proposals does not mean, however, that we will decide that particular proposals are either "acceptable" or "unacceptable" to a party. Instead . . . we shall continue to examine proposals when appropriate and consider whether on the basis of objective factors, *a demand is clearly designed to frustrate agreement on a collective-bargaining contract.* The Board's task in cases alleging bad-faith bargaining is the often difficult one of determining a party's intent from the aggregate of its conduct. In performing this task we will strive to avoid making purely subjective judgments concerning the substance of proposals. [Emphasis added.]

See also, e.g., *88 Transit Lines*, 300 NLRB 177 (1990). There, the Board, reversing the administrative law judge's finding that the employer engaged in unlawful surface bargaining, cautioned on the one hand that:

> we risk running afoul of Section 8(d) if we predicate a finding of bad faith on a party's refusal to agree to the exact language of the other party's proposals. [Id. at 178.]

But on the other hand, the Board acknowledged (id.):

> Of course, if a party is so adamant concerning its own initial positions on a number of significant mandatory subjects, we may properly find bad faith evinced by its "take-it-or-leave-it" approach . . . . Furthermore, there may be cases [where] the substance of a party's bargaining position is so unreasonable as to provide some evidence of bad-faith intent to frustrate agreement.

In *Chevron Chemical Co.*, 261 NLRB 44, 45 (1982), the Board stated:

> Determining whether parties have complied with the duty to bargain in good faith usually requires examination of their motive or state of mind during the bargaining process, and is generally based on circumstantial evidence, since a charged party is unlikely to admit overtly having acted with bad intent. Hence, in determining whether the duty to bargain in good faith has been breached, particularly in the context of a "surface bargaining" allegation, we looked to whether the parties' conduct evidences a real desire to reach an agreement—a determination made by examination of the record as a whole, including the course of negotiations as well as contract proposals.

The totality of Respondent's conduct both at the bargaining table and away from the table must be analyzed in accordance with the guidelines established by the Board and court cases indicated above. Thus, the employer's overall conduct must be scrutinized in order to determine whether it has bargained in good faith.

> "From the context of an employer's total conduct, it must be decided whether the employer is lawfully engaging in hard bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement."
>
> . . . .
>
> A party is entitled to stand firm on a position if he reasonably believes that it is fair and proper or that he has sufficient bargaining strength force the other party to agree. [*NLRB v. Advanced Business Forms Corp.*, 474 F.2d 457, 467 (2d Cir. 1973).]

2. The negotiators

Initially, the Unions were represented by Mike Rupert, then regional director for IAEP, and Vince Pernisco, a second union official. Neither Rupert nor Pernisco testified, but other testimony indicated that both ceased working for the Union sometime after the beginning of 1996. They were replaced as union negotiators by Harry Berman, regional attorney for IAEP, and the General Counsel's sole witness at hearing. In addition to testifying, Berman also represented the Charging Party Unions. During the time he was chief negotiator for the Unions, Berman was assisted by Mustafa Tahjuddin, a national representative for IAEP. Tahjuddin testified as Respondents' witness.

Respondents were represented during the entire course of negotiations by Jim Richardson, the second of two respondent witnesses. Richardson is the regional manager of the California Association of Employees (CAE). In late June, Respondents joined CAE with the understanding that in return for their dues, Respondents would receive the services of Richardson as both advisor and negotiator. The time Richardson spent on negotiations exceeded the time provided to employers by virtue of their membership in CAE. Accordingly, Richardson entered into a supplemental agreement by which he received additional compensation from Respondents in an amount not specified in the record.

3. The negotiations

Most of the central facts in this case are undisputed. All agree that the Unions and Respondents were negotiating over their first collective-bargaining agreements. All also agree that to begin negotiations, Rupert contacted Richardson by phone in early September and at or about the same time transmitted to Richardson a first written union proposal for the emergency unit.[4] For unknown reasons, this proposal is not contained in the record. However, two later proposals (emergency and nonemergency) sent by Rupert to Richardson in November are contained in the record (R. Exhs. 3, 4; Jt. Exhs. 3, 4).

a. October 3. This first meeting was held at the offices of the Federal Mediation and Conciliation Service (FMCS), Glendale, California.[5] The location was chosen because Richardson had requested sometime prior to October 3, that the parties work with a Federal mediator and the Unions agreed. Either at this first meeting or shortly before, Richardson tendered on behalf of the emergency unit, the first employer proposal to the Unions (Jt. Exh. 1). This first meeting lasted between 2–3 hours and tentative agreements (TAs) were reached on certain minor issues such as scope of agreement, jury appearances and definition of supervisor.

b. October 18 meeting did not take place due to family emergency in the home of Respondents' owner, Ralph Smith.

c. November 6. Respondents tendered a second proposal for the emergency unit. The Unions reviewed this proposal in caucus, and a few TAs were reached in the short subsequent meeting such as on probation period, portions of holiday article and family medical leave policy.

d. November 14 meeting did not take place due to Government shutdown and unavailability of FMCS offices.

e. November 29. Only a short meeting occurred due to unavailability of Federal mediator. The parties reviewed proposals but did not engage in bargaining.

f. December 14. Again the parties reviewed proposals for the emergency unit but apparently did little or no substantive bargaining.

g. December 18 meeting did not take place for the same reason that canceled November 14 meeting.

h. January 2, 1996 meeting did not take place for the same reason that canceled November 14 meeting.

i. January 9,1996. Pernisco showed up to explain that Rupert was no longer employed by the Union and Pernisco was not aware of nor prepared for any bargaining on that day. Richardson gave Pernisco a company proposal for the nonemergency unit (R. Exh. 5) and the parties adjourned without bargaining.

j. February 8, 1996. The parties bargained by telephone[6] with Berman representing the Unions for the first time. The parties negotiated for the nonemergency unit for about 4 hours. During this session, the parties discussed certain provisions of proposals previously tendered (Jt. Exhs. 2–5) and reached TAs on subjects such as working conditions article, overtime, and employee time records.

The subject of binding arbitration also was introduced by Berman. Richardson opposed it, saying the Unions had filed [frivolous] charges in the past and Respondents preferred not to have binding arbitration. Richardson added that the company president, Smith, desired to continue having the final word regarding any grievances.

Berman testified that a union-security clause was discussed but Richardson denied that it was, testifying that the session ended before the parties could discuss the subject. This difference of opinion is not critical since all agree that whenever discussed, the union-security clause was obviously desired by the Unions and opposed by Respondents.

k. February 20, 1996 meeting did not occur as was canceled by Respondents on the grounds that the Unions had been visiting community leaders and Respondents' vendors, and leaving with them bulletins and notices presumably about the status of negotiations. Respondents desired to formulate a response to this tactic before resuming negotiations.

l. March 5, 1996 meeting did not occur as Ralph Smith canceled meeting on March 4, on "advice of counsel."

m. April 2, 1996. The parties bargained by telephone for the second and last time. During the 3-hour session for the nonemergency unit, the parties discussed many subjects including arbitration. After Respondents continued to oppose it on the grounds that the Unions would file frivolous grievances thereby costing the Employers money, Berman made a verbal proposal that the loser would have to pay the costs. Richardson countered this by contending that it is not always clear who wins in arbitration and this uncertainty could lead to additional grievances.

Berman made another verbal proposal to trade a broad management-rights clause for either binding arbitration or a union-security clause. Richardson opposed a union-security clause on grounds that it would tend to erode employee free choice.

n. April 16, 1996 meeting not held on grounds, per Richardson call to Berman on April 15 that due to a FMCS glitch, no mediator had been scheduled for the next day so Richardson would not appear. Berman told Richardson the Unions desired to negotiate even without the mediator and that Berman would

[4] During the hearing, the terminology for the two units varied: to avoid confusion, I will use the terms "Emergency" to refer to the ambulance unit and "non-Emergency" to refer to the transportation or bus units.

[5] All face to face meetings were held at this location.

[6] According to Berman, the Unions agreed to negotiate by phone after Richardson had expressed some concern about negotiating in the presence of a group of hostile employees. Richardson's thought seemed like a good idea to Berman (Tr. 89–90).

appear as previously scheduled. Berman did appear but Richardson did not.

Although the scheduled bargaining session did not occur, Respondents nevertheless faxed to Berman a set of current proposals for the emergency unit with indications made for TAs, for identical proposals previously tentatively agreed to for nonemergency unit, for prior unchanged company proposals, and for prior company proposals which are amended (Jt. Exh. 11).

o. April 17, 1996. This meeting did occur for the emergency unit. TAs were reached on work shifts and some safety issues. There was movement on shift trades and employee reporting pay. Richardson promised to prepare a company wage proposal soon.

Berman again raised the issue of binding arbitration and verbally proposed that an arbitrator be selected from either FMCS or American Arbitration Association or alternatively, from the ranks of religious or political leaders. More specifically, Berman proposed steps in the grievance process: (1) adverse management decision; (2) a labor management committee to review the matter, and if no consensus; and (3) arbitration. Respondents rejected this on the grounds that Ralph Smith had never met any religious or political leaders he could trust and he opposed binding arbitration in any event. Respondents made no counterproposal.

As to management rights, Berman offered to trade the Unions' agreement for other concessions in arbitration or union security, but this offer was rejected.

p. May 8, 1996. This meeting did occur for the emergency unit and arbitration and union security were discussed, but there was no movement. Richardson submitted a partial proposal at the meeting (Jt. Exh. 7).

q. May 15, 1996. This meeting did occur and by agreement of the parties, the discussion continued to focus on the emergency unit, but without significant results. That is, there were the usual TAs on minor issues such as certain aspects of seniority and reporting pay. The stalemate over arbitration and union security continued.

On the seniority issue, Respondents first stated that job classification seniority within a given department should prevail provided that skill, ability, and job performance including punctuality, absenteeism and discipline were equal between employees, and Respondents would be the sole judge of these factors. Later on May 15, Respondents agreed to drop this assertion that they would be the sole judge.

However, Respondents continued to oppose any form of binding arbitration, telling the Unions, their only remedy for grievances would be to sue in court to enforce provisions of the contract. Again, Respondents rejected the Unions' proposal that the loser pay all costs associated with binding arbitration.

The Unions proposed to trade its agreement to a management-right proposal for binding arbitration, but to no avail.

As to the union-security clause, the Unions made various proposals to allay the Respondents asserted fears that with such a clause, a minority of employees, union members, could dictate to the majority, nonmembers, on such issues as ratification of the agreement and the resulting union dues, which the majority would allegedly oppose. The Unions made various proposals here to achieve a union-security clause such as agreeing that all bargaining unit employees, whether or not union members, could vote on ratification, that all ballots on the ratification vote could be impounded in a sealed ballot box not to be counted except in the presence of a management representative and that the minimum percentage of all unit employees who needed to vote to have a valid ratification election would be subject to negotiation. Respondents rejected all of these proposals with no counterproposals.

r. June 19, 1996. This meeting did occur for the emergency unit. Respondents made a written proposal regarding arbitration. While there would still be no binding arbitration by a neutral arbitrator, Respondents proposed a step in the grievance procedure whereby a labor management committee would be appointed consisting of two members from each side. Within 10 business days of receipt of a grievance, the committee would convene to hear and consider the grievance. If a consensus is reached, decision is to be final; if no consensus is reached, the prior decision of the president will be final (R. Exh. 6). The Unions rejected this proposal, and Respondents again rejected any concept of binding arbitration by a neutral arbitrator on the grounds that the cost is too high and that in the past, Respondents' rights had not been protected.

As to union security, the Respondents continued to oppose this in any form and never changed their position.

Apparently no further bargaining sessions were held for the emergency unit. One or more sessions were held for the nonemergency unit but these were subsequent to the issuance of the complaint and were not covered in the hearing. No party contends any breakthroughs occurred at sessions held on July 2, 1996, and perhaps subsequent to that day. Joint Exhibit 9 consists of various proposals for the nonemergency unit submitted by either the Respondents or the Unions on different dates during May and June 1996. Joint Exhibit. 10, also for the nonemergency unit, consists of various partial proposals, primarily relating to proposed wage schedules, submitted either by the Respondents or Unions during August 1996.

B. Analysis and Conclusions

1. Legal principles

In *Bryant & Stratton Business Institute*, supra, 321 NLRB 1007, 1041, the judge states applicable law:

> In determining whether an employer has engaged in surface or bad faith bargaining, the Board examines the totality of the employer's conduct, both away from and at the bargaining table, including the substance of the proposals on which the party has insisted, for evidence of the real desire to reach agreement. *Overnite Transportation Co.*, 296 NLRB 669 (1989), enfd. 938 F.2d 815 (7th Cir. 1999); *Atlanta Hilton & Towers*, 271 NLRB 1600 (1984).

In the instant case, the General Counsel points to no conduct away from the table which she contends supports her case. Instead, she proposes to rest her entire case on content of Respondents' proposals. However, relevant conduct away from the table does exist; it merely happens to support Respondents' theory, that it did not engage in surface or bad-faith bargaining.

2. Conduct away from table

a. Federal mediator. It is undisputed that virtually from the beginning of negotiations, Respondents desired the presence of a Federal mediator. The Unions joined in requesting the mediator and I find this fact weighs in Respondents' favor, since it is difficult to believe that Respondents could on the one hand ask for the neutral to assist in reaching agreement and on the other hand just be going through the motions. Berman conceded in his testimony that generally the party requesting a Federal mediator is desirous of reaching agreement (Tr. 131–132). Cf. *NLRB v. Cambria Clay Products Co.*, 215 F.2d 48, 55 (6th Cir. 1954).

b. Respondents' chief negotiator. Richardson was retained as Respondents' chief negotiator in late June. I find Richardson, the witness, to be low key, professional, and credible in his demeanor. I find Richardson, the negotiator, to be the same. In this opinion, I am joined by a union official who was called as a Respondent witness. According to Tahjuddin, the Respondents' owner, Ralph Smith, was present at some or all of the negotiations prior to May 1996, and his presence was intimidating to the negotiations; in the words of Tahjuddin [Smith's] "demeanor was very ominous, . . . you didn't want to be there, he was very cold, very short."[7] Then in one or more subsequent meetings, Smith was not present and the negotiating team for management was "more amicable, more cordial. . . . When this happened, it made quite an impression on me, and we had started to move on some of the issues at that time." So Tahjuddin was under the impression that management was bargaining in good faith (Tr. 152–153). In fact, Tahjuddin shared that impression with the general membership of the emergency unit by writing them a letter:

> May 14, 1996
>
> Dear Union Brother/Sister
>
> I am happy to report that the last two (2) contract negotiations went well, and management understands that we are not going away, and is in fact now ***BARGAINING IN GOOD FAITH***. We applaud management, and in particular, Vance Smith and Chris Jordan, who were extremely cooperative in finding a middle ground in which we can negotiate as gentlemen. Also to Ralph, without whose directions, his designates could not function.
>
> We also are pleased to announce that Corey Brooks, a former employee, has received a judgment for lost wages from the courts against A.P.T., (see attached copies). Also, a court ordered posting of management violations ***SHOULD*** be posted at both Crenshaw Station, as well as Hawthorne Station. These are acknowledgments of wrong doing by management against employees at A.P.T.
>
> Both Corey's case and the postings are a direct result of efforts from the legal staff of ***YOUR*** union!! This was all done at no cost to anyone except I.A.E.P.!!!
>
> If you haven't filled out a union card, please do so TODAY!!! You may not realize it, but you are moments away from victory. Remember, without ***YOU*** there is no union!
>
> In solidarity,
>
> /s/ Paul E. Jennings, Regional Director
>
> For Mustafa "Hawk" Tahjuddin
> National Representative
>
> [R. Exh. 2.][8]

The statements contained in the letter above is an admission against interest under 804(b)(3) FRE which I weigh in Respondents' favor. *NLRB v. Cal-Maine Farms,* 998 F.2d 1336, 1343 (5th Cir. 1993).

c. No independent unfair labor practices charged nor found. No independent unfair labor practices are charged nor even offered by the General Counsel as background. In this respect, I note that the Board's rule,

> "[I]t is elementary that collective bargaining is most effectively carried out by personal meetings and conferences of parties at the bargaining table," and that [I]ndeed imposes this duty to meet." [Citation omitted.] . . . . an employer "may not insist that negotiations be conducted over the phone or by mail." [*Foundation Lodge, Inc.*, 269 NLRB 674 (1984).]

In this case, there were two sessions conducted over the telephone. Other sessions were canceled due to a Government shutdown and the unavailability of the Federal mediators. Still other sessions were canceled for certain personal reasons or confusion. Because the General Counsel specifically limited the issues at hearing to the content of Respondents' proposals, I express no opinion over any issue concerning alleged dilatory tactics or even whether it appears the parties have had an adequate time to resolve their differences in attempting to reach their first collective-bargaining agreement.[9] I specifically find that none of this was litigated at hearing. I also find that there is no evidence outside of the negotiations indicative of a cast of mind against reaching agreement.[10] Finally, I note that Respondents reached TAs on a number of issues, made some concessions, and explained why they were standing fast on certain proposals. All of this is evidence of good faith on their part. *McClatchy Newspapers*, 307 NLRB 773, 780 (1992); *Litton Systems*, 300 NLRB 324, 330 (1990).

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[7] Of course, I express no opinion on whether Tahjuddin's description of Smith, who did not testify, is accurate.

[8] By implication, Tahjuddin appears to be saying that at a time prior to the date of the letter, Respondents were not bargaining in good faith. This implied assertion does not constitute credible evidence. Moreover, the evidence presented to me does not support that opinion.

[9] However, cf. *Bell Transit Co.*, 271 NLRB 1272, 1273 fn. 10 (1994), and *Old Man's Home of Philadelphia*, 265 NLRB 1632, 1634 (1982).

[10] Compare: "*M" System, Inc.*, 129 NLRB 527 (1960), and *NLRB v. My Store, Inc.*, 345 F.2d 494 (7th Cir. 1965), cert. denied 382 U.S. 927 (1965), where the employers demonstrated animosity against the union before it was elected bargaining representative or before negotiations began. By contrast, the parties here barely raised their voices during negotiations.

3. Respondents' proposals

In turning to Respondents' proposals, I first note the recent case of *McClatchy Newspaper, Inc.*, 321 NLRB 1386, 1390 (1996), where the Board stated:

> The Supreme Court declared in no uncertain terms that the Board may not "either directly or indirectly . . . sit in judgment upon the substantive terms of collective-bargaining agreements." *American National Insurance*, 343 U.S. at 404. Yet, the Board had held, with court approval, that even though a bad-faith refusal to bargain may not be based solely on the substantive content of an employer's bargaining proposals, those bargaining proposals can constitute evidence of bad-faith bargaining. [Citations omitted.]

a. Grievance and arbitration

It is undisputed that Respondents opposed a grievance and arbitration clause with a neutral arbitrator. In a context different from that existing in the instant case, the Supreme Court has recognized the central role of arbitration in effectuating national labor policy. Citing a past case of *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (U.S. Ala. 1960), the court in *John Wiley & Sons v. Livingston*, 376 U.S. 543, 459 (1964), stated that arbitration is described as "the substitute for industrial strife," and is "part and parcel of the collective bargaining process itself." At one point in the present case, the Unions proposed that no discharge or discipline occur but for "just cause." To this Respondents made a counter/proposal allowing apparently only discharge to be governed by a just cause standard (Tr. 229–230).

A just cause standard without a neutral arbitrator to render a binding decision, explained Richardson, would mean that the Unions would have to sue in court or use some other method of resolving the particular issue (Tr. 230). As noted above, the Respondents offered to agree to a management labor council with the management members apparently appointed by Smith and subject to his removal. I find that the refusal to agree to a neutral arbitrator, either a business, political, or religious leader, or a professional arbitrator is not, by itself, evidence of bad faith. The Board has taken the position that the absence of a neutral outside arbitrator is not an absolute bar to deferral by the agency. See *Roadway Express, Inc.*, 145 NLRB 513 (1963). The Board maintains its position despite the argument by then Member Jenkins that unless a joint employer-union panel included an outside neutral arbitrator, it was not really engaging in arbitration and the making of a binding impartial award. *Automobile Transport, Inc.*, 223 NLRB 217 (1976). If the Board will defer to a mechanism without a neutral outside arbitrator on the one hand, then it would be inconsistent to find that the making of such a proposal by respondent constitutes evidence of surface bargaining.

I find that Respondents' rejection of compulsory arbitration with an independent outside arbitrator because it was too costly, led to frivolous grievances, and was not in reality final (because sometimes difficult to tell who prevailed) is not evidence of surface bargaining or bad faith. *Boaz Carpet Yarns, Inc.*, 280 NLRB 40, 43–44 (1986).[11]

b. No-strike clause

Where bad-faith bargaining is found, the Board and courts frequently note the employer's coupling of a refusal to agree to an arbitration clause and insistence on a no-strike clause. See, e.g., *Chevron Oil Co. v. NLRB*, 442 F.2d 1067 (5th Cir. 1971). In that case, the court explicitly rejected the notion that a no-strike clause and an arbitration clause were so much one that a persistent demand for the one without acquiescing in the other is a refusal to bargain in good faith. (Id. at. 1073.)[12]

The court's decision in *Chevron Oil Co.,* supra, overturned a Board decision and thus cannot be cited by me in support of the decision I reach. However, I note in the instant case, Respondents did not oppose all arbitration, only that reached by a neutral outside arbitrator. In this case, Respondents proposed a no-strike clause but it was never discussed in detail. Berman testified that it was always understood by both the Unions and management, that at some point this would be something the parties would bargain into the contract (Tr. 112). Berman saw the no-strike clause as a bargaining chip to be traded for a workable arbitration clause, union security, and other objectives favored by the Unions. Both the Unions and Respondents traded proposals with a no-Strike/no-lockout provision (R. Exhs. 3, 4, art. XVI, emergency transmitted in September and nonemergency transmitted in November); (Jt. Exh. 1, art. XVI, emergency transmitted in October).

As mentioned above, the use of the no-strike clause as a bargaining chip as envisioned by Berman cuts both ways. That is, if Respondent would not agree to a neutral outside arbitrator, then presumably the Unions would not agree to a no-strike clause. There is no evidence that Berman in fact adopted this tactic, but only because he wanted what he believed the no-strike clause would buy. I do not find that Respondent was as adamant with respect to the no-strike clause as it was with respect to the no independent arbitrator and no union security. So I conclude that in this case the coupling of the two clauses does not compel a finding of surface bargaining.

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[11] To the extent, the union might have challenged the employer's asserted reasons, it could have filed one or more information requests, but did not do so.

[12] I also note the case of *Cummer-Graham Co.*, 122 NLRB 1044 (1959), enf. denied 279 F.2d 757 (5th Cir. 1960). In that case too, the employer would not agree to an arbitration clause but was adamant in insisting upon inclusion of a no-strike clause. Again, the Board found a refusal to bargain in good faith, but the court refused to enforce. Both *Cummer-Grahram Co.* and *Chevron Oil Co.* cases may be distinguished from the instant case. At the April 17, 1996 meeting, Richardson told the Unions that the Company did not like the arbitration procedure in general, in part, because of its cost, and the Company felt the Unions could use whatever economic means it wanted to be able to enforce that kind of provision (Tr. 199). Richardson's statement means to me that the employer was willing to trade a no-strike clause in return for the Unions' foregoing of an independent arbitrator clause, and this indicates a degree of good faith.

c. Management-rights clause

Respondents proposed a management-rights clause (Jt. Exh. 1, art. XIV), which reads as follows:

> ARTICLE XIV—MANAGEMENT RIGHTS
>
> A. Except as expressly and specifically limited or restricted by a provision of this Agreement, the Employer has and shall retain the full right of management and the direction of its business and operation. Such rights of management include, among other things, but are not limited to: the right of the Employer, in its sole discretion, to plan, control, increase, decrease, or diminish operations or areas, in whole or in part; to subcontract work; to introduce new methods or methods of delivery, techniques, and/or equipment; to hire, suspend, transfer, discharge, or discipline employees for cause as defined elsewhere in this Agreement, or to relieve or terminate employees for lack of work or for other causes other than for membership in the Union; to separate probationary employees during their probationary period without recourse; to add to or reduce the numbers of shifts, the work schedule and/or the number of overtime hours to be worked; and to determine the number of employees that it shall employ at any time and the qualifications necessary for any of the jobs it shall have or create in the future, including hiring seasonal employees; to, in its sole discretion, assign or reassign work duties, both of regular and overtime work in accordance with its determination of the needs of the respective jobs and operations; to adopt and from time to time modify, rescind, or change safety and work rules and regulations so long as such rules are not inconsistent with an express provisions of this Agreement and/or State or Federal Law, and to enforce such rules; to establish a drug/alcohol testing program; to select the persons lt.[sic] shall hire; and to select and assign such duties as it deems appropriate to supervisory and other categories of employees excluded from this Agreement.
>
> B. All rights heretofore exercised by the Employer or inherent in the Company and not expressly contracted away by the specific provisions of this Agreement are retained solely by the Employer. The failure of the Employer to exercise any function, power, or right reserved or retained by it, or the exercise of any power, function or right in a particular manner shall not be deemed a waiver of the right of the Employer to exercise such power, function, authority, or right, or to preclude the Employer from exercising the same in some manner so long as it does not conflict with an express provision of this Agreement, or the National Labor Relations Act.
>
> C. It is further agreed that the rights of Management specified herein or elsewhere in this Agreement may not be impaired by an arbitrator or arbitration even though the parties may agree to arbitrate the issue involved in a specific manner as provided in the Grievance and Arbitration Procedure hereof.

[Jt. Exh. 1, art. XIV.]

The Unions' reaction to this clause was essentially the same as to the no-strike clause, i.e., to be used as a bargaining chip and traded for arbitration and union security. To be sure, the Unions expressed concern that it was so extensive, but in the words of Berman, "[I]f we could get some sort of arbitration, we would consider trading with management rights." (Tr. 48–49.) Like the no-strike clause, management rights was never discussed in detail because the Unions were prepared to accept it as proposed or with minor modifications in return for a proper trade. Again, I quote Berman, "[I]f we are going to get the arbitration, then I can live with most of the management rights. I might want to make a small change, but basically I can accept most of what it says so long as we can go to arbitration on any kind of question that comes up. That was about all that was said." (May 15 meeting, Tr. 70—71.)

Using the same analysis as for the no-strike clause, I conclude that Respondents' management-rights clause, either by itself, or in the context of other matters desired by Respondents is not evidence of surface bargaining in this case. Of course, the Supreme Court has stated in *NLRB v. American National Insurance*, 343 U.S. 395 (1952), that a broad management-rights provision complied with a restriction on arbitral review of management decisions made thereunder, is not per se a violation of the Act.

In *Commercial Candy Vending Division,* 294 NLRB 908, 909 (1989), the Board reversed a finding of surface bargaining stating:

> It is not unlawful for an employer to propose and bargain concerning a broad management-rights clause. The Board has found bad-faith bargaining when the employer has insisted on a broad management-rights clause and a no-strike clause, while at the same time refusing to agree to an effective grievance procedure. [Footnotes omitted.]

In this case, I have found above that the grievance procedure proposed by Respondents can not be characterized as ineffective.

Moreover, I find that Respondents has not manifested a "take-it-or-leave-it" attitude in its negotiations. With respect to its opposition to a neutral arbitrator, it did agree during bargaining to a labor management council, as described above. With respect to seniority, Respondents also modified its position as described above. Compare: *John Ascuaga's Nugget*, 298 NLRB 524–527 (1990). Of course, I also recognized the large number of TAs reached by the parties.

It cannot be said that all factors in this case point in a single direction. In *American Meat Packing Corp.*, 301 NLRB 835 (1991), the Board focused on the Respondent's "take-it-or-leave-it" stance with respect to its grievance and no-strike proposals. (Id. at 837). While the grievance procedure in question resembles that in issue in the instant case, the posture of the no-strike clause is different and far less sweeping. Other factors in *American Meat Packing Corp.*, supra, which the Board recited in finding surface bargaining are not present in the instant case. I am convinced that the case should not govern the determination I make here as it may be factually distinguished. The factors present in *American Meat Packing Corp.* supra, which are different from the present case include:

(1) The employer and union had a prior collective-bargaining relationship and the employer was attempting to negotiate changes from the expired agreement.

(2) The employer's representative made one or more statements at the bargaining table indicating a "take-it-or-leave-it" attitude.

(3) The management-rights clause at issue was far broader and more comprehensive than that proposed by Respondents here.

(4) The employer demonstrated intransigence on a seniority article while Respondents here made a significant concession regarding seniority.

(5) The employer's president communicated directly with employees about negotiations and in the course of a series of letters disparaged and discredited union bargaining representatives. None of that is present here.

In sum, I find that *American Meat Packing Corp.* simply does not apply to this case.

d. Union security

I begin with the general rule that an employer's refusal to grant a union-security clause in negotiations does not constitute bad-faith bargaining. *Dow Chemical Co.*, 186 NLRB 372, 382 (1970). On the other hand, mere philosophical objections to a union-security clause does not relieve an employer of the obligation to bargain over that subject. . . . If a party is prepared to make concessions, it should not permit bargaining negotiations to founder without imparting that fact to the other side. *Bryant & Stratton Business Institute*, 321 NLRB 1007 (1996). With the above in mind, I turn back to the record.

Berman testified that the Unions were prepared to agree to management-rights and to a no-strike clause in return for arbitration and union security. Respondents on the other hand were opposed to union security, at least as proposed by the Unions. It is not at all clear from the evidence that Respondents would not consider any form of union security. Witness Berman's testimony regarding a telephone negotiation on February 8. According to Berman: [W]e asked if they would consider giving any kind of union security. At that time their comment was we are not prepared to change our position *at this time* (emphasisadded) (Tr. 47). Again on April 2, Respondents said it was not prepared to discuss union security *at that point* (Tr. 54). Later in negotiations, Respondents gave reasons for their position, that union security might give a minority of union members power to ratify the contract or to impose union dues over a majority of nonunion members. It is immaterial whether the Unions, the General Counsel, or I find these reasons total persuasive. What is important is that these reasons are not so illogical as to warrant an inference that Respondents has evinced an intent not to reach agreement and to produce a stalemate in order to frustrate bargaining. *Hickinbotham Bros. Ltd.*, 254 NLRB 96, 102–103 (1981).

I find this segment of my decision is governed by *Challenge-Cook Bros. (Cook Bros. Enterprises),* 288 NLRB 387, 388–389 (1988). In that case the Board reversed a decision of the judge finding surface bargaining in part based on the employer's proposal to eliminate union security as a condition of employment. The Board noted that merely because such a clause existed in a prior contract does not by itself obligate the parties to include it in successive contracts (citations omitted) (Id.at 388). From this principle, I find that parties need not necessarily include such a clause in an initial contract. Both sides in *Cook Bros.* were engaging in hard bargaining tactics (id. at 389) and I find this to be so in the present case as well. The Board in *Cook Bros.* emphasized the familiar rule that a party may stand firm by a bargaining proposal legitimately proffered (id at 389). Citing *Atlas Metal Parts Co. v. NLRB*, 660 F.2d 304, 308 (7th Cir. 1981). As found by the Board in *Cook Bros.* supra, and as I find here, there is no evidence that in maintaining its position on open shop, Respondents were motivated by bad faith or an intent to frustrate agreement. See also *Keller Mfg. Co.,* 272 NLRB 763, 800–801 (1984).

4. Conclusion

For the reasons stated above, I will recommend that this case be dismissed.

CONCLUSIONS OF LAW

1. Respondents are employers within the meaning of Section 2(2) of the Act, engaged in commerce and in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Unions are a labor organization within the meaning of Section 2(5) of the Act.

3. Respondents have not engaged in the unfair labor practices alleged in the complaint.

On the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, I issue the following recommended[13]

ORDER

It is ordered that the complaint be, and it is, dismissed in its entirety.

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.