

Allen Materials, Inc., Debtor-in-Possession and General Drivers, Salesmen and Warehousemen Local 984, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America. Case 26-CA-7389

September 30, 1980

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS
JENKINS AND PENELLO

On March 17, 1980, Administrative Law Judge David L. Evans issued the attached Decision in this proceeding. Thereafter, General Counsel and the Charging Party filed exceptions and a supporting brief; Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions² of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Allen Materials, Inc., Debtor-In-Possession, Memphis, Tennessee, its officers, agents, successors, and

¹ In adopting the Administrative Law Judge's dismissal of the allegation that Respondent violated Sec. 8(a)(5) and (1) of the Act in its recall of the truckdrivers, we do not adopt his discussion of the issue but agree with his result solely on the ground that it appears that Respondent made a good-faith attempt to apply the seniority provision of the contract in the recall and in fact did achieve substantial compliance with such provision in effectuating the recall. In reaching our result here we find it unnecessary to rely on the Administrative Law Judge's erroneous statement that employee Frazier had testified that all prior recalls had been made by telephone, as Frazier did not testify at the hearing and no one else so testified.

² The Administrative Law Judge recommended in his remedy and recommended Order that Respondent pay interest on any moneys Respondent owed the Union's health, welfare, and pension fund. However, because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of the proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. We leave to the compliance stage the question whether Respondent must pay any additional amounts into benefit funds in order to satisfy our "make whole" remedy. These additional amounts may be determined, depending on the circumstances of each case, by reference to provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss or return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. *Merryweather Optical Company*, 240 NLRB 1213 (1979). We have modified the remedy and the recommended Order accordingly.

assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(b):

"(b) Make whole the employees in the appropriate unit by paying all health and welfare contributions and pension fund contributions as required by the bargaining contract which was effective from March 1, 1977, to March 1, 1980, as modified by subsequent agreement with the Union, and as required by any succeeding collective-bargaining agreement, to the extent that such contributions have not been made or that the employees have not otherwise been made whole for benefits lost and their ensuing expenses which would have been covered by said health and welfare plans. This shall include reimbursing employees' contributions that they themselves may have made for the maintenance of the Union's pension and/or welfare coverage after Respondent unlawfully ceased contributing, for any premiums they may have paid to the third party insurance companies for health and welfare coverage, and for any medical or dental bills employees may have paid directly to health care providers that the contractual policies would have covered."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

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

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
- To refrain from the exercise of any or all such activities.

WE WILL NOT refuse to recognize and bargain collectively with General Drivers, Salesmen and Warehousemen Local 984, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of

America, concerning wages, hours, and other terms and conditions of our employees in the appropriate unit which is:

All production and maintenance employees at the place of business of the employer at 1572 Chelsea, Memphis, Tennessee, excluding all office clerical employees, watchmen, guards and supervisors as defined in the Act.

WE WILL NOT repudiate our agreement with the Union made through the process of collective bargaining for a schedule of payments to the Union's health and welfare and pension fund plans, or any other agreement made through the process of collective bargaining.

WE WILL NOT institute changes in vacation pay or any other term and condition of employment of the employees in the above-described unit during the effective term of a collective-bargaining agreement with the Union without first consulting and bargaining with the Union concerning such changes and reaching an agreement on any modification of the terms of the contract.

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

WE WILL make whole our employees for any failure in paying or delay in paying their 1978 vacation pay.

WE WILL make whole our employees in the appropriate unit by paying all health and welfare contributions and pension fund contributions as required by the bargaining contract which was effective from March 1, 1977, to March 1, 1980, as modified by subsequent agreement with the Union, and as required by any succeeding collective-bargaining agreement, to the extent that such contributions have not been made or that our employees have not otherwise been made whole for benefits lost and their ensuing expenses which would have been covered by said health and welfare plans. This shall include reimbursing employees' contributions that they themselves may have made for the maintenance of the Union's pension and/or welfare coverage after we unlawfully ceased contributing, for any premiums they may have paid to the third party insurance companies for health and welfare coverage, and for any medical or dental bills employees may have paid directly to

health care providers that the contractual policies would have covered.

ALLEN MATERIALS, INC., DEBTOR-
IN-POSSESSION

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge: This proceeding under Section 10(b) of the National Labor Relations Act was heard in Memphis, Tennessee, on September 5 and 6, 1979. The underlying charge, as amended, was filed by the Union on September 1, 1978,¹ and the complaint and notice of hearing issued on April 26, 1979. The primary issue is whether Respondent, as admitted successor to Allen Materials, Inc., refused to bargain in violation of Section 8(a)(1) and (5) of the Act by: (a) refusing to grant contractual wage increases to its employees; (b) failing to honor employees' seniority rights; (c) failing to make payments to its employees' health and welfare and pension funds; and (d) failing to pay full amounts of vacation pay to its employees. Respondent answered denying the refusal to bargain.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Allen Materials, Inc., Debtor-in-Possession, admits that since February 1, 1978, it has been a successor employer of Allen Materials, Inc. During the 12 months preceding issuance of the complaint, Respondent in the course and conduct of its business operations purchased and received at its Memphis, Tennessee, location products valued in excess of \$50,000 directly from points located outside the State of Tennessee and during the same period of time Respondent sold, shipped and delivered from said location products valued in excess of \$50,000 directly to points located outside the State of Tennessee. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent operates a concrete block manufacturing plant and ready-mix concrete delivery service in Memphis. Its president at all times material herein has been

¹ All dates are in 1978 unless otherwise specified.

William B. Allen; general manager was Fred Richardson; block plant manager was Basil Nichols; dispatcher supervisor (and undisputed supervisor) of the ready-mix drivers was William Martin. Each of these individuals, except Richardson, testified.

Respondent has recognized the Union as the collective-bargaining representative of its production and maintenance employees since the mid-1950's. There has been a succession of collective-bargaining agreements the last of which has effective dates of March 1, 1977, to March 1, 1980. The contracts between the parties expressly covered as the production and maintenance unit Respondent's ready-mix concrete plant employees, drivers, mechanics, yardmen and helpers. Although not expressly mentioned in the contracts it is essentially undisputed that as a part of the production and maintenance unit the parties have included the employees of Respondent's concrete block plant which is on the same premises as the rest of the operation.

Relevant provisions of the last contract between the parties are: Article XV, Seniority, provides "Seniority shall prevail. Seniority shall be based on length of service and ability to perform work." The article further provides "employees shall be laid off according to seniority, and employees shall be returned to duty according to their seniority rights, provided such employees report within four (4) days after notice, and registered mail to the last known address shall be accepted as proof of notice."

Article XIX, Grievance and Arbitration, provides for a grievance procedure which requires grievances to be filed within 5 working days after the act complained of has been committed and which includes a binding arbitration provision.

Article XXI, Vacations, provides progressively larger vacations for employees who have worked 1, 3, 15, or 20 years.

Article XXVIII, Wages, provides for wage increases for all classifications effective March 1, 1978, and March 1, 1979. (Although block plant employees are not specifically listed, they are paid the same, and were to get the same wage increases, as truckdrivers according to undisputed testimony.)

Article XXXII, Health and Welfare, provides for contributions to the Central States, Southeast and Southwest Area Health and Welfare Fund for the purposes of a group insurance plan. The contract called for increases to that fund effective March 1, 1978, and March 1, 1979.

Article XXXIII, Pension, provides for contributions to the Central States, Southeast and Southwest Area Pension Fund with increases effective March 1, 1978, and March 1, 1979.

On February 9, 1978, Allen Materials, Inc., filed a petition for an arrangement under Chapter XI of the Bankruptcy Act in Federal District Court and was declared a debtor in possession. However, Respondent did not seek to disaffirm its agreement with the Union. Instead, it sought voluntary "cooperation" from the Union in an attempt to ease part or all of the financial burden imposed by the contract. The extent of which the Union agreed to cooperate is a factual issue in this case.

B. February Meetings and the March 1 Wage Increase

The complaint alleges that since on or about March 1, in violation of Section 8(a)(5), Respondent unilaterally "[r]efused to grant contractual wage increases to its employees." It is undisputed that Respondent delayed the increases called for by the contract from March 1 to about November 1.

On or about February 6, Allen called Union Assistant Business Agent Authur B. Crutcher and informed him that Respondent was considering filing the Chapter XI petition, but there was no discussion of the effect of such petition. Allen and Crutcher met on February 9, apparently hours after the petition was filed. Crutcher testified that Allen stated that he wanted wages frozen and wanted permission to lay off employees out of seniority. Crutcher testified that he replied that the contract must be followed. As the General Counsel points out, Allen's testimony about this meeting is totally vague, but neither do I credit Crutcher that he adamantly insisted in this meeting that all contractual provisions be followed, including specifically the seniority clauses and the requirement that wage increases be granted to all unit personnel on March 1. Crutcher and Allen agreed to meet again with respective counsel, and there would have been no purpose in Crutcher's agreeing to the meeting if, as he claimed, he took the position in the first meeting that there was nothing to discuss.

The second meeting was held in late February. Crutcher was accompanied by Attorney John Koelz and Allen was accompanied by Attorney John R. Dunlap. Koelz testified; Dunlap did not. Allen testified:

[W]e told them that we, at this time, thought that we could make the pay increase sometime in the fall, probably October or November, but we weren't sure, that we would do our best. We had frozen all wages for all employees. And they said, all right, and that was, basically, all that was said.

Koelz described the discussion of wages thusly:

Basically, [w]e just discussed the situation where we was told that the company was in bankruptcy, and just discussed the possibilities of wage increases that was in accordance with the contract. I don't think there was any firm commitment made either way. There was some discussion as to the freezing of the wages at a certain point.

At this time, we had discussed the possibility of freezing wages. However, like I said, there was nothing that was firm about this point. We said we would look into it and discuss it with the membership.

Koelz was specifically asked by the General Counsel:

Q. From your own personal knowledge in the meetings, do you know whether or not the Union ever agreed to allow the company to grant wage increases at a time other than when they were due in the contract?

A. Nothing definite, no.

Q. All right. Do you know whether or not, from your own personal knowledge, that the Union ever agreed to allow the company to recall employees out of seniority?

A. Absolutely not.

Koelz was given another opportunity by me to deny that he and/or Crutcher granted permission for delay of the March 1 wage increase. Koelz again failed to deny such permission was given.

On direct examination Crutcher claimed an almost total inability to remember what happened at this second meeting. On cross-examination he claimed inability to remember if he asked when, if not on March 1, the March 1 wage increases would be implemented.

I find that in the second meeting the Union agreed to the postponement of the wage increase until "October or November" as Allen testified. My reasons are: although given the opportunity to, even led to, deny that the Union had agreed to be delayed, Attorney Koelz refused to do so. His "nothing definite" response regarding the wage increase was (and is) strikingly different from his "absolutely not" response regarding seniority. Koelz admitted offering to take the proposition to the membership; this was hardly an insistence that the contract absolutely be followed regarding the March 1 wage increase which was scheduled. If Koelz had said anything which would indicate the Union was demanding the March 1 wage increase be implemented as scheduled, despite Respondent's appeal, Koelz (and Crutcher) assuredly would have clearly indicated in their testimony. Crutcher's claimed inability to remember asking when the wage increases were to be implemented (if not on March 1) was plainly incredible. Moreover, as discussed *infra*, although there were numerous grievances filed immediately over layoffs and failures to recall in seniority and failures to pay vacation pay which occurred almost immediately after the second meeting, there were no grievances, or other protests, when, on March 1, Respondent failed to implement the wage increase called for by the contract. Respondent's failure to pay the March 1 wage increase continued until about November 1 when it was implemented. There was no oral or written objection to the delay until September 1 when Koelz filed the original charge herein on behalf of the Union. Koelz could not satisfactorily explain why the charge was not filed for 6 months and Crutcher could not credibly explain why there were no grievances filed over the delay of the wage increase. The only logical reason for a failure to object in some form was that the Union, and the employees, knew why the wage increase had been delayed; the Union had given permission for the delay, either with or without its taking the matter to the membership for approval. Upon these factors, and the credible demeanor of Allen as he testified regarding the Union's giving consent, I find that the Union did in fact consent to the delay of the March 1 wage increases, and Respondent did not violate the Act in delaying the wage increases until November 1978.

C. Layoff and Recall Issues

There was presented testimonial and documentary evidence at the hearing that Respondent laid off and recalled several employees including block plant employees and mixer drivers in 1978. The General Counsel makes the blanket allegation that seniority was not followed in regard to lay off or recall and, in regard to mixer drivers, that Respondent failed to follow a contractual requirement that recalls be made by registered letter. The General Counsel contends that by this failure to follow the contract, Respondent violated Section 8(a)(5) of the Act. The employer replies that the layoffs and recalls were made according to ability of employees to perform work and that its failure to recall employees by registered mail was in accord with past practice and that, at most, it has breached the contract but not violated the Act.

The reliable evidence presented is extremely sketchy. At many points the General Counsel relies on verbal testimony where it is obvious that documentary evidence was necessary. This is especially true as to the facts of layoffs and recalls and the classification and seniority dates of the employees involved. The General Counsel offered her Exhibit 33 which bares seniority, layoff, and recall dates of some employees but, contrary to her representation, it does not cover all employees involved. However, taking the credible portions of the verbal testimony and the parts of the General Counsel's Exhibit 33 which can be relied upon, I make the following findings:

During the week of February 8, the following employees (listed here in descending order of their seniority) were laid off by Respondent: Minor, Niter, Taylor, T. Johnson, Pollion, Frazier, Scaife, L. Johnson, Watts, O'Neal, Chase, Baker, James Howard, and D. Johnson. Minor, Niter, Taylor, Frazier, Scaife, L. Johnson, and O'Neal were ready-mix drivers. Baker, James Howard, and D. Johnson were block plant employees (and the three least senior block plant employees); Pollion was a warehouseman, and the record does not disclose the classification of Chase, Watts, and T. Johnson.

On April 25, Respondent laid off the following block plant employees listed here in descending order of seniority: Teague, Hillard, Mitchell, Gross, Head, Stewart,² Isom, Piyavunno, A. Haynes, Gilliam, M. Haynes,³ and John Howard.

On May 1, Teague, Hillard, and Mitchell were recalled to the block plant and worked until May 8, when they were again laid off. On May 16, Teague was recalled, but not Hillard or Mitchell.⁴ In their place, Respondent recalled Gross and Head. On May 18, Isom was recalled to the block plant. No other recalls were made to the block plant until March 20, 1979, when A.

² Stewart is not listed on G.C. Exh. 33; I rely on his testimony as to his date of hire.

³ G.C. Exh. 33 lists M. Haynes immediately following A. Haynes. It does not list an employee named Gilliam. Nichols testified that Gilliam followed A. Haynes. There is no need to resolve this conflict since neither M. Haynes nor Gilliam was recalled.

⁴ It is undisputed that Mitchell had a terminal illness at the time. Presumably the General Counsel concedes that Mitchell could not have worked even if he had been recalled because she makes no contention on behalf of Mitchell.

Haynes and John Howard were recalled. On the same date James Howard was rehired.⁵ As noted, Piyavunno had more seniority than any of these three; and Gilliam⁶ and Melvin Haynes had seniority over both Howards; and Baker had seniority over James Howard.

On November 8, ready-mix truckdriver Orlando Scaife was recalled, but not Minor, Niter, Taylor, or Frazier who had more seniority than Scaife.

To the General Counsel's objections to Respondent's failure to follow strict seniority in the block plant, Respondent replies that at most the General Counsel is stating a breach of contract, not a refusal to bargain in violation of Section 8(a)(5). Respondent further points out that the contract provides that "seniority shall be based on length of service and ability to perform the work." Nichols testified that Respondent opened the block plant on May 1 and recalled Teague, Hillard, and Mitchell in accordance with strict seniority. Respondent tried to combine jobs and get the three employees to produce 5,000 blocks per day but this did not work out because Hillard could not perform more than one function. Specifically, Hillard had been a strapper and he could not operate any machinery. When the plant reopened, Respondent discontinued the practice of strapping blocks before shipping. Gross, Head, and Isom could operate forklifts and machinery that Hillard could not. Stewart was a yardman and as such waited on customers. This function was also discontinued. Piyavunno was a "cream man," another function which was abolished. Alvin Haynes was a "multi-talented" employee and could operate machinery and do cleanup and he was called before Piyavunno and Stewart for this reason. Johnny Howard was a machine operator and performed maintenance; he was called before Gilliam, who had more seniority but, according to Nichols, Gilliam "was working."⁷ Nichols did not say why James Howard was rehired over those who were on layoff but he and Allen testified generally that all who were recalled could perform more than one function and were more able to perform the work as Respondent had restructured the block plant operation. Those block plant employees who still had recall rights when James Howard was rehired were John Williams (who only did cleanup), Gilliam, Piyavunno, Stewart, and Hillard.

The General Counsel introduced no evidence that Respondent's general or specific assertions regarding relative abilities of employees who were recalled were incorrect. The General Counsel simply contends that Respondent should have followed strict seniority in recalling its employees and its failure to do so violated Section 8(a)(5) of the Act. I disagree. In *N.L.R.B. v. Frontier Homes Corporation*, 371 F.2d 974 (8th Cir. 1967), the Eighth Circuit enforced a Board finding that a failure to

follow strict seniority and failure to bargain with the union violated Section 8(a)(5). However, the holding was premised on the facts that after expiration of a contract which contained an ability clause such as found herein, respondent unilaterally created a merit rating system and recalled employees according to that system rather than recall employees according to strict seniority which had been its past practice during the term of the contract. In enforcing the Board's Order the Eighth Circuit observed:

Had the contract been in force at the time of the layoff, Frontier would have been justified in following its terms even though it differed from the past practice. The right to consider ability (to some extent) had already been given as the result of past negotiations, so to the extent granted there would have been no need to submit this issue to further negotiation. However, the fruit of these past negotiations must end with the expiration of the contract.

Here the contract, with the ability clause, was in effect at the time of the recalls and it plainly provided that ability to perform work is a coequal consideration with length of service, and there is no evidence that Respondent chose employees for layoff or recall on a basis inconsistent with the contract. But, even assuming that it did, there is no evidence that Respondent in any way was by its actions seeking to repudiate the contract. The evidence is that Respondent first gave the most senior block plant employees a chance to do the work; then, when they did not work out on the restructured jobs, Respondent chose among the laid-off employees on the basis of ability for the jobs which then existed. Grievances could have been, and were, filed over the selection for recall. Respondent did not refuse to entertain any of them. If Respondent's contractual interpretation was wrong, the Union could have pressed the grievance to arbitration. It did not. There is no evidence to cast suspicion upon Respondent's contentions that its selection for recall among the block plant employees was based upon an appraisal of relative ability and a good faith interpretation of the contract, and not a repudiation of the contractual seniority provision. Accordingly, I find that by its selection of block plant employees for layoff on May 8 and recall on May 16 and thereafter, Respondent did not violate Section 8(a)(5) of the Act.

In regard to the ready-mix truckdrivers, dispatcher William Allen Martin testified that in February he laid off drivers Minor, Niter, Taylor, Frazier, and Scaife. Frazier testified that all prior recalls had been handled by telephone. Martin testified that he did attempt to call Minor but he was told by another employer that Minor had another job and was not interested in coming back. Martin accepted this. Martin testified that he attempted to contact Niter by telephone but was unsuccessful. No other attempt to recall Niter was made. Frank Taylor was the next senior truckdriving employee, but Martin made no attempt to contact him because, "I had neither a telephone number or an address for him. In the past, he had changed residences quite frequently. And based on that, I didn't try to get in touch with him." Nor did

⁵ James Howard cannot be said to have been "recalled" because he had been laid off for over 12 months and, under the contract, lost all seniority rights.

⁶ Actually, the General Counsel does not mention Gilliam, but since the General Counsel is following strict seniority in all cases, and Nichols admitted Gilliam's relative seniority status and that he was passed over, this is an apparent oversight.

⁷ If this meant Gilliam was not offered recall rather than that he declined recall because he wanted to continue working elsewhere, the General Counsel failed to develop the point.

Martin attempt to call Frazier who was the next driver in seniority after Taylor. Orlando Scaife was next after Frazier. Martin telephoned Scaife and Scaife began working on November 8.

The General Counsel contends that the failure to tender offers of recall and failure to send offers of recall by registered mail to the employees senior to Scaife were violations of the contract and a violation of Section 8(a)(5). Respondent's defense is that its action in recalling Scaife was, at most, a breach of contract, but not a violation of the Act.

The contract does not require recall by registered mail. It states that "registered mail to the last known address shall be accepted as proof of notice," but it does not say that this is the *only* method of recall, and Respondent's evidence that recalls were previously handled orally was not rebutted by the General Counsel. But, assuming *arguendo*, that the failure to send registered letters was a literal violation of the contract, the General Counsel has nevertheless, failed to prove that Respondent's action was a repudiation of the contractual agreement or an attempt to undermine the Union and therefore has failed to prove a violation of Section 8(a)(5) of the Act.

Moreover, Respondent's passing over Minor (as well as Niter, Taylor, and Frazier) to recall Scaife also represents an apparent breach of contract, but not a violation of the Act. The General Counsel offers no theory of how the recall of Scaife could constitute an attempt to undermine the Union or an attempt to repudiate a contractual agreement regarding seniority. Thus, the General Counsel is simply attempting to enforce a seniority provision, and nothing more. The statutory machinery created to prevent unfair labor practices is not a simple substitute for the grievance and arbitration procedures which the Union chose here not to invoke. That is, not every breach of a collective-bargaining agreement is a violation of the Act. I find that under the circumstances herein, Respondent did not violate the Act in recalling Scaife on November 10 rather than Minor, Niter, Taylor, and Frazier who were senior to him.

D. Suspended Payments to Health and Welfare and Pension Fund

The complaint alleges that since on or about March 1, Respondent unilaterally "failed to make payments to its employees' health and welfare and pension funds." As noted, the contract provides for employer contribution to the Union's health and welfare and pension plans on behalf of the employees. Allen testified that at the second February meeting, "they [the Union] were also concerned about the payment of the health and welfare and pension fund, and it was left that the two attorneys would get back together and try to work out some sort of settlement and repayment schedule on that." The only evidence of "some sort of settlement" on this point is the following testimony of Allen and the representation of counsel:

Q. Do you know, of your own knowledge, whether or not an agreement was reached with the Central State's Health, Welfare, and Pension Plan of

the Teamsters, regarding settlement of their claim for pension benefits?

A. Yes, sir.

Q. In the bankruptcy proceeding.

A. Yes, sir, there was one reached.

Q. Do you know whether or not, of your own knowledge, if an order was entered with regard to payment of any sums due for claims by Central State's Pension Plan—

A. Yes, sir.

Q. —pursuant to the contract.

A. Yes, sir, there was one.

Q. Okay

JUDGE EVANS: Have you complied with that order?

THE WITNESS: No, sir. We have not been able to meet the financial commitments that were set forth in it yet.

JUDGE EVANS: Do you have the date of that order, counsel?

MR. DUNLAP: Your Honor, the date of that order was in October of 1978.

JUDGE EVANS: Was that by the same District Court in which the bankruptcy proceeding is being entertained?

MR. DUNLAP: That's correct.

JUDGE EVANS: Thank you.

MR. DUNLAP: Basically, for the Court's own information, it provided for a payout over a period of time to the Central State's Pension Plan, and we were going to have to seek an amendment to that order to make application for it with the consent to the Central State's Pension Plan.

The bankruptcy court order incorporating the agreement referred to was not placed in evidence. However, it is clear that an agreement (subsequently made the subject of a bankruptcy court order) for the benefit of the employees was reached by the processes of collective bargaining; that Respondent has refused to abide by said agreement for no reason other than alleged financial inability; and that there is no evidence of union acquiescence in Respondent's failure to make the payment. In these circumstances Respondent, has, in effect, repudiated its agreement made with the Union as representative of the employees in the unit and Respondent thereby violated Section 8(a)(5) of the Act. *B. N. Beard Company*, 231 NLRB 191 (1977); *Adams Iron Works, Inc.*, 221 NLRB 71 (1975); *Oak Cliff-Goldman Baking Company*, 207 NLRB 1063 (1973). Since the agreement itself is not in evidence, the specific perimeters of Respondent's violation of the Act in this regard cannot be determined here. That determination may appropriately be made, and remedied, at the compliance stage of this case.

E. The 1978 Vacation Pay

The complaint alleges that Respondent has unilaterally "failed to pay full amounts of vacation pay to its employees since on or about March 1, 1978."

In this regard Allen admitted that for the great majority of its employees for whom vacation pay became due

in 1978, the employees did not receive such pay or, if they were paid, it was after delay. Allen testified that in the second February meeting Dunlap stated that those individuals who felt they were entitled to vacations should file with the bankruptcy court because the claims would be treated either as "priority or administrative type claim." Allen further testified that Crutcher or Koelz replied that the Union would secure the appropriate forms for filing such claims and assist the employees in such attempts to get their vacation pay. On direct examination Crutcher testified that vacation pay, as well as seniority, wages, and other matters were discussed at the meeting, but "the only response that I got out of the company was that they couldn't do nothing, because they were tied up in the bankruptcy court." Koelz did not deny agreeing to assist the employees in filing in the bankruptcy court for their vacation pay which was then due or soon to become due and he acknowledged that he did assist some employees in filing such claims. Thus, the issues becomes; did the Union, by agreeing to assist the employees, consent to Respondent's failure or delay in paying some of the 1978 vacations? I find that it did not. Even as Allen related it, Dunlap presented the Union with the accomplished fact that Respondent had no intention of paying the 1978 vacation pay. While Dunlap suggested a method by which the employees could receive their vacation pay, and the Union indicated that it would attempt to assist the employees in such endeavor, there is no evidence that the Union agreed to omitting or delaying the 1978 vacation pay for any employee.

Respondent's referrals of the employees and their representative to the bankruptcy court was a disavowal of any responsibility for paying the vacation pay, not a good-faith interpretation of the contract. In these circumstances, Respondent's delay or refusal to pay 1978 vacation pay constitutes a unilateral modification of the contractual obligation which is not excused by inability to pay⁸ and is thus a violation of Section 8(a)(5) of the Act.⁹ Again, the names of the employees whose 1978 vacation pay was delayed or denied may properly be determined at the compliance stage this case.

Upon the foregoing findings of fact and upon the entire record and pursuant to Section 10(c) of the Act, I make the following:

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The following constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All production and maintenance employees at the place of business of the employer at 1572 Chelsea,

⁸ *Oak Cliff-Goldman Baking Company, supra.*

⁹ In effect, in delaying or refusing to pay the 1978 vacation pay, Respondent is attempting to take advantage of an order disaffirming a collective-bargaining agreement which was not only not granted, it was not even sought. See *Oxford Structures, Ltd., Debtor-in-Possession*, 245 NLRB 1180 (1979).

Memphis, Tennessee, excluding all office clerical employees, professional employees, technical employees, watchmen, guards and supervisors as defined in the Act.

4. At all times material herein, the Union has been the exclusive bargaining representative of the employees in the aforesaid unit within the meaning of Section 9(a) of the Act.

5. By unilaterally delaying or denying vacation pay to employees in the aforesaid unit during the term of its collective-bargaining contract with the Union, Respondent has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. By refusing to honor and comply with the terms of the collective-bargaining agreement reached with the Union regarding a schedule of payments to Central States, Southeast and Southwest Area Health and Welfare Fund and the Central States, Southeast and Southwest Area Pension Fund of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Respondent has violated Section 8(a)(5) and (1) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

8. Respondent has not engaged in unfair labor practices insofar as the complaint alleges violations of the Act not specifically found herein.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act, including the posting of the notice attached to this Decision.

Since Respondent, in derogation of its statutory obligation, unilaterally delayed or denied vacation pay of its employees during the term of the collective-bargaining contract covering the employees involved, I recommend that Respondent be directed specifically to refrain from making unilateral changes in wages, rates of pay, or other terms and conditions of employment of its employees in the above-described appropriate unit during the term of the contract without first reaching agreement with the Union concerning such contemplated changes. Further, I recommend that the Respondent make whole the employees in the above-described appropriate unit, and make whole the respective union health and welfare and pension funds, for any¹⁰ losses they may have suffered as a result of the unfair labor practices found herein, with interest thereon. *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

¹⁰ *The Saloon, Inc.*, 247 NLRB No. 156 (1980).

ORDER¹¹

The Respondent, Allen Materials, Inc., Debtor-in-Possession, Allen Materials, Inc., and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain with General Drivers, Salesmen and Warehousemen Local 984, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America as the exclusive representative of its employees in the following appropriate bargaining unit:

All production and maintenance employees at the place of business of the employer at 1572 Chelsea, Memphis, Tennessee, excluding all office clerical employees, professional employees, technical employees, watchmen, guards and supervisors as defined in the Act.

(b) Repudiating or renegeing on agreements made with the Union through the process of collective bargaining for the benefit of employees in the appropriate unit, including specifically agreements regarding contributions due the Central States, Southeast and Southwest Area Health and Welfare Fund and Pension Fund of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.

(c) Instituting changes in vacation pay or other rates of pay, or other terms and conditions of employment of its employees in the above-described appropriate unit during the effective term of any contract covering said employees without first consulting with and bargaining with the Union concerning such changes and reaching agreement on any modification of the terms of such contract.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights set forth in Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Make whole the employees in the appropriate unit by paying to them, with interest, all monies they would have received as vacation pay for the year 1978 which was either delayed or denied.

(b) Make whole the employees in the appropriate unit by paying all health and welfare contributions and pension fund contributions as required by the bargaining contract which was effective for March 1, 1977, to March 1, 1980, as modified by subsequent agreement with the Union and as required by any succeeding collective-bargaining agreement, with interest, to the extent that such contributions have not been made or that the employees have not otherwise been made whole for benefits lost and their ensuing expenses which would have been covered by said health and welfare plans. This shall include reimbursing employees' contributions that they themselves may have made for the maintenance of the Union's pension and/or welfare coverage after Respondent unlawfully ceased contributing, for any premiums they may have paid to the third party insurance companies for health and welfare coverage, and for any medical or dental bills employees may have paid directly to health care providers that the contractual policies would have covered.

(c) Preserve and, upon request, make available, to the Board or its agents, for examination and copying, all payroll records, social security payment records, time-cards, personnel records and reports, and all other records necessary to analyze the amounts of backpay and benefits going under the terms of this Order.

(d) Post at its Memphis, Tennessee, facility copies of the attached notice marked "Appendix."¹² Copies of said notice, on forms furnished by the Regional Director for Region 26, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

¹¹ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

¹² In the event that 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."