

Western Conference of Teamsters, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (California Cartage Company, Inc.) and David Hal Davis, Case 21-CB-6590

August 19, 1980

DECISION AND ORDER

**BY CHAIRMAN FANNING AND MEMBERS
JENKINS AND TRUESDALE**

On April 25, 1980, Administrative Law Judge Leonard N. Cohen issued the attached Decision in this proceeding. Thereafter, counsel for the General Counsel filed exceptions and a supporting brief, and Respondent filed limited cross-exceptions and a supporting 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, cross-exceptions, and briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order.

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 and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

¹ Counsel for the General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd, 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

DECISION

STATEMENT OF THE CASE

LEONARD N. COHEN, Administrative Law Judge: This case was heard before me on July 19 and 20 and September 4, 5, and 6, 1979, in Long Beach, California, pursuant to a complaint issued on October 30, 1978, by the Regional Director for Region 21 of the National Labor Relations Board. The complaint is based upon a charge filed by David Hal Davis on July 26, 1978. The complaint alleges that Western Conference of Teamsters, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, herein called Respondent, has engaged in certain violations of Section

8(b)(1)(A) of the National Labor Relations Act, as amended.

Issues

The complaint alleges that Respondent, as the authorized bargaining representative of Teamsters Local 692, failed to fairly represent certain employee-members and thereby violated Section 8(b)(1)(A) of the Act by willfully misrepresenting substantive portions of a proposed agreement at a ratification vote. Respondent denies that any such misrepresentations were made. The principal issue then is one of credibility relating to the question of whether or not Respondent's representatives actually made such material misrepresentations.

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

Upon the entire record, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER

Respondent admits that California Cartage Company, Inc., herein called either the Employer or the Company, is a California corporation with an office and place of business located in Wilmington, California, where it is engaged in freight handling and warehousing. It further admits that the Company annually provides services in excess of \$50,000 directly to customers located outside the State of California. Accordingly, it is admitted and I find that the Company is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits and I find that at all times material herein it has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES¹

A. Background

The Employer's freight operation extends throughout the State of California with two facilities located in the southern California area. The facility which is the subject of the instant litigation is a freight container station, herein referred to as Warehouse 13, located in Wilmington, California. As of the spring of 1977,² approximately 51 regular employees were engaged at Warehouse 13 in the stuffing and unstuffing of shipping containers for var-

¹ Other than certain statements allegedly made to unit employees at a meeting with company officials and subsequently at a union membership meeting, both of which occurred in late March 1977, the material facts are not in dispute. Except where specifically noted, the following recitation is based on a lengthy, partial stipulation of facts entered into at the hearing, certain documentary evidence, and the uncontroverted testimony of witnesses.

² All dates refer to 1977 unless otherwise indicated.

ious shipping lines engaged in the transportation of containerized cargo by ship to and from the ports of Los Angeles and Long Beach, California.³ The Employer's remaining 250 to 275 regular employees are employed in transporting freight between the docks and the warehouse, as well as to and from various warehouses and yards located throughout the State.

For some years prior to the spring of 1976, the Employer had been a member of and bargained collectively through a multiemployer association. In late March 1976, the Employer withdrew in a timely fashion from the association and commenced bargaining on an individual basis for a new collective-bargaining agreement covering all of its employees, including those employed at Warehouse 13, in one overall unit.

B. The 1976 Negotiations

In the early spring of 1976, the Employer through its president, Clifford Bailey, and vice president, Robert Curry, met with Jack Koenig, secretary-treasurer of Local 692, and Gene Shepherd, coordinator of Respondent's Master Freight Division, for the purpose of negotiating a separate contract. Although Local 692 has represented the Employer's employees for a number of years, Respondent, pursuant to a power of attorney executed in either 1963 or 1964, has the exclusive authority to negotiate and sign agreements on the Local's behalf. These 1976 negotiations ultimately led to an agreement on the National Master Freight Agreement, herein called the master agreement, and to the Western States Area Pickup and Delivery Local Cartage and Dockworkers Supplemental Agreement, generally referred to by the parties as the Western States Supplement Agreement and herein simply called the supplement agreement.⁴

During those negotiations, the Employer initially took the position that there should be a separate agreement covering the employees employed at Warehouse 13. In support of this position, the Employer advanced three major arguments: (1) The adverse impact of clause 59 of the supplement agreement on Warehouse 13's operations;⁵ (2) the fact that Warehouse 13 was essentially a warehouse and not a freight-handling operation and that therefore the Employer suffered an economic hardship *vis-a-vis* its competitors;⁶ and (3) the fact that, due to the costly and extensive litigation the Employer had undertaken with the Longshoremen's Union, the direct benefit of which inured to the Local, the Employer had certain

³ This figure is based on the testimony of Clifford Bailey, the Employer's president. The figure of approximately 70 to 75 as contained in the stipulation of fact appears to be an incorrect estimate which included a number of casual employees.

⁴ The master agreement was ratified by a majority of the entire Teamsters membership in the United States who were employed in the freight industry. The supplement agreement was ratified by those Teamsters members employed in the freight industry in the 11 Western States.

⁵ Clause 59 provided, *inter alia*, that Saturday and Sunday work be paid at time and a half. The Employer argued that, due to the irregular steamship scheduling, a certain number of these employees would always have to be employed on weekends on a regular basis.

⁶ The wages for the employees of Warehouse 13 as called for in the supplement agreement were substantially higher than the wages paid for similar work performed under either the Longshoremen contracts or the Teamsters warehouse agreements.

additional built-in costs in its container station operation.⁷

When Shepherd rejected the Employer's proposal and indicated that there was no way the Union would agree to a separate contract for Warehouse 13 employees when they worked in conjunction with freight handlers, the Employer's representatives then suggested that the parties agree to a supplemental agreement giving the Employer the right to reopen the master and the supplement agreement and renegotiate their terms. Shepherd replied that the Union could agree to such an agreement if it was limited solely to Warehouse 13's operations. Ultimately the parties reached agreement and executed the new master and supplement agreements which were in effect from April 1, 1976, to March 31, 1979. In addition, the Employer and Shepherd, on behalf of Local 692, executed a memorandum of agreement, herein called the memorandum agreement, which provided, *inter alia*, that the Employer at any time after 6 months from April 1, 1976, could reopen the master and supplement agreements as they relate to Warehouse 13 "for the purpose of negotiating wages, hours, and conditions of employment designed to meet the special needs of the Employer's operation."

C. Negotiations for the Rider Agreement

By letter dated February 4, 1977, the Employer exercised the option set forth in the memorandum agreement and requested renegotiation of the master and supplement agreements. Pursuant to this request, representatives of the Employer, Local 692, and Shepherd met on February 24 and 25 in the Long Beach area and on one occasion in late March in Burlingame, California. Bailey and Curry represented the Employer at these meetings while Shepherd and Monty Ogden, who by then had replaced Koenig as Local 692's secretary-treasurer, represented the Union. In addition, Guy Lizotte, president of Local 692, was present and participated in the two February sessions.

Throughout these negotiating sessions, the Employer's representatives reiterated and elaborated upon their 1976 arguments of the problems inherent in Warehouse 13's operations and the specific need for some form of relief. Again and in greater detail it compared the wages its Warehouse 13 employees were receiving with the wages received by employees performing similar work under Longshoremen and Teamsters warehouse agreements. Additionally, the Employer's representatives advised the Union that it had recently lost several important customers, and that, in an effort to remain competitive in its containerization operation, it was then currently engaged in negotiations with the Harbor Department for renova-

⁷ Between approximately 1972 and 1976 the Employer incurred legal expenses in excess of \$250,000 in litigation before both the Board and the courts involving the question by whom and where containerization work could be performed.

As a result of the Employer's prevailing in this litigation the containerization work remained with the Teamsters. A contrary disposition of this litigation would have permitted the Employer to perform its containerization operation at the docks rather than at a location some 4 to 5 miles away. The location of the warehouse operation added substantially to the Employer's cost.

tion and modernization of its docks and warehouse facilities. The Employer's representatives further explained that, if it went through on these plans, which also included the building of a new office building, the changes would have the effect of increasing job security for Teamsters employees already on the payroll, as well as significantly adding new Teamsters jobs to Warehouse 13's operations. However, as explained to the Union at these meetings, the Company's planned undertakings were contingent upon getting relief from under the union contracts.⁸

During the course of these negotiations, the Company put forth several major proposals. Prior to the final meeting in Burlingame, none of these proposals was even accepted by the Union.⁹ These proposals provided, *inter alia*, for a reduced starting rate for permanent employees, creation of a new class of employees to be known as "regular casual" at a reduced wage rate, freedom to subcontract out work, and a reduction in wages for current employees.¹⁰

Under the supplement agreement, the Warehouse 13 employees were entitled to a 50-cent-an-hour increase plus a cost-of-living allowance, herein called COL, as of April 1, 1977, with another 50-cent-an-hour increase and COL allowance the following April. Initially in these negotiations, the Employer's representatives proposed a 25-cent-an-hour *decrease* with no COL for April 1977 and a second 25-cent-an-hour *decrease* but with the COL allowance for April 1978.

Additionally, the Employer sought specific relief from under clause 59 which required mandatory overtime for weekend employment, as well as a guarantee that 80 percent of the work force would receive a specified number of guaranteed hours of work per week.

Bailey and Curry each testified that the relief they sought throughout each of these sessions was intended to run for the duration of the contract and that they fully explained this to the Union. It is undisputed that the Employer's position was fully understood by all the union representatives who participated in these meetings.

At the Burlingame meeting which took place sometime between March 20 and March 25, the Employer again proposed a new rate for beginners. Shepherd and Ogden discussed the matter and agreed to reject the reduced starting rate proposal but to offer the Employer a total freeze on all wages, including the COL increases for the duration of the contract. Additionally, they agreed to grant the limited relief sought from under clause 59. When this counterproposal was offered, the company officials indicated that while they were not pleased, if Shepherd and Ogden would both represent

that they would recommend it to the membership, the Employer would agree. Shepherd and Ogden agreed to so recommend the proposal. At no time during this meeting did the parties draft or prepare any document embodying this conditional proposal, herein referred to as the Company's or the Employer's proposal. The parties then ended the session with the union representatives stating that they would get back in touch with the Employer after the general membership meeting.

D. *The Employer's Meeting With Warehouse 13 Employees*

Sometime between the Burlingame session and the Union's membership meeting of March 30, Curry, at the suggestion of a representative of Local 692,¹¹ went to Warehouse 13 and met with a large group of employees.¹² According to Curry's account of the meeting,¹³ he advised the employees that the 1976 contract provided for a reopener clause, and that the Company had exercised that option and for the past weeks had been negotiating with the Union. Curry stated that the membership would be having a meeting within a few days and at that time all the details of the negotiations would be given to them. Curry then informed the employees that they were one big unit, and that, if they were going to continue to survive, they needed to work together. Curry further briefly explained the type of improvements it was seeking to make in its operations and the advantages these improvements would have for the employees. At this point, the meeting started getting out of hand with employees asking many questions having nothing to do with negotiations or the reasons for the Company's seeking relief, and the meeting ended shortly thereafter.

Curry specifically denied that he ever explained what relief the Employer had sought and conditionally received. He testified that he had been cautioned by his attorney that he was not permitted to state anything regarding the specific terms and conditions of the proposed agreement since the Employer had done its bargaining exclusively with the Union. Curry stated that he is certain that several questions were asked concerning the type of relief offered by the Union but that he merely referred all these questions to the upcoming union meeting. Curry unequivocally denied that he ever made the statement during this meeting that the Employer was seeking a wage freeze for 1 year only.

Six employees were questioned regarding statements allegedly made by Curry at this meeting.¹⁴ An amalgam of their testimony indicates that both during Curry's remarks to them as well as in his direct answers to their questions Curry allegedly stated that the Company was seeking relief in the form of a wage freeze for 1 year only. None testified that Curry indicated or made any

⁸ The Harbor Department would not commit itself to take the Employer's renovation plans to the Board of Harbor Commissioners until the Employer showed its good faith. The Harbor Department therefore insisted that as a token of its good faith the Employer must put up \$200,000 as earnest money for the construction of the new office building. Since this building was to be built on leased land with a 30-day revokable permit, the Employer was unwilling to make such a commitment until it had an agreement with the Union for economic relief.

⁹ On several occasions during these meetings, Shepherd informed the Employer that some of its proposals, including the wage matters, were strike items.

¹⁰ At one point during the negotiations, the Company proposed some 24 specific changes from the existing contract.

¹¹ Curry did not identify who suggested this meeting.

¹² Neither Curry nor the employee witnesses stated how many employees attended this meeting.

¹³ It appears that Curry may have been accompanied by either Bailey and/or Chuck Chotsko, the general manager of Warehouse 13. Unfortunately, Curry was never asked this question.

¹⁴ See the testimony of Dennis Helm, Steve Higgins, Arthur Kawsowski, Michael Logan, James Walten, and Ron Della Torre.

statement that the 1978 pay raise was "subject to review."¹⁵

Curry was an extremely convincing witness. He testified in a careful, detailed, consistent fashion and gave the appearance of honesty. Furthermore, as will be discussed *infra* the rider agreement which was later agreed upon and executed embodies the clear understanding of the individuals to the negotiations that wages, with the exception of the COL increases, would be frozen for the duration of the contract. Further, the Employer has little financial stake in these proceedings where the General Counsel is seeking that Respondent alone be held responsible to remedy, through a monetary award, its alleged unfair labor practices. The record discloses that Curry and Shepherd, the chief negotiators for the respective sides, engaged in difficult and sometimes heated negotiations during both 1976 and 1977, and no evidence was offered which would either explain, justify, or warrant Curry's fabrication of the evidence where the only result would be to assist Respondent to the detriment of its own employees.

As noted above, the record evidence is clear that all the Employer's proposals in the negotiations for the rider agreement were for the duration of the contract. This included the counterproposal which the Union conditionally offered and which the Employer reluctantly accepted at the Burlingame meeting. Even aside from the credible evidence that the Employer was unwilling to undertake any of the plans for renovation, improvements, and construction of a new office building without first reaching agreement with the Union for economic relief, Curry's version of this meeting is clearly the more probable of the two.

To credit the General Counsel's witnesses on this point, one would have to believe that Curry, an extremely intelligent and careful chief executive, would have inexplicably undercut his own bargaining position. In this regard, he had already received a firm commitment from both Shepherd and Ogden that they would recommend to the membership that the employees accept the counterproposal that wages and the COL allowance be frozen for the duration of the contract. In the face of this commitment, for Curry to turn around and inform the employees that at the upcoming union meeting they would be asked to approve a wage freeze for 1 year *only* would be pure and simple economic suicide. The predictable effect of such a statement by Curry would be the outright rejection by the employees of a wage freeze for anything more than 1 year. In these circumstances, I find that the testimony of the six employee witnesses to this meeting is highly implausible and unreliable.

E. The Union Meeting of March 30

A total of 11 witnesses, 9 for the General Counsel and 2 for the Respondent, testified regarding the events at this meeting. The meeting, which lasted over an hour, was unstructured in its procedure and, despite the presence of Local 692's recording secretary on the podium, apparently no minutes or other transcription of the

¹⁵ The significance of their failure to testify in this regard will be noted *infra*.

events was ever made. That this meeting had a general atmosphere of confusion throughout, the existence of which is acknowledged by nearly every witness, is not surprising in view of the procedures that were followed. Of the three votes taken by the membership, the first, which was a written secret-ballot vote, was declared invalid due to the Spanish-speaking members' apparent inability to understand exactly what was being voted upon. The third vote was conducted by either a showing of hands or by members standing. Additionally, contrary to well-established procedures, votes were taken on motions without the requirement that they be seconded. Furthermore, among the 50 to 100 people present were individuals employed as "casual employees" by the Employer. These individuals, though neither members of the Union nor part of the appropriate bargaining unit, were not only permitted into the meeting, but apparently cast ballots as well. That the presence of these individuals at the meeting added to the general confusion is readily apparent by the fact that, at some point during the actual meeting itself, the individuals seated on the raised podium were forced to caucus and argue among themselves concerning what action, if any, should be taken with regard to the nonmembers' voting. It is not clear whether this caucus caused a break in the meeting or simply whether the meeting went on without some or all of the spokesmen.

Against this background it is not particularly surprising that the testimony of the nine witnesses called by the General Counsel varies in substance as to specific details. What is surprising is that all nine testified that, at some point during and in a few cases after the meeting itself, Shepherd, the chief union negotiator of the rider agreement, on his own or in answers to members' questions, specifically stated and gave the employees assurances that they would only be approving a wage freeze for 1 year. Shepherd unequivocally denied that he ever so informed the members and testified that nothing was said by him which could indicate to the employees that they were voting on anything less than a freeze for the duration of the contract. Shepherd further testified somewhat implausibly that he could recall no questions being asked at the meeting regarding the length of time the employees were being asked to give up their wage increases. Likewise, Shepherd denied making any statement regarding the future negotiability of the 1978 wage increase.

In addition to Shepherd, Ogden, the secretary-treasurer of Local 692, Gunder Hansen, a former president of Local 692, and Lavon McGinty, Local 692's recording secretary, all sat at the raised podium and, with the exception of McGinty, all spoke to the assembled group and answered questions. Unfortunately for this trier of fact, only Shepherd was called as a witness. No explanations were offered as to the failure of Hansen, Ogden, and McGinty to testify.

Notwithstanding the above, it is possible with careful reading of the record to reconstruct with some degree of accuracy the events of the March 30 meeting. The following account, with the exception of Shepherd's alleged statements noted above, is based upon an amalgam or composite of the testimony of the nine employee wit-

nesses.¹⁶ The testimony of those nine General Counsel witnesses on the subject of what, if anything, Shepherd and/or Ogden said regarding the time frame for the freeze or the 1978 wage increase will be specifically noted and dealt with separately.

Ogden opened the meeting by explaining to the employees that the Employer had exercised its option to reopen the master and supplement agreements and that the Employer and the Union had been negotiating the terms of a rider agreement. Ogden then apparently read to the assembled employees the terms of the rider agreement that had been reached at the Burlingame meeting.¹⁷ At this point, Ogden introduced Hansen and Shepherd and apparently both spoke prior to taking of the first vote. Shepherd informed the employees regarding the Employer's competitive need for the relief sought and urged the membership to vote in favor of the rider agreement. Hansen then spoke and went over the history of the Employer's litigation with the Longshoremen and also recommended that the employees approve the proposal.

The first secret-ballot vote was taken but prior to the count was invalidated due to some confusion by Spanish-speaking employees over the meaning of an affirmative vote. A second secret-ballot vote was then taken with the result that the proposal was overwhelmingly rejected.

Shepherd then again spoke to the members and explained that he was required under the law to bargain in good faith with the Employer and that the employees had to give him something to take back to the Employer. Shepherd added that he was pressed for time and that, unless they gave him a counterproposal, he would go back and either sign the last proposal or use his own judgment in the negotiations. At or about this point, one of the members made either a motion or suggestion that the employees seek their COL allowance and one-half of the 50-cent-an-hour raise. Some discussion followed with employees again questioning the need for the granting of any relief to the Employer. After several minutes of questions and answers among the members and the individuals on the podium, someone, most likely either Shepherd or Ogden, suggested that the employees vote to seek the COL allowance only and anything else Shepherd could get. The members then approved this suggestion, or proposal, by either a showing of hands or by a standing vote. The meeting then ended, although most of the individuals present remained in the room milling about drinking coffee.

I now turn to the central question of what Shepherd and/or Ogden told the employees about the terms of the initial proposal and the second proposal, which was ultimately approved. The record testimony is far from clear.

Shepherd testified that Ogden, in reading the initial proposal at the start of the meeting, specifically indicated that it called for a total wage freeze for both 1977 and 1978.

¹⁶ In addition to the six employees listed above in fn. 14, Charles Kasowski, Sue Dorsey, and Greg Schlappy all testified regarding this meeting.

¹⁷ Apparently, no one saw the document from which Ogden was reading.

From the nine witnesses called by the General Counsel who testified as to what was said prior to the first vote on the subject of the duration of the proposed wage freeze, several different versions were presented.

Lizotte testified that Shepherd indicated that the wage freeze was for both years.¹⁸ Helm initially testified that Ogden in presenting the proposal did not specify the duration. However, Helm subsequently changed his testimony to reflect his "understanding from Ogden's remarks" that the wage freeze was for the year 1977 only. Higgins testified that Shepherd at the outset explained that the proposal ran for 1 year only. Kasowski testified that Ogden did not specify the length of time, but that prior to any vote Shepherd was asked if it was for 1 year and answered that it was. Logan and Walten testified that Ogden did not specify the duration, but that they knew it was for 1 year only by virtue of their attendance at the Employer's meeting prior to March 30. However, Walten added that prior to the first vote he believed Shepherd was asked the question and assured the members that the freeze was for 1 year only. Torre testified that, in Ogden's initial reading of the proposal, he specified a 1-year freeze only, but that he also knew that to be the fact since he had also attended the Employer's meeting with Curry. Charles Kasowski testified that Shepherd was asked the question prior to the first vote and that Shepherd replied that it was for 1 year only and that next year was "another story." And finally, Dorsey testified that several times during the meeting Shepherd, in response to specific questions, answered that the freeze was for 1 year only. Dorsey could not recall whether any of these questions were asked prior to the first vote.

Similarly, the testimony regarding what Shepherd said about the duration of the freeze either prior to or immediately following the last vote is also in conflict. As noted above, Shepherd neither recalls any questions on the subject being asked during this portion of the meeting nor recalls any discussion at all regarding the 1978 pay raise.

On the other hand, Lizotte testified that Shepherd in response to a question after the third, and last, vote stated, "We'll worry about 1978 when it gets here."¹⁹ Helm testified that prior to the final vote he asked Shepherd about the duration of the freeze and that Shepherd replied that "this would be for 1 year only, that the increase for 1978 would be negotiable." Kasowski testified that on two occasions Shepherd stated that a freeze for 1 year should be adequate and that nothing was said about the 1978 raise. Walten testified that after the meeting he was present in a small group of employees gathered around Shepherd when he overheard Shepherd state, "We'll be back next year and get the whole dollar back." Torre and Dorsey testified that during the meeting Shepherd said the wage freeze was for 1 year and that nothing was said about 1978. Charles Kasowski simply testi-

¹⁸ Apparently, Lizotte also testified that he arrived at the meeting apparently 20 minutes after it started.

¹⁹ Lizotte, as president of Local 692, was present at both of the February negotiating meetings and knew that all of the Employer's proposals through that time had been in terms of the duration of the contract. It is not clear why, armed with this knowledge, he did not attempt to clarify the proposal either before, during, or after the meeting.

fied that before the final vote Shepherd said the wage freeze was for 1 year.

Higgins and Logan both testified at some length and in greater detail than did the others regarding this portion of the meeting, and I have therefore left their testimony for last. Higgins, in extremely rambling testimony, stated that Shepherd in response to several questions stated that the freeze would only be for 1 year and that the 50 cents they were giving up from the 1977 raise might be negotiable next year or in the next contract negotiations. Higgins further testified that Shepherd, in discussing the 1978 wage increase, told the employees that it would be subject to review but as it stood then he saw no reason why they would not receive it. When questioned further as to the meaning of the phrase "subject to review," Shepherd allegedly replied that the Company only needed relief for 1 year and that the only way the Company could get a review of the 1978 increase would be if the Company was going under.

Logan testified that Shepherd stated on several occasions that the freeze was for 1 year only but that they might be able to get back the 50 cents they were giving up if the Union renegotiated. After the meeting, according to Logan, he and Dorsey approached Shepherd and again asked if they could get back the 50-cent raise. Again Shepherd answered that they could if they renegotiated with the Company. Logan did not testify that there was any discussion or mention by Shepherd of the 1978 pay raise either during or immediately following the meeting.

In view of the subsequent events that tend to shed some light on this issue, I shall leave its resolution to the analysis portion of this Decision.

F. Final Negotiation of the Rider Agreement

At some point on the evening of March 30, Ogden called Curry and informed him that, while the membership had rejected the Employer's proposal, they had accepted a wage freeze subject to the COL allowance, and that Shepherd had been given the power to work out the details. Curry indicated that he was disappointed with the results. Ogden then stated that Shepherd would be in touch with him the next day.

On March 31, Shepherd called Curry and again informed him of the results of the March 30 meeting,²⁰ and asked if Curry could prepare the document.²¹ Curry in turn asked Shepherd to dictate the terms of the rider agreement over the phone to his secretary. Shepherd did so and later that day the two met at a Los Angeles restaurant.²² The rider agreement prepared at Shepherd's direction and executed by Respondent and the Employer that afternoon provides the following:

²⁰ According to Shepherd's uncontradicted testimony, he suggested to Curry that the Company agree to a 25-cent-an-hour wage increase with the COL allowance for 1977, along with a wage freeze for the year 1978. Curry answered that he was surprised by Shepherd's suggestion since he had earlier been advised by Ogden that the membership had already agreed to accept the COL allowance only.

²¹ Shepherd's secretary was not at work that day and he had no other personnel available to do the actual typing.

²² Neither Ogden nor any other representative or official of Local 692 was present for this meeting. No explanation was offered as to why no one from the Local was present.

RIDER AGREEMENT

Subject: Appendix A and Appendix B; Joint Council No. 42 Wage Rate

Warehouse 13: Freight Handler, Fork Lift Operator, and CFS Clerk

The classifications, as listed above, shall be frozen at the April 1, 1976, rate; however, the cost-of-living allowance due on April 1, 1977, shall be added to the present April 1, 1976, rate.

The COL due under the Freight Agreement on April 1, 1978, shall be applied to the wage scale and the negotiated increase due on April 1, 1978, shall be subject to review by the parties.

Article 59, Section 1 (A), (B), and (C), shall not apply at Warehouse 13 (only). However, the Western Master Freight Division of the Western Conference of Teamsters shall have the authority to reinstate Article 59, Section 1. (A), (B), and (C), if there is an abuse.

In waiving Article 59, Section 1 (A), (B), and (C), it is understood that Saturday or Sunday shall not be overtime as such but the sixth consecutive day of work shall be paid at time and one-half and the seventh consecutive day of work shall be paid at doubletime.

All other conditions of the National Master Freight Agreement and all Supplemental Agreements shall apply.

As the two of them were reviewing the agreement, Curry asked Shepherd the meaning of the phrase in the second paragraph "the negotiated increase due on April 1, 1978, shall be subject to review by the parties."²³ Shepherd replied that the language was his vehicle to make sure that the Company did all the things they were supposed to do. Curry then asked what the other conditions were, and Shepherd answered the modernization and renovation of the facilities, the building of an office building, and the seeking of new business with the result that new employees would be added to the unit. Additionally, Shepherd cautioned that the Employer would not be permitted to abuse the relief granted to it under the revisions to article 59. Shepherd further warned that, if the Employer did not fulfill these conditions, it would be in "big trouble" and the parties would then revert back to the original terms of the master and supplement agreements. Shepherd added that a review of the Employer's action would be taken sometime prior to April 1978 to insure compliance. Curry indicated that he had no problems with this language since the Employer fully intended to comply with the previously stated commitments.

²³ Though Shepherd and Curry testified in similar fashion as to this meeting, Curry testified in somewhat greater detail than did Shepherd and the account set forth is from his credited and corroborated testimony.

G. Events Subsequent to March 31, 1977

On April 4, Shepherd sent a letter to Ogden enclosing for his signature and return a copy of the rider agreement. Several days later, Shepherd and Ogden spoke on the phone about the matter. Shepherd, after first reminding Ogden that Respondent had not yet received a signed copy from Local 692,²⁴ explained that the phrase "subject to review" was put into the agreement as a safeguard to insure the Employer's compliance, and would permit Respondent to put the Employer back under the preexisting terms if it did not live up to its responsibilities.

Lizotte testified that he saw and received a copy of the rider agreement within a few weeks after its execution by Respondent and the Employer. Apparently, other than Lizotte and Ogden, no official or other member of Local 692 either saw a copy or were apprised of the terms of the rider agreement prior to early April 1978.

By letter dated March 21, 1978, Shepherd wrote the Employer and requested that the COL allowance due April 1, 1978 be put into effect.²⁵ The letter further requested a meeting "to review the above articles and sections of the rider agreement as to whether the Company has lived up to the rider articles and sections."²⁶ By letter dated March 22, 1978, Bailey informed Shepherd that the COL allowance would be implemented on April 1 and that the Employer had fully lived up to its commitments.²⁷

Sometime during the last week in March, Ogden called both Bailey and Shepherd and inquired as to why the employees were not also receiving the 50-cent-an-hour wage increases due them on April 1, 1978, under the terms of the supplement agreement. Both Bailey and Shepherd in essence answered that the Union had waived that increase by virtue of the rider agreement.

Although rumors were abounding throughout Warehouse 13 during the last 10 days of March, it was not until April 3, 1978, that the employees officially found out that they were not going to receive their 50-cent-an-hour wage increase. At that time, their timecards reflected a new wage which represented only the increase from the COL allowance.

On or about April 8, 1978, Shepherd, Bailey, Curry, Ogden, and Lizotte met in Respondent's offices for the purposes of reviewing the obligations created by the rider agreement and the Employer's fulfillment of its obligations thereunder. At that meeting, Respondent and Local 692's representatives agreed that the Employer had substantially complied with its obligations as to its renovation of the facilities, the increase in the work force, and its performance under clause 59. The repre-

sentatives of Local 692, however, took the position that the employees of Warehouse 13 were also entitled to a 50-cent-per-hour wage increase due April 1. During a union caucus, Shepherd explained that it had been his intent to freeze the wage rates for the duration of the contract. Ogden and Lizotte took the contrary position and, according to Lizotte, stated that they understood the terms of the rider agreement to mean that prior to April 1, 1978, the Union would review the events of the past year and at that time grant the Employer a second 50-cent wage freeze if justified. Shepherd reminded Ogden that he had fully explained to him the contrary meaning of the term "subject to review" nearly a year previously.

As a result of the disagreement voiced at the April 5 meeting, Bailey, on April 6, posted a bulletin in Warehouse 13 reciting the history of the negotiations for the rider agreement and the steps that the Employer had undertaken in the last year to improve its competitive position and attract more business. Additionally, the bulletin announced that the Employer considered their annual wage raises frozen as of 1976.

On April 7, Bailey and Lizotte met with a group of employees at Warehouse 13. Bailey explained to the employees that their 1978 wage increase had been negotiated away or waived by the rider agreement. During the course of this meeting, several of the employees present expressed the view that they felt they were entitled to the increase. Lizotte stated that both he and Ogden were also of the view that the wage increase due on April 1 should have been granted.²⁸ Within the first approximately 10 days of April employee Helm prepared a petition which by the time it was presented to Local 692 on April 13 contained the signatures of 81 employees. This petition states the following:

We, the undersigned, Employees of California Cartage Company, Inc.—Warehouse 13—assert that the terms and provisions of the *Rider Agreement* of March 31, 1977, were falsely presented to us, both by the Company and the Union.

To be specific: March 30, 1977, we met with many union officials at Local 692's Hall to decide on the Company's proposal. After 2-1/2 votes we finally voted to accept the [a]formentioned Rider. The officials expended considerable effort to persuade us to do so.

The most vital question asked, in the process of persuasion, was "If we accept this Rider, are we also voting to give away the 50¢ per hour wage increase that our contract stipulates is due us April 1, 1978?" Gene Shepherd answered, "No. The Cost-of-Living Allowance you will get automatically and the wage increase will be 'subject to review.'" (Additionally, as the Company talked to us March 28, 1977, they were asked the same question. They gave us the

²⁴ Apparently, no copy signed by any official of Local 692 was ever received by Respondent.

²⁵ This letter makes no reference to the 1978 wage increase. The 1977 COL allowance had been timely implemented.

²⁶ This phrase specifically refers to clause 59.

²⁷ The record indicates that, by the end of March 1978, the office building had been completed and substantial renovations were in the process of being made as to both the warehouse and the dock facilities. Further, the record indicates that, by the time of the hearing, the number of regular employees employed in the unit at Warehouse 13 had increased to approximately 100.

²⁸ From late March 1978 to the present, Lizotte has taken this view in discussions with members, some of whom, specifically Helm, Higgins, Kasowski, Logan, and Walten, testified at the hearing.

same answer: "[T]he April, 1978, wage increase will be 'subject to review'").²⁹

On or about April 17, 1978, Local 692 filed a grievance on behalf of the bargaining unit employees employed by the Employer at Warehouse 13 over the failure of the Employer to pay the employees the 50-cent wage increase due under the contract on April 1, 1978.

On or about June 5, 1978, this grievance was heard before the Southern California Joint State Committee and on or about the same date the Committee issued its decision in which it referred the matter back to Respondent, the Employer, and Local 692 for "determination of the issue." No further action has been taken on the grievance by any party.

IV. ANALYSIS AND CONCLUSIONS

The General Counsel contends that Respondent breached its duty of fair representation and thereby violated Section 8(b)(1)(A) of the Act when it affirmatively misrepresented the substantive provisions of the proposed rider agreement to Warehouse 13 employees who were about to vote to ratify or reject that agreement. In this regard, the General Counsel notes that the Warehouse 13 employees were entirely dependent on Respondent to accurately advise them of the terms of the proposal since Respondent was in charge of the negotiations and never furnished the employees with a written copy of any proposals prior to the voting. The General Counsel, while conceding that a union is not obligated to obtain ratification of any agreement that it negotiates on behalf of employees it represents, argues that, once a union has determined to gain the approval of the employees, it must honestly disclose to them the terms of the proposed agreement.³⁰

Here, the General Counsel continues, Respondent through its agent, Shepherd, fully intended to negotiate away the employees' wage increases for both the years 1977 and 1978, and, by assuring the employees that their affirmative vote would only deprive them of their 1977

wage increase, Respondent materially and willfully misled them and thereby violated its fiduciary duties under the law.

Respondent initially contends that the instant dispute is time-barred under Section 10(b) of the Act since both Ogden and Lizotte, Local 692's secretary-treasurer and president, respectively, were apprised of the terms and conditions of the rider agreement a short time after its execution and were at all times fully aware of Respondent's position relative to the 1978 wage increase. Respondent argues that, notwithstanding this knowledge, these officers chose to do nothing with respect to the rider agreement for over a year, and that Local 692's membership was bound by their officials' knowledge.

Respondent, in addressing the merits of the dispute, argues that the facts, at most, demonstrate a failure on Shepherd's part to communicate in an articulate fashion to the members the precise terms and conditions of the proposed agreement they were being asked to approve, and that this failure, even if it rises to the level of negligence, is not the type of conduct intended to be encompassed by Section 8(b)(1)(A) of the Act.

Finally,³¹ Respondent argues that the remedy sought by the General Counsel, to wit, payment to the employees of the 1978 50-cent-an-hour wage increase, is punitive in nature since it is speculative whether the Union would have successfully secured from the Employer this increase.³²

Before delving into an analysis of what was presented to the employees at the March 30 meeting, it is necessary to briefly summarize the negotiations that took place regarding the rider agreement. At all times the Employer's proposals covered the entire duration of the agreement. Shepherd, as well as Ogden, was present at all three negotiating sessions prior to the March 30 meeting and fully and clearly understood that to be the case. At the Burlingame meeting during the last week in March, the Employer's representatives withdrew their demand for a reduced starting wage rate only on Shepherd's and Ogden's representations that they would recommend at the upcoming union meeting a total freeze on all future increases, both wages and COL increases, for the duration of the contract.

The day following the general membership meeting, Shepherd and Curry met and executed the rider agreement. Although the document's "subject to review" language in reference to the 1978 wage raise is admittedly

²⁹ All nine of the employees who testified as witnesses for the General Counsel signed this document. As set forth in some detail in subsec. D hereof, contrary to the third paragraph in this petition, none of the six employees who testified regarding the late March meeting with Curry ever stated that Curry or any other company official informed them that the 1978 wage increase would be "subject to review." Likewise, of the nine who testified about the March 30 union meeting, three stated that nothing was ever said at this meeting regarding the reviewability of the 1978 raise and only four of the remaining six recalled Shepherd's saying anything at all regarding the subject.

³⁰ Although the master and supplement agreements do not specifically require it, all parties involved herein treated employee ratification as a condition precedent to the execution of a valid rider agreement. In view of my conclusion that the General Counsel has not established that Respondent willfully and intentionally misled its members, I need not reach the issue of whether Respondent's alleged conduct, if proved, would amount to an unlawful breach of its duty where there is no showing that the effect of such conduct was to jeopardize the employment status of any unit member. See, *Warehouse Union Local 860, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (The Emporium)*, 236 NLRB 844 (1978); and *United Steelworkers of America, AFL-CIO, et al. (Duval Corporation and Duval Sierrita Corporation)*, 226 NLRB 772 (1976), reversed and remanded *sub nom. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 310 v. N.L.R.B.*, 587 F.2d 1176 (D.C. Cir. 1978), and on remand 243 NLRB 1157 (1979).

³¹ Respondent also argues that the entire matter should be properly deferred to the parties' internal grievance procedure. I disagree. First, as will be discussed, *infra*, no real controversy exists over the meaning of the terms and conditions of the rider agreement. The issue heard before me does not, contrary to Respondent's contention, involve a dispute between contracting parties over the interpretation of a provision in the contract akin to an alleged violation of Sec. 8(a)(5) or Sec. 8(b)(3) of the Act. The case involves a claim that Respondent did not properly fulfill its fiduciary duties. As the Board pointed out in *General American Transportation Corporation*, 228 NLRB 808 (1977), it will not defer to the grievance arbitration procedures on matters affecting individual rights under Sec. 7 of the Act.

³² In support of this argument, Respondent relies upon the recent Ninth Circuit Court opinion in *N.L.R.B. v. Mercy Peninsula Ambulance Service, Inc.*, 589 F.2d 1014 (1979), denying enforcement of 232 NLRB 1070 (1977). In view of my ultimate conclusion regarding disposition of the complaint, I need not reach this issue.

somewhat ambiguous, resort to the testimony of Shepherd and Curry dispels any confusion as to what the parties intended and accomplished by executing this agreement; to wit, the 1978 pay raise was *waived* unless the Employer failed to live up to its previously stated commitment to make certain changes in its operations. No claim is made that the Employer acted in bad faith in seeking economic relief and other concessions from the Union. Likewise, no claim is made that Respondent's dealings with the Employer were less than at arm's length. In fact, Shepherd, in both the 1976 and the 1977 negotiations took a hard stand against giving any relief which he did not feel would benefit in the long run the affected employees.³³

As set forth in section III, D, hereof, the credible evidence establishes that at no time prior to the March 30 meeting did any company official ever explain to the employees the specific terms and conditions of the proposed rider agreement and they certainly never assured them that they were going to be asked to waive only their wage increase due in 1977.

Against this background, the General Counsel nonetheless contends that the credible evidence establishes that, on one or more separate occasions during and immediately following the March 30 membership meeting, Shepherd willfully and intentionally misled the employees into believing that they were only giving up their right to the 1977 increase and that they either would automatically receive their 1978 wage increase or at the least would receive it unless the Union subsequently agreed to an additional waiver. In furtherance of his theory of the case, the General Counsel presented the testimony of nine employee witnesses, who all testified, albeit in somewhat different and confusing fashions, that Shepherd made such assurances. Shepherd, on the other hand, did not only deny ever making such assurances, but further denied that either the question of the length of time of the proposal or what would occur to the 1978 raise was ever mentioned. I find neither the employees' version nor Shepherd's as entirely satisfying or convincing. Determining from essentially 10 different accounts what was actually said at this membership meeting is not an easy proposition. No minutes or notes of the events were offered by any witness. This is somewhat puzzling since Local 692's recording secretary, McGinty, was present and seated at the table on the podium. Unfortunately, McGinty was not called as a witness. Similarly, Ogden, Local 692's secretary-treasurer and the individual who not only represented Local 692's interest at the three negotiating sessions preceding the ratification vote but also initially presented the proposal to the member-

ship, did not testify. Likewise, Hansen, the third main speaker at that meeting, was not called as a witness. While there may be legitimate explanations for their not testifying, none were offered.

I find the employees' versions of what Shepherd allegedly said that evening about the status of the 1978 wage raise so fraught with the previously noted substantive inconsistencies as to render them unreliable. Additionally, and perhaps more importantly, I find that their versions, when viewed in the peculiar circumstances in this case, are inherently implausible. Other than Shepherd's apparent annoyance and impatience at the members' failure to immediately approve the proposal, the General Counsel ascribes no basis which would explain, justify, or warrant Shepherd's willfully making the false and misleading statements attributed to him. Shepherd is an experienced labor negotiator who clearly would have recognized that material misrepresentations made in 1977 would come back to haunt him as soon as the employees discovered the "truth." If such had been his design, I do not believe that he would have almost immediately furnished a copy of the rider agreement to the Local and explained its meaning to Ogden.

I find even more persuasive the fact that Ogden was present on the podium when Shepherd allegedly made the damning remarks. Shepherd would have to have known that, had he lied to the membership, Ogden would be in a position to immediately correct him and at the least cause him some extreme and unnecessary embarrassment. Yet were I to credit the employees' account, I must also believe that Ogden merely silently stood by and knowingly permitted Shepherd to mislead, if not outright lie, to his members. While the finding of a specific unlawful motive may not be necessary to establish that a union's conduct was arbitrary, capricious, or invidious, it is of probative value in weighing the probabilities of whether certain acts or conduct took place.

The foregoing is not to say that I fully credit Shepherd's testimony of the meeting either. I find his denial that the 1978 wage freeze was ever discussed equally suspect. Even a consensus of the majority of the General Counsel's witnesses indicates that the original proposal made by Ogden at the start of the meeting did not specify that the employees were being asked to give up their wage rates for the duration of the contract. That employees being presented with this proposal would not have inquired as to the 1978 raise strains one's credulity. Based upon the conflicting testimony before me, the more probable version is that this or a similar question was asked and that Shepherd did indeed say something to the effect that the 1978 raise would be "subject to revision." That Shepherd and apparently Ogden interpreted this remark or limitation differently than did the employees is readily apparent from their reactions the following April. While Shepherd may have been remiss in failing to adequately and fully explain the ramifications of the proposals, such a failure does not amount to intentional and willful misleading of the employees. *Amalgamated Meatcutters and Butcher Workmen of North America, AFL-CIO, Local 17 (Aero Restaurant, Inc.)*, 241 NLRB 22 (1979). Based upon the above analysis and

³³ For example, Shepherd in the 1976 negotiations flatly refused the Employer's request or demand that the Warehouse 13 operation not be considered under the master agreement. Additionally, during the 1977 rider agreement negotiations, Shepherd admittedly refused to give the Employer a lower starting rate, which was a major portion of the relief it sought. On more than one occasion Shepherd informed the Employer that its proposals were "strike issues." Further, even after the March 30 meeting, Shepherd in communicating with Curry sought to give the Employer less relief than the membership had authorized him to give. However, his effort in this regard was totally undercut by Ogden's earlier phone call to Curry in which he informed Curry exactly what the members had accepted.

conclusions, I find that the General Counsel has not met his burden of proving by a preponderance of the evidence that Respondent, through its agent, Shepherd, intentionally and willfully attempted to deceive, misrepresent, or mislead the employees at the ratification meeting.

Although the testimony of the General Counsel's witnesses was in large part confusing and imprecise, I do not base my rejection of their testimony on such grounds. I have no reason to doubt that each testified sincerely and honestly as to their present recollections of what they believed they were told by Curry and Shepherd regarding the 1978 pay increase. However, I note that they had a number of conversations with each other regarding the incidents in question. Although it is far from clear, it appears that their testimony is a probable product of their resentful attitude towards both the Company and Respondent. In this regard, it seems likely that their anger and resentment was supported by their fellow employees and that they simply adopted as their own recollections the misunderstandings and exaggerations contained in others' versions.

Finally, I reject Respondent's argument that the entire matter is time-barred under Section 10(b) of the Act. While the employees³⁴ apparently misunderstood the meaning of their approval at the membership meeting of March 30 and were not apprised of the consequences of their action until early April 1978, approximately 4 months prior to the filing of the instant charge, no such

³⁴ I place Local 692's president, Lizotte, in this group. He was not present at the Burlingame meeting and, unlike Ogden, was never informed directly by Shepherd as to the meaning of the phrase "subject to review" as used in the rider agreement.

excuse appears available to Ogden. However, I do not find that Ogden's knowledge of the terms and conditions of the rider agreement, in these circumstances, is attributable to the employees.

Accordingly, I find that Respondent did not act in bad faith with the Warehouse 13 employees nor did it engage in such arbitrary, capricious, or invidious conduct of the nature as to constitute a failure of its duty of fair representation in violation of Section 8(b)(1)(A) of the Act. *Amalgamated Meatcutters and Butcher Workmen of North America, Local 17 (Aero Restaurant, Inc.), supra.*

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has not engaged in the unfair labor practices alleged in the complaint.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER³⁵

It is hereby ordered that the complaint be dismissed in its entirety.

³⁵ 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.