

United Artists Theatre Circuit, Inc. and Moving Picture Projectionists, Local No. 150, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada. Case 31-CA-8694

July 23, 1980

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS
JENKINS AND PENELLO

On March 17, 1980, Administrative Law Judge Gerald A. Wacknov issued the attached Decision in this proceeding. Thereafter, the Charging Party Union and counsel for the General Counsel filed exceptions and supporting briefs, and Respondent filed a reply 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 had considered the record and the attached Decision in light of the exceptions and briefs and has decided to remand this case to the Administrative Law Judge for credibility determinations and the issuance of a Supplemental Decision.

In his Decision the Administrative Law Judge quoted or summarized the testimony of witnesses for the General Counsel and for Respondent. Witnesses for the General Counsel clearly testified that the Union and Respondent reached oral agreement on the terms of a collective-bargaining agreement on August 9, 1978.¹ Respondent's witnesses denied that an agreement as described by the General Counsel's witnesses was reached on that date.² In his Decision, however, the Administrative Law Judge failed to make critical credibility determinations regarding such conflicting testimony. The Administrative Law Judge's sole credibility determination serves only to clarify that some time prior to August 15, Respondent Vice President Gallagher told the Union that its position with regard to what transpired at the August 9 meeting was er-

¹ These witnesses testified that Respondent agreed to the Union's proposal that Respondent's Westwood theaters, covered by the expired contract, be operated by manager-projectionist subject to interview of its members and that Respondent would accept the "full contract" in the remaining theaters according to the terms of a previously negotiated associationwide contract between the Union and other employers. This contract contained a provision for holiday pay which Respondent had earlier resisted. These witnesses further testified that they agreed to Respondent's condition that the Westwood projectionists resign from their positions at the Westwood theaters.

² In recounting this testimony, the Administrative Law Judge incorrectly stated that Vice President Gallagher denied that the position of manager-projectionist at the Westwood theaters was mentioned at the meeting on August 9. On cross-examination, he admitted that the Union suggested such a proposal.

roneous. This finding, however, is fully consistent with the General Counsel's position that Respondent repudiated the agreement after the August 9 meeting.³

We further disagree with the Administrative Law Judge's rationale that the Union's quiescence upon hearing that Respondent had a different view of the events of August 9 evidences its concurrence with Respondent's position. On August 15, the union members ratified the agreement which the Union claims was reached on August 9, and the Union so notified Respondent. While Respondent expressed to the Union a contrary view regarding the terms of the agreement, the returning strikers, nevertheless, received additional benefits identical to those contained in the associationwide contract.⁴ As the record indicates that Respondent had continued to operate during more than 4 months of strike activity, we draw no adverse inference from the Union's decision not to reinstate the strike. In any event, the Administrative Law Judge incorrectly states that the Union did not timely file an unfair labor practice charge.⁵

Finally, we note that the diverse positions taken by the General Counsel and the Union provide no basis for the dismissal of the complaint herein. The General Counsel's witnesses testified that the parties agreed that employees at the Westwood theaters, who had been covered by the expired contract, would no longer be covered by terms of the contract agreed to on August 9. The General Counsel and the Union agreed that the Westwood theaters were to be excluded from the agreement allegedly reached on August 9. Their dispute, however, focuses merely on the effect of the agreement, with the General Counsel conceding, and the Union denying, that the Union thereby disclaimed interest in further representing manager-projectionists at the Westwood theaters.⁶ This collateral matter has no bearing on the instant proceeding as no party contends that the Westwood theaters are covered by the alleged August 9 agreement.

³ While such a finding indicates that Gallagher had the subjective understanding that no such agreement had been reached, the General Counsel's witnesses likewise revealed they had a subjective understanding that Respondent had reached such an agreement. These subjective understandings provide no solid basis upon which to determine the events of August 9, absent specific credibility determinations.

⁴ The employees received a regular wage increase and many initially received extra pay in accord with the holiday pay provision here in dispute. Moreover, Respondent conducted interviews of the Union's projectionists, which the Union claims the parties had agreed to on August 9.

⁵ The instant unfair labor practice charge was filed on January 31, 1979, well within the time limits defined in Sec. 10(b) of the Act.

⁶ The General Counsel's position here stems from his determination that these positions are supervisory.

ORDER

It is hereby ordered that the above-captioned proceeding be, and it hereby is, remanded to Administrative Law Judge Gerald A. Wacknov for the purpose of making credibility determinations with respect to the testimony of the witnesses referred to herein, particularly with respect to the events of August 9, 1978.

IT IS FURTHER ORDERED that the Administrative Law Judge shall prepare and serve on the parties a Supplemental Decision containing credibility determinations, findings of fact, conclusions of law, and recommendations to the Board, and that, following service of such Supplemental Decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, shall be applicable.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge: Pursuant to notice, a hearing with respect to this matter was held before me in Los Angeles, California, on October 25 and 26, and November 1, 1979. The charge was filed on January 31, 1979, by Moving Picture Projectionists, Local 150, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (herein called the Union). On March 26, 1979, the Regional Director for Region 31 of the National Labor Relations Board (herein called the Board) issued a complaint and notice of hearing alleging a violation by United Artists Theatre Circuit, Inc. (herein called Respondent), of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (herein called the Act). On September 6, 1979, the aforementioned Regional Director issued an amended complaint in the captioned matter. Respondent's answers to the complaint and amended complaint, duly filed, deny the commission of any unfair labor practices.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses and to introduce relevant evidence. Since the close of the hearing, briefs have been received from the General Counsel, counsel for Respondent, and counsel for the Charging Party.

Upon the entire record and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Delaware corporation engaged in the business of operating motion picture theatres, including theatres in the Metropolitan Los Angeles, California, area. In the course and conduct of its business operations Respondent annually derives gross revenues in excess of \$500,000 and annually sells and ships goods or services valued in excess of \$50,000 directly to customers located

outside the State of California. It is admitted, and I find, that Respondent is now, and has been at all times material herein, 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

It is admitted, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Issue*

The principal issue raised by the pleadings is whether Respondent violated Section 8(a)(5) and (1) of the Act by repudiating the terms of a verbal collective-bargaining agreement.

B. *The Facts*

1. Background

The parties have maintained a collective-bargaining relationship for over 15 years. In late August or early September 1977 the parties commenced bargaining negotiations for a successor contract to the then current collective-bargaining agreement which expired on February 1, 1978, and which covered projectionists at certain of Respondent's theatres, including two theatres in Westwood. Respondent had previously belonged to the Southwest Employers Association, a multiemployer association organized for the purpose of bargaining with the Union, but withdrew from the Association prior to the instant negotiations in order to thereafter bargain on an individual basis. In August or September 1977, the Union presented to Respondent's negotiators, Jim Gallagher, vice president, and Richard Goldman, corporate counsel, the identical contract proposals which it was simultaneously presenting to the Association. Gallagher stated that he would study the proposals, but indicated that he would not commit Respondent to a contract until the Association negotiations had been concluded. The Union voiced no objection to this procedure.

The Union and the Association agreed to the terms of a contract on January 12, 1978, and shortly thereafter the Union arranged a meeting with Respondent. The Union was represented by Business Manager Ralph Kemp and President Frank Rubin. Gallagher and Goldman represented Respondent. Gallagher received the contract which had been agreed to by the Association and said he would get back to the Union before the end of January. Several days thereafter another meeting took place, and Gallagher stated that the contract would be acceptable to Respondent with two modifications, namely, unlike the prior contract and the new Association agreement, Respondent would not pay time-and-a-half for holiday work by projectionists except in the case of specially scheduled holiday matinee performances;¹ and Respondent wanted its two theatres in Westwood, which are lo-

¹ In the prior contract and new Association contract there were several holidays for which projectionists received overtime pay.

cated several blocks apart, to be run by one operator rather than two.² There were additional, but less serious, issues involving contract language on other items with which the parties agreed in principle.

Thereafter, the parties met about every 2 weeks. The same individuals were present and the same positions were taken with no movement on either side. Similarly, numerous telephone conversations between the parties failed to result in agreement.

2. The Union's position

At one meeting prior to May 1978, Kemp proposed that the Union would withdraw the holiday pay proposal if Respondent would increase the regular hourly rate by 3 cents per hour, having computed that the additional 3 cents per hour equaled what the projectionists would have received in holiday premium pay. Gallagher said, according to Kemp, "We have a deal."

At the next meeting, Kemp stated that the Union was happy with the movement at the prior meeting regarding holiday pay but Gallagher denied that he had made such an agreement. Kemp accused Gallagher of being a liar and the meeting broke up. Rubin testified that he called Gallagher a "no good son-of-a-bitch." There was no movement in subsequent negotiations. A strike commenced about May 1, and ended on August 15, 1978.

On August 9, 1978, a meeting was held in San Francisco at the office of Robert Naify, president of Respondent. Also present, in addition to Naify, were the four aforementioned representatives of the respective parties. According to Kemp and Rubin, the Union proposed that if Respondent agreed to the Association contract, the Union would agree that the Westwood theatres would go "projectionist-manager subject to interview of our people," Respondent's representatives caucused, and then stated they would accept the Association contract in the remainder of the theatres, and the projectionist-manager concept at the Westwood theatres. The union representatives said the agreement would be taken to the membership for ratification within a week, and Naify suggested to the four individuals that they step outside his office and negotiate the details and technicalities. Outside in the hallway the union representatives referred to the previous contract as containing the framework for implementing the projectionist-manager concept.³ Goldman agreed and said the projectionists would have to give up their rights to the jobs they currently held and would be interviewed for the position of projectionist-manager at the two Westwood theatres.

The ratification meeting was held on August 15, 1978, at which time Kemp and Rubin reported to the membership the terms of the aforementioned agreement. The agreement was ratified and resignation letters were signed by most of the Westwood projectionists. Immedi-

² As a result of new sophisticated and reliable automated projection equipment at the two theatres, Respondent took the position that one projectionist could readily walk back and forth between both theatres and perform the necessary work.

³ The prior agreement contained a clause entitled "Manager-Projectionist" which clause merely indicates that such a classification may exist, but does not indicate whether the Union shall have the right to represent employees in this classification.

ately thereafter Kemp so advised Gallagher, who again agreed to the aforementioned terms and said, "put the men back to work." Gallagher suggested that the Union set up the interviews for projectionist-manager and stated that he would begin to interview the applicants. Thereafter, the striking employees, except for the projectionists at the Westwood theatres who had resigned their employment, returned to work.

Following the conversation with Gallagher on August 15, Kemp sent the following telegram to Naify:

MOVIE PICTURE PROJECTIONISTS LOCAL 150 HAS ACCEPTED YOUR PROPOSAL TO RELEASE THE TWO WESTWOOD THEATERS FROM OUR COLLECTIVE-BARGAINING AGREEMENT (PROJECTIONIST-MANAGER OPERATION). I PRESENTLY HAVE THE FIVE LETTERS OF RESIGNATION FROM THE WESTWOOD PROJECTIONISTS YOU REQUESTED.⁴

THE REMAINING THEATERS WILL OPERATE UNDER THE 5 YEAR MAJOR THEATER CONTRACT. THIS WAS THE AGREEMENT REACHED IN OUR MEETING IN SAN FRANCISCO. OUR DISPUTE IS OVER AND I LOOK FORWARD TO A FAVORABLE RELATIONSHIP WITH YOUR COMPANY. *I would appreciate a call from you on this matter as soon as possible as Jim Gallagher seems to hesitate in recognizing our agreement.* [Emphasis supplied.]

Naify replied by telegram dated August 16, 1978, as follows:

WE AGREED TO UA WESTWOOD AND CINEMA CENTER [two Westwood theatres] BEING COMPANY OPERATED PROVIDED RESIGNATIONS WERE FORTH COMING.

I WAS VERY SPECIFIC THAT OUR COMPANY WOULD NOT NEGOTIATE FOR HOLIDAY PAY IN ANY CONTRACT IN WHICH WE ARE INVOLVED. WE SPOKE OF NO OTHER ISSUES THAT MAY BE OUTSTANDING BETWEEN OURSELVES AND THE UNION. THESE MATTERS MUST BE NEGOTIATED BETWEEN YOU AND GALLAGHER AND GOLDMAN AS I ADVISED YOU BEFORE I COULD NOT BECOME INVOLVED IN THE NEGOTIATIONS DIRECTLY WITH YOU.

And on August 17, 1978, Goldman sent the Union a letter outlining the parties' discussions during a phone conversation the preceding day. The letter stated as follows:

Concerning our conversation of yesterday, you have indicated to Jim Gallagher and myself that we have reached substantial agreement on a new contract.

For the two Westwood Theatres, you have informed us that you have written resignations from all projectionists who were working at the theatres prior to the strike and that you will confirm in writing that your union no longer desires to represent

⁴ In fact, Kemp had only three such letters in his possession. The two other projectionists did not sign such letters until they were required by the Union's executive committee to do so on September 18, 1978.

these theatres (by form I have previously sent you).⁵

As to the other theatres, our contract shall be substantially the same as that you have previously negotiated with the other majors; except that it shall provide for no premium holiday pay and that the non-business terms will be rewritten as outlined in the memo I have previously given you. If there are any terms in that memorandum that are unacceptable to the union, you have told me that you will have your attorney contact me to work out those issues.

About the end of August the employees who went back to work said they were not receiving the correct wage rate under the new contract. Kemp called Gallagher, who stopped by at the Union's office and said he would rectify the situation. Also, Gallagher emphasized that Respondent had not agreed to pay the holiday pay. Kemp accused Gallagher of renegeing on the deal made in San Francisco.

On September 14, 1978, Goldman sent the following letter to the Union:

This is to confirm that Local 150 has renounced representation of employees at the UA Westwood and the Westwood Cinema Center following the resignation of the projectionists employed at those theatres.

By mid-September, the Union had received responses from 27 members who desired to be interviewed by Respondent for the position of projectionist-manager and the said individuals filled out applications prepared by management. There were three groups of interviews, and Kemp attended portions of most of them. The interviews were concluded around the end of October. According to Kemp, Gallagher mentioned to the applicants that the interviews were for the position of projectionist-manager at the two Westwood theatres. At one point during a telephone conversation with Kemp, Gallagher confirmed that he was "Going to hire your people in Westwood." Alan Jaquish, secretary-treasurer of the Union, testified that he was listening to the conversation on an extension and heard Gallagher make this statement. None of the individuals interviewed were ever hired.

Kemp had one meeting with Richard Goldman after the aforementioned interviews. Goldman presented contract language changes, which he regarded as being non-substantive, but there was no agreement as Kemp said the changes were too technical for him and referred Goldman to the Union's attorney, Gerald Goldman. Thereafter, the parties' respective attorneys were likewise unable to agree on contract language.

The projectionists did not receive holiday pay for Christmas 1978.⁶ Kemp so advised Gallagher who replied that Respondent would not pay holiday pay and did not intend to "Hire your people in Westwood."

⁵ Goldman had sent a form letter for the Union's signature, confirming the Union's agreement to renounce representation of employees at these theatres.

⁶ It appears that some projectionists were paid holiday pay for Labor Day 1978. The Respondent's reasons for this are discussed below.

Kemp testified that he did not respond to the August 16, 1978, telegram from Naify, but merely ignored it. Further, Kemp did not reply to Goldman's August 17, 1978, letter because it did not make sense to him, so he also ignored it. In justification of this inaction, Kemp testified, "This is Mr. Goldman and Mr. Naify's style that I ran into so I just ignored it." Rubin discussed the correspondence with Kemp and testified, "I thought it was a joke." When asked to explain, he said, "Well, with United Artists, anything they said you can't take seriously. They had made an agreement prior and had broken it. To Ralph and me it was continually—they would make an agreement and then break it. It's a flakey company." Rubin further testified, "They had broken agreements with us prior to this and it was par for the course with United Artists. They are always looking for a better deal than the rest of the major circuits."

3. Respondent's position

Richard Goldman was corporate counsel for Respondent, from 1976 through April 1979, and was no longer employed by Respondent at the time of the hearing herein. Goldman testified that the August 9, 1978, meeting with Naify was, from Respondent's point of view, for the purpose of having Naify personally affirm Respondent's position on the outstanding issues. These positions were reiterated by Naify. Moreover, pursuant to inquiry by the union representatives, Naify said he would be willing to consider a concept of manager-projectionist. However, it was specifically pointed out that Respondent did not want to have a union contract covering this position, because the Company would thereby be giving managerial control to the Union. The union representatives responded that they would be willing to discuss this matter with Respondent provided that their members could be utilized in the position of manager-projectionist. Goldman and Gallagher were directed by Naify to explore this with the Union. On the matter of holiday pay, Naify reiterated his belief that the theatre business was primarily a holiday business for which holiday pay was inappropriate, and was adamant in affirming that there would be no movement by Respondent on this issue. Goldman, who did not attend the first part of the meeting, does not recall that the Westwood theatres were specifically mentioned, and does not believe that he and Gallagher met with the union representatives after leaving Naify's office that day.

Goldman's testimony indicates that several days thereafter, apparently on August 16, 1978, the union representatives took the position that they would give up any representational rights at the Westwood theatres rather than establish the principle of having a projectionist walk a considerable distance between two theatres. Goldman thereupon forwarded a letter to the Union, the aforementioned letter of August 17, 1978, confirming this discussion with the Union.⁷

Goldman recalls that the conversation of August 16, 1978, was pleasant, and everyone seemed satisfied. Kemp

⁷ Goldman admitted that he had no detailed recollection of each meeting and discussion, and that his testimony was largely directed by the substance of the correspondence between the parties.

said that he had written resignations from the Westwood projectionists and agreed that Respondent would operate the Westwood theatres with nonunion personnel. Further, Kemp expressed his disappointment over the holiday pay matter, but agreed that holiday pay would be omitted from the contract. Finally, Kemp and Rubin agreed that the contract language would be finalized by the Union's attorney.

Gallagher testified that Goldman came in at the latter part of the August 9, 1978 meeting, and that Rubin was the chief spokesman for the Union. Rubin explained that the Union could not agree to having one projectionist cover two theatres, because other theatre operators would also insist upon such a concession. Naify explained that with automated projection equipment there was no need for a projectionist to remain in the booth, and that one projectionist could handle any emergencies at either theatre. Holiday pay was discussed, but Naify refused to agree to the Association contract holiday pay provision. Either Rubin or Kemp mentioned that the Union had had a manager-projectionist "program" and had many members who would be qualified to fill this position. This was discussed and considered, and Gallagher said there was a problem getting a manager at Woodland Hills, a theatre which was then under construction and which Respondent would be opening at Christmas time. Gallagher indicated that he would not be averse to interviewing union members for this position or other similar positions. He testified that the position of manager-projectionist at the Westwood theatres was not mentioned. Gallagher's testimony indicates that he and Goldman had no discussion with Kemp and Rubin after leaving Naify's office. Gallagher maintained that there was no agreement on any subject on August 9, 1978, but that agreement was reached on August 15, 1978, as outlined in Goldman's August 17, 1978, letter to the Union.

Gallagher stated that during his conversation with Kemp on August 15, 1978, while Goldman was listening, Kemp specifically acknowledged that holiday pay would not be covered by the contract. He further testified that due to inadvertence, some theatre managers paid holiday pay on Labor Day 1978 to some projectionists and were thereafter instructed that projectionists were not to receive holiday pay.⁸

Naify testified that he received a call from Rubin which culminated in the August 9, 1978, meeting. The meeting lasted about an hour, and there was no agreement on any issue. After some discussion regarding the projectionists at the Westwood theatres and Respondent's reiteration of its position, Rubin stated, "Well, supposing you operate your Westwood Theatre nonunion. Would that be O.K. with you?" Respondent's representatives stated they would agree to this, but apparently the Union did not then acquiesce. The union representatives suggested a manager-projectionist concept and Naify said, "We have it in some situations and we would certainly be willing to negotiate that."

⁸ A memo sent to the theatre managers subsequent to the strike sets forth the new wages of projectionists and does not mention holiday pay.

C. Analysis and Conclusions

This case is predicated upon the contention of the General Counsel and the Union that the parties reached agreement on the terms of a collective-bargaining agreement at the August 9, 1978, meeting, and that Respondent is thereby required to sign a contract which embodies the agreed-upon terms. Interestingly, the diverse positions of General Counsel and the Union regarding what they believe was the commitment of Respondent regarding the critical element of the Union's continuing status as bargaining representative of employees at the two Westwood theatres, mandates dismissal of the complaint herein without regard to the merits of the case.

Thus, the General Counsel, in agreement with Respondent, takes the position that the Union disclaimed any further interest in representing the projectionists or manager-projectionists at the two Westwood theatres,⁹ while the Union steadfastly maintains that such was never the case but rather that, as enunciated by the Union at the hearing¹⁰ and as the Union's post-hearing brief explicitly states, "The Union would hold the employer to its commitment of hiring union represented projectionists as projectionist-managers in Westwood pursuant to the projectionist-manager clause in the previous agreement." Simply stated, to conclude herein that the General Counsel's view is the correct one would require that the Union disavow any representational rights it asserts at the Westwood theatres. The Union vehemently opposes this result, and insists that the agreement it reached with Respondent includes the right of the Union to represent "manager-projectionists." This dilemma is not addressed by the parties in their respective briefs, and I find that it constitutes a fatal defect to the complaint herein. The Union, not being a respondent in this proceeding, is not subject to the sanctions of a remedial order and therefore it would be an exercise in futility to require Respondent to enter into an agreement to which the Union does not agree.

As would be expected in a case where even the General Counsel and Union are unable to agree upon the terms negotiated by the parties, a plethora of bewildering, vague, and inconsistent testimony was presented by all the parties to this proceeding, sometimes admittedly resulting from failure to take notes or maintain records, and also resulting from inability to recall with any degree of precision the substance of various meetings and conversations.

Regardless of whether the parties ever came to a mutual agreement regarding the Union's representation of manager-projectionists at the Westwood theatres, I find that the record evidence is clearly insufficient to warrant the finding that Respondent agreed to the payment of holiday pay at its remaining theatres.

⁹ However, the General Counsel apparently contends that such agreement occurred at the August 9, 1978, meeting, whereas Respondent maintains that the agreement was reached thereafter.

¹⁰ Thus, the Union's attorney stated at the hearing that "it was agreed by the parties that these people [manager-projectionists] would be represented by the Union. That was very clear. And that was part of the agreement and the Employer simply reneged on that agreement."

By telegram dated August 15, 1978, Kemp outlined to Respondent the agreement purportedly reached on August 9, 1978, and specifically stated, "I would appreciate a call from you on this matter as soon as possible as Jim Gallagher seems to hesitate in recognizing our agreement." I discredit any contrary testimony of Kemp or Rubin and find that, sometime prior to the sending of this telegram, Gallagher did in fact tell the Union that its position with regard to what transpired at the August 9, 1978, meeting was erroneous. No other reading of the telegram appears plausible.

The next day, August 16, Naify replied to the aforementioned telegram, stating, *inter alia*, "I was very specific that our company would not negotiate for holiday pay in any contract in which we were involved." And this position was reiterated by Goldman in a letter which the Union received within several days thereafter.

Despite these unequivocal statements which clearly and completely contradicted what the Union purportedly believed had been agreed to, the Union chose to do absolutely nothing to reassert its position. Significantly, it did not even wait for Naify's reply to its August 15, 1978, telegram, but rather terminated the strike in the face of Gallagher's refusal to recognize what the Union purportedly believed to be the agreement. Neither did it thereafter reinstate the strike, nor reply verbally or in writing to Respondent, nor timely file an unfair labor practice charge. Rather, the Union proceeded to cause the striking employees to return to work, and required that the remaining Westwood projectionists who had not already done so submit letters of resignation to Respondent. Such conduct is totally incomprehensible given the clearly articulated written position of Respondent setting forth its characterization of what transpired between the parties. Even more incomprehensible is the Union's rationale for its failure to act. Thus, Kemp said he did not reply to the communications, but merely ignored the telegram from Naify and disregarded Goldman's letter as being nonsensical. Rubin testified that he believed the correspondence was a joke that could not be taken seriously, and that Respondent was prone to breaking agreements as it had done in the past when Gallagher allegedly reneged on the 3-cent-per-hour increase he had at one time agreed to. Such considerations articulated by Kemp and Rubin would appear to warrant an immediate response from the Union, and it is difficult to conceive that the Union would pass off such a serious matter as being a joke or unworthy of a reply.

The conduct of the union representatives, detailed above, and the reasons enunciated by Kemp and Rubin in purported justification of such conduct, is totally illogical and implausible and does not comport with any reasonable behavior governing union-employer relations. Particularly in the instant case, where the record is replete with caustic expressions of the parties' mutual mistrust, it is inconceivable that the Union would permit such critical matters, over which the Union chose to strike, to remain unchallenged. Therefore, I am constrained to find that the Union's conduct clearly evi-

denced concurrence with the position taken by Respondent in its written communications, namely that at no time did Respondent agree to the payment of holiday pay.

The fact that Respondent paid certain projectionists holiday pay for Labor Day 1978 does not warrant a different result. Respondent points out that its managers, pursuant to the custom established in past contracts, paid such holiday pay on one occasion only, through inadvertence. When the matter was brought to the attention of Gallagher, the managers were instructed that holiday pay was not to be paid thereafter. I find that, under the circumstances, the payment of holiday pay for Labor Day 1978 is insufficient to overcome the abundant contrary evidence that Respondent never agreed to such a contractual provision.

Much is made of the fact that Respondent commenced interviewing applicants, furnished by the Union, for jobs as manager or manager-projectionist. Respondent contends that the interviews did not involve the Westwood theatres, while the Union maintains that the interviews were specifically for positions at the Westwood theatres. Even assuming that the Respondent was searching for individuals to occupy these positions at the Westwood theatres who would not be represented by the Union, as the General Counsel contends, or who would be so represented, as the Union contends, this is not dispositive in any respect of the holiday pay issue, which is a critical element to this proceeding. As found above, the General Counsel has not proven that Respondent agreed to pay holiday pay.

The General Counsel alternatively argues that if it is found that no agreement was reached, Respondent nevertheless unilaterally changed the terms and conditions of employment of unit employees by failing and refusing to pay them premium holiday pay, and by abolishing the unit positions at the Westwood theatres. However, Respondent maintains that an agreement was indeed reached, albeit a much different agreement than that advanced by the Union or the General Counsel. The record evidence lends considerable support to Respondent's position in this regard. Therefore, I deem the record insufficient to establish a violation under this alternative theory of the General Counsel.

On the basis of the foregoing, I shall dismiss the complaint in its entirety, as the record does not support the complaint allegations herein. See *Summer Home for the Aged*, 226 NLRB 976 (1976).

CONCLUSIONS OF LAW

1. Respondent is an employer 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. Respondent has not violated the Act as alleged.
- [Recommended Order for dismissal omitted from publication.]