

**Warehousemen's Union Local 334 a/k/a Driver Salesmen, Warehousemen, Food Handlers, Clerical and Industrial Production Teamsters Union, Local No. 582, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and The Crescent, Division of The Halle Brothers Company (A Subsidiary of Marshall Field & Company)**

**Driver Salesmen, Warehousemen, Food Handlers, Clerical and Industrial Production Teamsters Union, Local No. 582, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and its Agents Inland Empire Teamsters Trust and its Trustees and Genuine Parts Company, d/b/a NAPA**

**Driver Salesmen, Warehousemen, Food Handlers, Clerical and Industrial Production Teamsters Union, Local No. 582, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Columbia Lighting, Incorporated. Cases 19-CB-2954, 19-CB-3065, and 19-CB-3074**

January 8, 1981

#### DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS  
JENKINS AND PENELLO

On January 31, 1979, Administrative Law Judge David G. Heilbrun issued the attached Decision in this proceeding. Thereafter, Respondent and Inland Empire Teamsters Trust (herein called the Trust) each filed exceptions and supporting briefs; the Charging Parties (herein also called the Employers) filed a brief in support of the Administrative Law Judge's Decision and, later, a brief in opposition to the exceptions; the General Counsel also filed a brief in support of the Administrative Law Judge's Decision and cross-exceptions and a supporting brief; the Charging Parties joined in the cross-exceptions; and Respondent and the Trust filed separate briefs in response to the cross-exceptions.

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

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

Respondent has maintained a collective-bargaining relationship with Associated Industries of the Inland Empire, a multiemployer bargaining group,

for many years. One product of that relationship has been the Trust, a Section 302(c)(5) "Taft-Hartlev" trust established in 1966 and modified in 1976 to conform to the provisions of the Employee Retirement Income Security Act of 1974 (ERISA). In 1976 the Trust administered three separate employee benefit plans for health and welfare, dental care, and **prescription** drugs. Its governing body consists of six Trustees. Three are union-selected Trustees, all of whom were officers of Respondent during times relevant herein, and the other three are management-selected Trustees. Trustee authorization **procedures** for certain Trust actions require a unanimous "unit vote"; i.e., approval by a majority of both the union and management trustee units.

The three Employers, The Crescent, Genuine Parts, and Columbia Lighting, are separate business **entities** which utilize certain employee relations services of the Associated Industries but maintain *individual* collective-bargaining relationships with Respondent. Since 1974 each Employer's contract with Respondent has contained explicit provisions for contributions to and unit employees' participation in the three aforementioned fringe benefit plans administered by the Trust. The Employers have also executed identical declarations of trust, agreeing thereby that they will be bound by the acts of the Trustees. None of the Employers has any role in the selection of management Trustees for the Trust.

During 1976 contract negotiations between Respondent and each of the Employers, the establishment of a new vision care employee benefit plan was proposed and rejected. Consequently, the three contracts ultimately executed continued to reflect the Employers' agreement to the operation of health and welfare, dental care, and prescription drug plans *only*, with provisions for increases in employer contributions where necessary "to maintain present benefits." Notwithstanding this bargaining history, the Trustees of the Trust voted in December 1976, with only one management Trustee objecting, to create a vision care benefit plan for the employees of all employers participating in the Trust and to fund the plan initially with a portion of the unallocated reserves built up in the Trust. A union Trustee who had previously **participated** in Respondent's contract negotiations with the **Employers** suggested the vision care plan's creation. All three union Trustees participated in the vote authorizing the plan and expressed their unanimous approval of it. Afterwards, these same Trustees, in their roles as union officers, publicized the new plan to the Employers' employees and assisted in the actual July 1, 1977, implementation of the plan for those and other employees.

The Administrative Law Judge has found, in agreement with the General Counsel, that the Trustees acted as Respondent's agents and violated Section 8(b)(3) of the Act by unilaterally changing the Employers' employee benefit plans to include vision care. Respondent and the Trust have each excepted to this finding. They support their exceptions with the contention that, by executing a declaration of trust and through the participation of management Trustees, the Employers have consented to abide by the Trustees' discretionary creation of a vision care plan. Respondent Union and the Trust further contend that the Administrative Law Judge erred in finding that the Trustees acted as Respondent's agents with respect to the vision care plan. We find no merit in these contentions.

We agree with the Administrative Law Judge that the Employers are bound to the Trust only for the benefits they had agreed upon contractually during negotiations with Respondent, and that they have contracted to make contributions only to the Trust plans covering health and welfare, dental care, and prescription drug expenses. Not only have they not contracted to contribute to the new vision care benefit plan Respondent seeks to impose upon them, but they specifically rejected that plan during negotiations with Respondent for their most recent contracts. On no occasion have the Employers executed any Trust document delegating unlimited agency to the Trust, or empowering the Trust to implement benefit plans other than those specified in their collective-bargaining agreements, nor have they otherwise agreed to be bound by any Trust provisions beyond their collective-bargaining agreement commitments. Therefore, while those agreements clearly state that the Employers agree to be bound by the decision of the Trustees, the extent of any discretionary authority thereby granted is equally clear—it extends only to decisions related to the benefit plans specifically agreed upon. This conclusion is underscored by evidence that the bargaining agreements earmark contributions for specific benefits and that the Trust individually accounts for, funds, and administers separate Trust benefit plans. The only other usual communications between the Employers and the Trust about benefit plans are notices of increases in required contributions.

The Employers' acceptance of the Trust agreement did not authorize the Trustees to establish new benefits not provided for in existing collective-bargaining agreements. The Employers' required contributions to the Trust were made to fund only those agreed-upon benefits, and any surplus for such contributions was obligated to be applied by the Trust only toward such benefits, whether

through a reduction in the Employers' future contributions, maintenance as a reserve for the agreed-upon benefits, or some other method. It is plain, therefore, that the new vision care program contravened the authority granted the Trust and the Trustees, and was contrary to the Employers' collective-bargaining agreements with Respondent.

It is equally plain that Respondent was responsible for the breach of the Trust agreement and, through it, a unilateral change in its contracts with the Employers. That breach was initiated at a December 7, 1976, Trustees' meeting by Trustee Clouse who, in his dual capacity as Respondent's secretary-treasurer, "explained the desire of [Respondent] to establish a Vision Care Plan." Trustee Warner, who is also Respondent's business representative, proposed that the Trust establish the new plan effective January 1, 1977, and all three union Trustees and two employer Trustees voted in favor of the proposal. Although the plan did not become operative until July 1977, Clouse, prior to any further action by the Trustees, entered into contractual negotiations with third parties in which he was instrumental in establishing a timetable for implementing the Trustees' creation of the plan.

Respondent then implemented the plan by printing informational pamphlets concerning the plan under their union designation. Warner then went to the Employers' places of business and distributed to employees there the pamphlets and other information pertaining to the plan. While so engaged, he identified himself and his business as being that of Respondent, not of the Trust. As the Administrative Law Judge aptly stated, Respondent "enthusiastically disseminat[ed] it as a new feature of union membership even as the employers chorused their protest."

Consistent with the implementation of the plan, Respondent then administered the plan by maintaining a file of all employees participating therein and assisting employees in completing their claims forms, by printing and distributing to employees, at its own expense, information about the plan, and by establishing a clinic in its offices for vision care services. These facts clearly show that Respondent instigated and caused the creation of the new plan, and then claimed credit for it by holding itself out to employees as being responsible for it. In our view, this is a unilateral change in benefits—a new benefit for which Respondent openly took credit—and thus a plain violation of Section 8(b)(3) of the Act.

If such unilateral changes can be made after specific rejection in collective bargaining, then bargaining is undermined. Taken to its logical conclusion, even agreed-upon benefits have no certainty

of constancy during the contract term if such benefits can be modified by means of the ploy used here. We find no sanctuary for Respondent in the Trust as our colleague does. The inference is clear, and we draw it, that Respondent's representatives were speaking with a union voice while simultaneously seeking to cloak themselves with the immunity of their fiduciary status when they engaged in conduct intended to promote union, not Trust, goals.<sup>1</sup>

#### AMENDED REMEDY

To remedy the violation found, the Administrative Law Judge recommended that the vision care benefit program for the Employers' employees be terminated 90 days after the recommended notices to employees and members had been posted. According to the Administrative Law Judge, the 90-day waiting period would serve to prevent undue hardship to employees faced with a potential loss of benefits. He did not recommend any reimbursement remedy for additional expenses incurred by the Employers as a result of the unilateral implementation of the vision care plan.

The General Counsel contends in his cross-exceptions that the Administrative Law Judge erroneously failed to make whole the Employers by ordering the restoration to original Trust funds or accounts of any money transferred or borrowed therefrom for use in connection with the vision care plan. The remedy requested by the General Counsel fails to distinguish between funds traceable to the Employers' contributions to the Trust and funds traceable to contributions by other employer-participants who have either agreed to vision care plan coverage for their employees or at least have not challenged the plan in this proceeding. Under these circumstances, we regard such a reimburse-

<sup>1</sup> The Board has, of course, found on numerous occasions that trustees of a Taft-Hartley trust have performed certain acts as agents for either or both of their joint settlors. See, e.g., *Jacobs Transfer, Inc.*, 227 NLRB 1231 (1977); *Local 80, Sheet Metal Workers International Association, AFL-CIO, and its Agents, etc. (Turner-Bmokr Inc.)*, 161 NLRB 229 (1966); *J. J. Hagerty, Inc.*, 139 NLRB 633 (1962). Neither the cited cases nor our agency analysis herein contravenes Board law that trustees do not exercise the specialized agency powers of a "collective-bargaining representative." See *Sheet Metal Workers' International Association and Edward J. Carrough, President (Central Florida Sheet Metal Contractors Association, Inc.)*, 234 NLRB 1238 (1978). The issue in this case is not whether the Trustees have engaged in collective bargaining *inter se*. The issue is whether the Trustees' vision care plan is consistent with the terms and conditions of employment already negotiated by the recognized collective-bargaining representatives of Respondent and the Employers. If inconsistent, then a further issue, resolved through an agency analysis, concerns to whom the change wrought by the Trustees may be attributed. As indicated, we would find that Respondent is responsible for the change. We note in this regard that our dissenting colleague joined in a similar finding in *Turner-Brooks, supra*, wherein the Board unanimously found a respondent union responsible for an 8(b)(3) violation committed by its agents who were trustees in the act of administering benefit trust funds

ment remedy as excessively overbroad. We shall, however, amend the recommended remedy and modify the recommended Order and notice to provide that Respondent alone make whole the Employers by reimbursing them, with interest,<sup>2</sup> for whatever the new benefit plan has directly cost them in additional contributions to the Trust.<sup>3</sup> In addition, although we share the Administrative Law Judge's concern for the plight of employees who may be abruptly deprived of vision care coverage, we do not believe such concern can justify forestalling the Employers' entitlement to restoration of the status quo prior to the unlawful unilateral institution of the vision care plan. Accordingly, we shall order both Respondent and the Trustees as its agents to rescind the vision care plan immediately upon the request of any of the Employers. The employees of any Employer so requesting must seek relief for lost benefits through the mechanism of collective bargaining or in legal actions before forums other than the Board.

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified and set out in full below, and hereby orders that:

A. The Respondent, Driver Salesmen, Warehousemen, Food Handlers, Clerical and Industrial Production Teamsters Union, Local No. 582, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its officers, agents, and representatives, including Inland Empire Teamsters Trust and its Trustees, shall:

1. Cease and desist from:

(a) Unilaterally creating and implementing a vision care program for employees of The Crescent, Genuine Parts, and Columbia Lighting in derogation of the Union's statutory duty to bargain collectively with these Employers.

<sup>2</sup> Interest shall be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). Member Jenkins would compute interest in accord with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

<sup>3</sup> Although there is a tenable legal basis for holding the Trustees secondarily liable for any monetary reimbursement due, the Board in exercising its discretionary remedial authority does not find such a holding necessary to make whole the Employers. Moreover, it is possible that a Board order assessing liability against the Trustees would open the door to multiple litigation of fiduciary issues under ERISA and the Act and thereby actually impede compliance. Member Jenkins, however, would run the reimbursement order against the Trustees individually as agents of Respondent and would further hold the Trustees personally but secondarily liable for any monetary reimbursement due.

(b) Engaging in any like or related conduct in derogation of the Union's statutory duty to bargain.

2. Take the following **affirmative** action designed to effectuate the policies of the Act:

(a) Upon request of any of the aforementioned Employers, rescind the vision care plan as to employees of that Employer.

(b) Post at its business offices and all meeting halls wherever located in the State of Washington copies of the attached notice marked "Appendix A."<sup>4</sup> Copies of said notice, on forms provided by the Regional Director for Region 19, after being duly signed by Respondent's authorized representatives, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Furnish the Regional Director for Region 19 with signed copies of such notices for posting by The Crescent, Genuine Parts, and Columbia Lighting, if willing, at all places where they customarily post notices to employees.

(d) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

B. The Respondent, Driver Salesmen, Warehousemen, Food Handlers, Clerical and Industrial Production Teamsters Union, Local No. 582, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its **officers**, agents, and representatives, shall:

1. **Cease** and desist from refusing to bargain collectively with The Crescent, Genuine Parts, and Columbia Lighting by unilateral implementation of a vision care program for employees of these Employers.

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

(a) Upon request of any of the aforementioned Employers, rescind the vision care plan as to employees of that Employer.

(b) Reimburse The Crescent, Genuine Parts, and Columbia Lighting, with interest, for whatever the vision care plan has cost them in additional contributions to the Inland Empire Teamsters Trust in the manner set forth in the section of this Decision and Order entitled "Amended Remedy."

<sup>4</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Post at its business offices and all meeting halls wherever located in the State of Washington copies of the attached notice marked "Appendix B."<sup>5</sup> Copies of said notice, on forms provided by the Regional Director for Region 19, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Furnish the Regional Director for Region 19 signed copies of such notice for posting by The Crescent, Genuine Parts, and Columbia Lighting at all places where they customarily post notices to employees.

(e) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

CHAIRMAN FANNING, dissenting:

My colleagues adopt the Administrative Law Judge's conclusion that Respondent Teamsters Local 582 and the Inland Empire Teamsters Trust and its board of trustees, acting as Respondent's agents, violated Section **8(b)(3)** of the Act by unilaterally implementing a vision care program for employees of the Charging Parties. In my judgment, there is no basis here for finding unilateral conduct that falls within the proscriptions of the Act. Rather, on this record, the majority and the Administrative Law Judge have reached a result that is damaging to the trust fund concept and its **operation**.<sup>6</sup> Accordingly, I dissent.

The facts generally are undisputed. Respondent represents certain employees of the three Charging Parties (The Crescent, Genuine Parts, and Columbia Lighting) and has had separate collective-bargaining agreements with each of these Employers.<sup>7</sup> In accordance with their respective agreements, the Charging Parties have made periodic, predetermined payments into fringe benefit plans administered by the Inland Empire Teamsters Trust. Each agreement contains virtually identical sections requiring that each Employer make contributions for

<sup>5</sup> See fn. 4, *supra*.

<sup>6</sup> The **8(b)(3)** violation found by the Administrative Law Judge is linked with failure to comply with the requirements of Sec. **8(d)** of the Act to give notice of intent to bargain collectively, a section that applies to "parties" to a contract, not trustees.

<sup>7</sup> Respondent's agreement with The Crescent expired on November 3, 1978, its most recent agreement with Genuine Parts expired on June 30, 1979, and its agreement with Columbia Lighting expired on September 21, 1979.

the provisions of a health and welfare plan, a **dental** care plan, and a prescription drug **plan**.

For each of the various plans for which contributions were negotiated, as reflected in the agreements, each Charging Party signed an identical document designated an acceptance of trust. In pertinent part, these documents all provide that the Employer "**acknowledges** receipt of the attached Trust instrument" and "consents to and accepts the terms, conditions and provisions of the Trust." The acceptance of trust further provides that the Employer agrees that the Trustees serving pursuant to the terms of the trust instrument "are and shall be his or its representatives and consent to be bound by the acts of said Trustees, successor Trustees and alternate Trustees, pursuant to the provisions of said Trust." It is almost inconceivable that this language could be more clearly drawn to reflect that the Employer accepted in advance any discretionary decisions made **by** the Trustees under the terms of the Trust agreement. Nevertheless, it is just such a decision by the Trustees that is the center of dispute.

At a regular meeting of the Trust<sup>8</sup> on December 7, 1976, the union Trustees proposed establishment of a vision care plan for employees and their dependents to be funded by borrowing about **\$100,000** from the Trust's unallocated reserves<sup>9</sup> and from payments to be made by employers who had agreed to pay for such benefits for their own employees.<sup>10</sup> Of the six Trustees, only one employer Trustee, Michael O'Brien, objected to the vision care **proposal**. In accordance with the Trust's "unit vote" principle,<sup>11</sup> with a majority of the employer Trustees and all of the union Trustees voting for the plan, it was approved.

The significance of the plan's approval by a majority of the employer Trustees is given scant attention by the Administrative Law Judge and my colleagues. Nonetheless, I deem it significant that there is no evidence that the approving employer Trustees acted on any basis other than their good-

faith independent judgment. The lone dissenting employer Trustee, Michael O'Brien, was called as a General Counsel witness. **O'Brien's** own testimony evidences that the employer Trustees as a group could deny any action proposed by the union Trustees by a simple vote of "no." O'Brien further testified that there have been no instances during the life of the Trust where a proposal by the union Trustees was implemented over a negative vote of the employer Trustees. Absent any evidence that this action of the employer Trustees was controlled in any way by the union Trustees or by Respondent, I find that implementation of the vision care plan is attributable solely to the proper exercise of independent judgment by the Trustees as a group.<sup>12</sup>

Nor is there any basis for concluding that the vision care plan was an impermissible subject under the terms of the Trust. To the contrary, the Trust Agreement's statement of purpose includes "providing and maintaining any employee benefit, except pension, including but not by way of limitation, life and accident, health and welfare benefits, including dental, vision, drugs and pharmaceutical supplies [emphasis supplied]."<sup>13</sup> The section entitled "Purpose of Trust" adds: "The Trustees shall, in their sole discretion, determine which benefits shall be provided." It thus appears clear that implementation of a vision care plan is within the contemplated purposes of the Trust. Especially in light of the acceptances of trust, the Charging Parties are therefore bound by the Trustees' decision to effectuate such a plan. Oral testimony expressing the Charging Parties' opposition to the vision care plan is not sufficient to negate or alter the terms of either the acceptances of trust or the Trust document itself.

Against this background, I perceive no basis for concluding that Respondent, simply because of its Trustees' interest in and urging of the vision care plan, acted unilaterally regarding effectuation of the vision care benefit,<sup>14</sup> a benefit that entailed no

<sup>8</sup> The Trust was established on July 21, 1966, by Respondent and the Associated Industries of the Inland Empire (hereinafter the Association). The Trust is directed by a board of trustees. Three Trustees are selected by the Union and three by employers who are represented by the Association for collective-bargaining purposes.

<sup>9</sup> As of November 30, 1976, just before this meeting, Trust reserves exceeded \$1 million, of which over \$700,000 was categorized as unallocated reserves. According to employer Trustee Michael J. O'Brien, of the \$700,000, about \$400,000 was unofficially allocated as a "backstop for catastrophe" while the other \$300,000 had no stated purpose.

<sup>10</sup> The vision care benefits were also to be made available to employees of all employers, such as the Charging Parties, who currently paid into any of the Trust Funds pursuant to collective-bargaining agreements.

<sup>11</sup> Sec. 3—"Voting by Trustees"—of the Trust's most recent modification, effective January 1, 1976, provides in pertinent part: "[T]here shall be but two votes: the Union Trustees shall have one vote among them and the Employer Trustees shall have one among them." Any action taken by the Trustees requires the approval of both groups of Trustees.

<sup>12</sup> In recognizing that a trustee designation clause, denying an employer association the right to select directly management trustees, is a mandatory subject of bargaining, the Board has found that management trustees are not, in fact, collective-bargaining representatives under Sec. 8(b)(1)(B) of the Act, but act solely as fiduciaries who consider all recommendations but are bound to exercise their independent judgment in administering the trust fund. See *Sheet Metal Workers' International Association and Edward J. Carlough, Resident (Central Florida Sheet Metal Contracting Association, Inc.)*, 234 NLRB 1238 (1978).

<sup>13</sup> This statement is on the first page of the Trust agreement and is repeated in sec. 2—"Purpose of Trust."

<sup>14</sup> Nor am I persuaded otherwise by *Jamba Transfer, Inc.*, 227 NLRB 1231 (1977), upon which the Administrative Law Judge places considerable reliance. In *Jamba*, the Board was confronted with a very limited question. An earlier Board decision, *Jacobs Transfer, Inc.*, 201 NLRB 210 (1973), had found that the employer violated Sec. 8(a)(3) and (1) of the Act by unlawfully discharging employee Daniel George for his concert-

*Continued*

Additional employer expenditure during the existing contract, and was subject to revocation by individual employers at the next round of contract negotiations. Accordingly, I would dismiss the complaint.

d activities. A make-whole order provided, *inter alia*, that the employer would make contributions to the health and pension trusts on George's behalf. At the union's direction, however, the trusts refused to accept the employer's contributions. The Board simply found that, for the purpose of effectuating compliance with its order, the trusts were agents of both the employer and the union and that the union and the trusts violated sec. 8(b)(1)(A) and (2) of the Act by their refusal to accept the contributions on behalf of George. In reaching this conclusion, the Board found that the union "did control the Trusts for the purpose of discriminating against George." See 227 NLRB at 1232, fn. 3.

Contrary to my colleagues' suggestion, moreover, I do not view this case as similar to *Local 80, Sheet Metal Workers' International Association, FL-CIO, and its Agents etc. (Turner-Brooks Inc.)*, 161 NLRB 229 (1966). As the Board recognized in that case, the trustees of various trusts were "not free to exercise their discretion" in refusing to accept the payments tendered by the employer "but rather were acting pursuant to a specific limitation of authority contained in the contract." 161 NLRB 234. Unlike this case, therefore, an action involving the proper exercise of independent judgment by the trustees, including a majority of the employer trustees, was not at issue.

#### APPENDIX A

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

WE WILL NOT unilaterally create and implement a vision care program for employees of The Crescent, Genuine Parts, and Columbia Lighting in derogation of the Union's statutory duty to bargain collectively with these Employers.

WE WILL NOT engage in any like or related conduct in derogation of the Union's statutory duty to bargain.

WE WILL, if requested by the above-named Employers, or any of them, terminate the vision care program announced to you about July 1, 1977, as participants in the Inland Empire Teamsters Trust by virtue of your employment by one of said Employers.

WE ADVISE **you** that your Employer has merely followed the law in charging us with this unfair labor practice, and that said Employers, The Crescent, Genuine Parts, and Co-

lumbia Lighting, have not agreed to this program.

DRIVER SALESMEN, WAREHOUSEMEN, FOOD HANDLERS, CLERICAL AND INDUSTRIAL PRODUCTION TEAMSTERS UNION, LOCAL NO. 582, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND ITS AGENTS INLAND EMPIRE TEAMSTERS TRUST AND ITS TRUSTEES

#### APPENDIX B

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

WE **WILL** NOT refuse to bargain collectively with the Crescent, Genuine Parts, and Columbia Lighting by unilateral implementation of a vision care program for employees which we represent at these Employers.

WE **WILL**, upon the request of any of the above-named Employers, rescind the vision care program for employees which we represent at these Employers.

WE **WILL** reimburse The Crescent, Genuine Parts, and Columbia Lighting, with interest, for whatever the vision care plan has cost them in additional contributions to the Inland Empire Teamsters Trust.

DRIVER SALESMEN, WAREHOUSEMEN, FOOD HANDLERS, CLERICAL AND INDUSTRIAL PRODUCTION TEAMSTERS UNION, LOCAL NO. 582, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

#### DECISION

##### STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge: This case was heard before me in Spokane, Washington, on July 11 and 12, 1978, based on an amended consolidated complaint alleging that Driver Salesmen, Warehousemen, Food Handlers, Clerical and Industrial Production Teamsters Union, Local No. 582, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called Re-

Respondent,<sup>1</sup> violated Section 8(b)(3) of the National Labor Relations Act, as amended, by unilaterally changing the wages, hours, and working conditions of certain collective-bargaining agreements to which it is (or was) a party without complying with the requirements of Section 8(d) of the Act. The collective-bargaining agreements involved exist (or existed) with respect to service building employees of The Crescent, a general merchandise retailer, with respect to both warehouse and clerical employees of Genuine Parts, an automobile parts distributor, and with respect to shipping, receiving, and related employees of Columbia Lighting, a manufacturer of lighting fixtures.

Upon the entire record, my observation of witnesses, and consideration of the post-hearing briefs, I make the following:

#### FINDINGS OF FACT AND RESULTANT CONCLUSION OF LAW

The three firms that are individual Charging Parties to this consolidated proceeding each utilized certain employee-relations services of Associated Industries of the Inland Empire without subsuming their labor-management relations to the concept of Association-wide bargaining. Each such firm has a collective-bargaining relationship with Respondent, and the singly negotiated contracts referred to above were in each case of a 3-year duration to expire later this year or, in the case of The Crescent, on November 3, 1978.<sup>2</sup> Since at least late 1974 the collective-bargaining agreements of each employer have contained fringe benefit plans for employees manifesting themselves as health and welfare, prescription drug coverage, and dental care. Each such provision is based on a trust fund cognizable under Section 302 of the Act as a jointly administered program for the sole and exclusive benefit of employees and their dependents. Insofar as is material here, the plans were administered by the Inland Empire Teamsters Trust, herein called the Trust. The composition of this bipartite body was at no time influenced by any action of the Charging Parties, nor officials on their behalf, with the only significant relationship to the Trust being monthly remittances due under the terms of the collective-bargaining agreements

<sup>1</sup> It was stipulated that Warehousemen's Union Local 334 no longer exists, having been absorbed by merger into Local No. 582.

<sup>2</sup> The Crescent. Division of The Halle Brothers Company, engages in its described business in Spokane, Washington, where it annually makes retail sales in excess of \$500,000, while purchasing and receiving goods and materials valued in excess of \$50,000 directly from outside Washington. Genuine Parts Company, d/b/a NAPA engages in its described business in Spokane, Washington, where it annually makes retail sales in excess of \$500,000, while purchasing and receiving goods and materials valued in excess of \$50,000 directly from outside Washington. Columbia Lighting, Incorporated, engages in its described business in Spokane, Washington, where it annually purchases goods and materials valued in excess of \$50,000 directly from outside Washington, while selling goods and providing services valued in excess of \$50,000 directly to customers located outside Washington. On these facts I find that The Crescent, Genuine Parts, and Columbia Lighting are each employers engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act. I further find, as is admitted, that Respondent is a labor organization within the meaning of Section 2(5) of the Act, and that Local 334, at all material times prior to its merger with Respondent in September 1976, was similarly a labor organization as defined in the Act.

as originally formulated by contractual language or as from time to time adjusted through discretionary action taken to maintain benefits. The Trust itself performs organic functions by a "unit vote" procedure between its labor and management trustees (each a group of three). An administrative agent, A. W. Rehn & Associates, Inc., maintains the Trust office, conducts its daily business, receives employer contributions, banks these into appropriate accounts, and operates a claims service. The revenue of the Trust is apportioned to accounts for claims, operating costs, administrative expense, and "breakage" as the excess that may be accumulated into reserves. Phraseology in the current collective-bargaining agreement between Genuine Parts and Respondent suffices to illustrate what this case is about in terms of contract language. It reads:

#### Article XVIII—Health & Welfare

*Effective September 1, 1976*, based on August hours, the Employer shall pay into the *Inland Empire Teamsters Trust* the sum of Fifty-One Dollars and Seventy Cents (\$51.70) for each employee who was compensated for eighty (80) hours or more in the preceding month. The Employer further agrees that, if, during the life of this Agreement, the Insurance Carrier proves a need for increased premiums to maintain the present benefits, the Employer will pay the required increase upon notification from the Trustees of said Trust.

#### Article XIX—Dental

The Employer shall continue to pay into the *Inland Empire Teamsters Dental Trust* the sum of Fourteen Dollars and Fifty-Five Cents (\$14.55) per month for each employee who worked eighty (80) hours or more during the preceding month. The Employer agrees to pay such additional cost determined by the Trustees as necessary to maintain present benefits.

*Effectiv August 1, 1977*, based on July hours, the Employer shall pay into the *Inland Empire Teamsters Dental Trust*, the provisions of which he agrees to be bound by, the amount of Twenty-One Dollars and Forty Cents (\$21.40) to purchase the improved Plan for each employee who worked eighty (80) hours or more during the preceding month. The Union agrees that during the life of this Agreement they will not request any additional benefits and the Employer agrees that during the life of this Agreement the Company will pay any increase in contribution rates if required by the Trustees to maintain the benefits of the Teamsters Dental Plan.

The above payments shall be made to the Administrative Office by the tenth (10th) day of each month and in the event the Trust Fund is required to take legal action to collect any Employer contributions due under this contract, the Employer shall be liable for all necessary legal and court costs.

\* \* \* \* \*

*Article XXI—Prescription Drug Plan*

*Effective August 1, 1977*, based on July hours, the Employer shall pay into the *Inland Empire Teamsters Trust* (Prescription Drug Plan) the sum of Four Dollars and Ninety Cents (**\$4.90**) per month for each employee who worked eighty (80) hours or more during the preceding month. The Employer agrees that if, during the life of this Agreement, the Union Trustees of the Fund prove the need for increased contributions to maintain the present benefits, the Employer will pay the required increase upon notification from the Union.

The Trust was **originally** established in 1966 for dental care, and expanded over succeeding years to add the further benefits. In 1973 a conversion to "self-funded" status was rendered, and subsequently, effective January 1, 1976, an amending and superseding declaration of trust was executed with the primary purpose of conforming to the Employee Retirement Income Security Act of 1974 (ERISA). By late 1976, the union Trustees were Oscar **Upton**, former secretary-treasurer of Local 334 and a continuing office holder with Respondent, Donald Clouse, Respondent's secretary-treasurer, and Lloyd Warner, a full-time business representative for Respondent. At a regular meeting of the Trust on December 7, 1976, the union Trustees proposed establishment of a vision care plan for employees and their dependents by borrowing **\$100,000** (later increased to 5112,500) from **unallocated** reserves of the Trust as **startup** financing for such a feature. It was contemplated at the time that employers of the major industry groups with contracts about to expire would **be** pressed to agree to it, and make appropriate contributions for its operation into the future. Of the six Trustees present only Michael O'Brien, association president, objected, so by unit vote the idea passed in principle with January 1, 1977, as the target date for **implementation**.<sup>3</sup> The following fuller description of this action appeared in official minutes:

Date: December 7, 1976

Time: 10 a. m.

Place: Red Lion Motor Inn, Spokane

The meeting was called to order by Chairman **Upton** with the following persons in attendance: Employer Trustees Robert L. Francis, Wesley Anderson, and Michael J. O'Brien; Union Trustees Oscar **Upton**, Donald L. Clouse, and Lloyd Warner, Jr.; and Others in Attendance Archie

<sup>3</sup> **O'Brien** understood at the time that employers of the wholesale baking industry had already informally committed themselves with officials of Respondent for such a plan. As also then known, employers of the dairy industry and wholesale grocery industry would soon begin negotiations to renew contracts expiring on April 1 and June 1, 1977, respectively, while the soft drink bottling industry agreement of the Spokane vicinity was to expire in February 1978. **O'Brien**, who resigned as Trustee immediately after this meeting, perceived a general intention by union Trustees to broadly seek such benefits through the mechanism of **associationwide** bargaining with the several industries involved, and should negotiations on the point not prove productive as to given employers or industries this would terminate or limit the scope of coverage with respect to their employees.

Rehn—administrator, Russel Reid—trust attorney, and Gary Jenkins—consultant.

The minutes of the meeting of September 30, 1976, were approved as read.

\* \* \* \* \*

*New Business:*

\* \* \* \* \*

2. Clouse explained the desire of Teamsters Union Locals 334 and 582 and Laundry Workers Union Local 49 to establish a Vision Care Plan for all enrollees in the Trust effective January 1, 1977. He also requested that **\$100,000** be utilized from the Unallocated Reserve of the Trust to establish the Vision Care Plan since the majority of the employers were not committed by a labor agreement to contributions for a Vision Care Plan. O'Brien objected to this procedure for the following reasons: That this was an improper use of the Unallocated Reserve since the money in this fund had been contributed for other purposes; that since there was a maintenance of benefits clause in the various labor contracts employers could later object [by] the invoking of the maintenance of benefits clause if the Unallocated Reserve funds were utilized for Vision **Care** benefits rather than [for] maintaining the benefits for Plans provided in the labor agreements; and that Vision Care was an entirely new benefit which the majority of employers had not agreed to provide in the labor agreements. After discussion it was moved by Warner that the Trust establish a Vision Care Plan for the benefit of all enrollees effective January 1, 1977, with the provision that if the employer in the next individual labor contract negotiations does not agree to contribute to the Vision Care Plan the Vision Care Plan will be revoked for employees of that individual employer, and that the **Trust** use **\$100,000** from the Unallocated Reserve to establish the Vision Care Plan with the intent being to reimburse the Unallocated Reserve Fund if funds later become available from the contributions to the Vision Care Plan. Anderson asked the Trust Attorney if the establishment of a Vision Care Plan on this basis was legal and the Trust Attorney stated that in his opinion it was legal for the Trust to do so. Francis seconded the motion. All Trustees except O'Brien voted for the motion. O'Brien voted against the motion. The motion was passed by a unanimous vote of the Union Trustees and by a majority vote of the Employer Trustees.

January 1, 1977, came and went without further action on the subject, and O'Brien, now an outsider to the Trust but chiefly active for industry negotiations through his role as association president, met for contract settlement purposes with Clouse about mid-February 1977. From this a series of agreements ensued: The dairy industry would commence vision care benefits for its employees effective April 1, 1977, the wholesale grocery in-

dustry would commence vision care benefits on July 1, 1977, (based on June hours), and soft drink bottling employees would receive these benefits starting July 1, 1977, with the industry to have the option during early 1978 negotiations of whether to accept the plan.

Over the first half of 1977, the Trust's administrative agent maintained liaison with the broker-consultant designing this particular benefit, and devised an informational pamphlet for employees, internal procedures, employer remittance forms, plus a vision care claim procedure. In an operating sense this benefit was effective July 1, 1977, as participating employers contributed on the basis of hours worked by employees during June with amounts supplementing the original six-figure seed money. Necessary confirmation of these events occurred during formal trustee meetings held March 11, June 7, and July 15, 1977, at which time an additional amount of \$12,500 was transferred from the unallocated reserves of the Trust to cover initial outlay for vision care claims in excess of available funding.

As this was occurring, Respondent printed informational sheets to members on the vision care plan,<sup>4</sup> and Warner made certain direct distributions of these as well as the comprehensive informational pamphlet and claim forms prepared by the Trust's administrative agent. During June, Warner went to both service buildings of The Crescent and handed material directly to employees, while at Genuine Parts he contacted Dennis Rigas, the Spokane general manager, and advised him that vision care was being extended to all members. Rigas promptly transmitted this information to his Georgia-based superior for personnel matters. Still around late June 1977, Warner visited Columbia Lighting for the same purpose, but was parried by its plant manager, who preferred a home mailing to the small portion of Teamsters members employed there. Respecting these contacts, David Fenton, warehouse manager for The Crescent, testified that Warner remarked to him while at service building 1 that "the Union was donating [vision care] at no cost to [its] members." In claimed support of such notion, the

• The informational sheets read as follows:

**TEAMSTERS UNION, LOCAL NO. 582**

N. 1912 Division Street  
Spokane, Washington 99207  
Phone: 3269504

*Effective July 1, 1977, premium payments for a Vision Care Program will be made on your behalf as a result of your being a participant in the Inland Empire Teamsters Trust.*

*All Employees, who worked eighty (80) hours or more during the month of June 1977, will be covered July 1, 1977. This Program provides benefits for you and your dependents.*

*Booklets explaining the Inland Empire Teamsters Trust Vision Care Program, and claim forms, will be distributed and available at your place of employment and at the Union Office.*

*You are free to choose any provider of services; however, we want to bring to your attention that the Vision Arts Optical Clinic in your new Teamster Building—Division and Indiana—will provide the services for the allowance as described in your booklet, thereby Providing you with 100% coverage.*

*For Appointments call—327-7753.*

Fraternally,  
Donald L. Clouse  
Secretary-Treasurer

General Counsel introduced as Exhibit 20(a) the described writing of Rigas, in which he relayed to Hart Hooper, Genuine Parts' assistant vice president for personnel, his impression from conversing with Warner that "Local #582 is now providing [new vision care coverage for employees] at 'no charge' until the expiration of our current contract." I credit the persuasive denial of Warner that he expressed matters this way, and believe instead that, as he testified, only the Trust itself was identified as the source of this change. I am not satisfied that Fenton was sufficiently insightful to pick up nuances in Warner's remarks, and as to other "local unit employees" within earshot they were equally available to the General Counsel for corroboration and I decline to draw any inference unfavorable to Respondent because these persons were not called as witnesses to support Warner's refutation. In view of Rigas' demonstrated uncertainty on basic conceptual matters as to employee fringe benefits, I give no weight to his recording of past recollection.

It is established that each Charging Party, two through the medium of written bargaining proposals of Respondent and Columbia Lighting as a verbal demand made on Frank Lydon, its industrial relations manager, had rejected vision care as an identifiable demand during negotiations that led to all current or recently expired agreements. Further, Respondent at no time offered to negotiate or bargain with any of these firms prior to adopting implementation of vision care benefits, instead enthusiastically disseminating it as a new feature of union membership even as the employers chorused their protest. This rounds out the essential facts from which the following issues arise:

1. Is the Trust an agent of Respondent relative to conduct cognizable under Section 8(b)(3) of the Act?

2. Have the collective-bargaining agreements of any Charging Party been modified as a matter of law in consequence of vision care benefits being extended to their employees from and after July 1, 1977?

3. If modification arose, was it unilateral in nature leading to a violation of the Act that may be attributed to Respondent?

Preliminarily before decisive discussion, some further description of the Trust is necessary. While several benefit plans are extant, overall excess revenue of the Trust is maintained in comingled fashion as an unallocated ("or uncommitted") reserve account.<sup>5</sup> From a time prior to 1973 when the Trust operated with insurance carriers, and continuing beyond the conversion to self-insured status, it accumulated considerable unallocated reserves through the process of obligatory employer contributions exceeding claims experience. By December 1976 the amount of total reserves stood at \$1,145,000.<sup>6</sup> Of this ap-

<sup>5</sup> Rehn & Associates serve as administrative agent to numerous trusts other than the Inland Empire Teamsters Trust. This is significant in the sense that the chief administrative official, Archie Rehn, is involved with numerous trust entities, each of which (as contrasted to their own internal affairs and accounting) must be kept meticulously segregated within the workings of his own business office.

<sup>6</sup> O'Brien testified without contradiction that at a Trustee meeting in October 1975 then chairman Upton raised the prospect of establishing

*Continued*

proximate amount \$700,000 was unallocated, while \$400,000 was a committed reserve against incurred but unreported claims, and otherwise informally understood by the Trustees (or at least O'Brien) to constitute a fund sufficient to satisfy any respectable insurance company should the Trust again choose that form of coverage and shop for carriers.

In this overall context, the General Counsel has proceeded on the theory propounded in the underlying charges to the effect that diversion of over \$100,000 from unallocated reserves is tantamount to a cost item for firms contributing to the funds (which firms have not expressly agreed to the vision care benefits plan), thus constituting a mid-term modification of the collective-bargaining agreements without, as is admittedly so, any manner of Section 8(d) compliance. To the extent that Respondent obviously does not administer the plan, the General Counsel asserts further that the Trust here performed as its agent with the unwanted creation of employee benefits attributable to Respondent as the alleged principal. The primary justification for this branch of case theory is the identity of persons simultaneously serving as responsible union functionaries and Section 302 plan trustees. The General Counsel argues that this is further colored by the obvious identity of interest in terms of predictable negotiation strategy whereby vision care benefits, once implemented, may be secured through collective bargaining with greater ease. This reasoning advances the common belief that employees, once accustomed to a benefit, would bristle at it being withdrawn, thus unfairly weakening the bargaining strength of employers faced with such configuration. The Charging Parties emphasize that none of them endowed an agency relationship on the Trust, and that Respondent itself has been adequately affirmatively identified with the claimed unilateral change.

Respondent argues that it is separate and independent of the Trust, while its functionaries serve in separable roles as union representatives and understandably appointed Trustees for jointly administered plans. The Trust contends basically that a fiduciary duty mandated by the Employee Retirement Income Security Act of 1974 (ERISA) caused the Trustees to search for appropriate disbursement of unreasonably excessive funds, which they chose to do in good faith through offering the vision care benefit plan, pointing out too that employer execution of Trust acceptances<sup>7</sup> conferred "sub-

stantial authority" on the Trust as to negate any unilateral aspect to the action taken.

On the threshold issue of agency, the circumstances of this case are generally parallel to those in which the Board holds a Taft-Hartley trust to be the agent of a labor organization. Here the Trust was established and perpetuated pursuant to collective-bargaining agreements to which Respondent was a party with plenary authority to designate one-half of the board of trustees. At all material times the union Trustees were individuals fully aligned with Respondent's interests, and, although this expectable array does not automatically demonstrate control over the trust entity, such has been adequately shown here. Since the early 1976 declaration of amended trust, vision care has been an expressly contemplated feature as shown from the preamble (p. 1) and statement of purpose (pp. 9 and 10). Coextensive with that, Clouse has been credibly shown to have voiced interest in the subject by remarks both internal and external to the Trust. It became a plain demand of Respondent later in 1976, but most importantly Clouse usurped the subject to himself in definitive labor negotiations well preceding any action by the Trust's own governing body. Clouse's confident establishment of a timetable for implementing the board of trustees' mere creation of the vision care plan is a telling indication that for purposes of enlarging on the labor contracts of members-employers of the Association he was amply capable of dictating Trust affairs. Warner's role was consistent with this finding; however, his ministerial conduct in June 1977 shows only as collateral to what Clouse effectively settled the prior February. See *Jacobs Transfer, Inc.*, 227 NLRB 1231 (1977), and cases cited therein.<sup>8</sup> This concept of purpose is also treated in *Nu-Car Carriers, Inc.*, 187 NLRB 850, 862, fn. 2 (1971), where certain pension plan filings, and the "approvals" that followed, were held to be "for purposes independent of and unrelated to the National Labor Relations Act," and where such filings were also held to create no "immunity . . . to utilize or participate in operations of the Fund so as to violate the Act." For these reasons, I find that, respecting the central allegation of 8(b)(3) conduct, the Trust and its board of trustees have at all material times concerning the establishment and implementation of vision care been the collective agent of Respondent.

vision care benefits, but no action was taken at the time beyond directing the Trust consultant to explore further. This relates also to the testimony of James Argites, The Crescent's vice president and general operating manager, that during contract negotiations in September 1975 Clouse once alluded to vision care as a benefit not being sought.

<sup>7</sup> The following phraseology is typical of such acceptances:

The undersigned acknowledges receipt of the attached Trust Instrument. The undersigned Employer or Union, as the case may be, by its execution of this instrument, consents to and accepts the terms, conditions, and provisions of the Trust. This acceptance shall be considered effective and operative upon delivery to the Employer and Union Trustees and the written acceptance by such Trustees of this instrument. Accordingly, the undersigned agree[s] that the Trustees named in the Trust and their successor Trustees elected pursuant to the provisions of said Trust and Alternate Trustees, if any, selected or elected pursuant to the provisions of said Trust are and shall be his or its representatives and consent[s] to be bound by the acts of

said Trustees, successor Trustees, and Alternate Trustees, pursuant to the provisions of said Trust.

This acceptance shall terminate and become inoperative as to any and all action taken by the Trustees thereafter from and after the date when he or it has no collective-bargaining agreement to which he or it is a party providing for payments into the Trust.

<sup>8</sup> The matter of what purposes, in the sense also emphasized above, are attached to underlying case dynamics is consistently tied to the collective-bargaining process by Board decisions. In *United Brotherhood of Carpenters and Joiners of America, Local 11913, AFL-CIO, et al. (Associated Contractors of America, Southern California)*, 213 NLRB 363 (1974), the purpose related to the acceptance and administration of surrogate contributions to a fund, while in *Jacobs Transfer* the control manifested itself as unlawful discrimination against an employee. On this point, the Board has expressed its respectful disagreement with the Ninth Circuit's partial enforcement of *Carpenters Local 11913* at 531 F.2d 424 (1976). *Jacobs Transfer, supra* at 1232.

On this basis, the offering of vision care becomes a reward of employment effectively assured to employees of these Charging Parties. Increased visual acuity and comfort without cost to an employee or eligible dependent is a valuable benefit to those clustered within one of the collective-bargaining units that is here involved. It is a desirable and identifiable feature that is devoid of viability but for the accumulations from these remitting employers under other benefit plans applicable to their employees. Alluding again to the Trust's formal statement of purpose (and application), I note that such "plan or plans" as are established will "embody benefits to be provided by the Employer Contributions." (Art. III, p. 10—emphasis supplied.) Cf. *Charles Starbuck and Diane Starbuck d/b/a Starco Farmers Market*, 237 NLRB 373 (1978). Further, it appeared abruptly during mid-term of the contracts with every characteristic of being a term and condition of employment that employees would instantly assume to be a remunerative aspect of why they were working.<sup>9</sup> Respondent was deeply involved in touting vision care as an aspect of union membership, its spokesmen were familiar with projected cost, and the feature was a widely sought concession during relevant collective-bargaining sessions. I therefore find that the deliberate effectuation of vision care benefits constituted unlawful modification of the contracts to which these Charging Parties were bound. In so finding, I reject arguments by the Trust that an embarrassment of riches triggered some mandate of ERISA for new ways to be devised in expending apparent surplus, or that failure to do so improperly "subsidize[d]" the Employers. The first argument is speculative at best, disregards the obvious alternative of mere prudent investment of large reserves until contract renewal negotiations, and, most importantly, is outside decisional purview here in light of *Sheet Metal Workers, International Association, supra*. The second argument is contrived as a semantic extension of the first, and I note here that respecting The Crescent a July 1977 "require[ment]" by the Trustees for an increased rate of contribution to fund the prescription drug plan was routinely, though with reservation of rights, obeyed. Cf. *Lathers Local No. 42 of the Wood Wire and Metal Lathers International Union (Lathing Contractors*

<sup>9</sup> The notion of reliance by a hypothetical employee of average awareness is found in *Lewis et al., Trustees v. Seabor Coal Company*, 256 F.Supp. 456 (1966), affirmed 382 F.2d 437 (3d Cir. 1967), cert. denied 390 U.S. 947 (1968), where the court of appeals wrote, at 443, that employees "might be led to remain at their jobs in reliance on the [promised] benefits." This rationale, recently cited approvingly in *Restaurant Employees Bartenders and Hotel Employees Welfare Fund, et al. v. Rhodes*, 580 P.2d 611, 99 LRRM 2868 (1978), was rendered in a case nullifying an oral modification as ineffective in the face of the "written agreement" phraseology of Sec. 302(c)(5)(B) of the Act. The Board has expressly declined to make a comparable interpretation, holding instead that it does not possess jurisdiction to determine the "structural validity" of a "complex trust agreement." *Sheet Metal Workers' International Association and Edward J. Carluogh, President (Central Florida Sheet Metal Contractors Association, Inc.)*, 234 NLRB 1238 (1978). In contrast, where pure unilateral action allegedly violative of Sec. 8(b)(3) is involved, the Board shows itself willing to examine the "nature and impact of the parties' understanding" rather than the "precise wording of the contract itself." *System Council T-6, International Brotherhood of Electrical Workers AFL-CIO, CLC, et al. (New England Telephone and Telegraph Company)*, 236 NLRB 1209 (1978).

*Association of Southern California, Inc.*), 223 NLRB 37 (1976).

The final question is whether the resultant contract modification was unilateral by Respondent. This must be treated because *Jacobs Transfer* speaks of agency status running to both labor-management parties, and because these Charging Parties have executed acceptances with respect to each Trust plan in which consent to the acts of the Trustees is expressed. The *Jacob Transfer* branch of this issue is disposed of because, contrary to the fact situation there, these Employers have absolutely no role in the election of Trustees. As to the acceptances, they are strictly a traditional affirmation of settlor satisfaction with a trust arrangement. This is the further teaching of *Sheet Metal Workers' International Association, supra* at 24-33, and the "convincingly demonstrate[d]" point that "a trust fund established pursuant to Section 302(c)(5) is merely a product of the collective-bargaining process and not an extension thereof."

Accordingly, I render a conclusion of law that Respondent and its collective agents, by implementing vision care benefits for employees of the Charging Parties herein without complying with the notice requirements of Section 8(d) of the Act, have engaged, and are engaging, in unfair labor practices within the meaning of Section 8(b)(3) of the Act.

#### THE REMEDY

The unique configuration of facts and the passage of time since July 1, 1977, requires a carefully fashioned remedy best suited to the Board's objective of restoring the status quo following a violation, yet avoiding undue hardship to innocent employees. The availability of eye examinations, lenses, and eyeglass frames for employees and their eligible dependents has now spanned 1-1/2 years. While I am not informed of the circumstances at The Crescent, the other two contracts have yet many months to run, and Respondent has seemingly gained insidious bargaining leverage by its unlawful conduct. I shall therefore establish a reasonably early time at which vision care benefits are to cease for employees of these Charging Parties (unless in conflict with newly negotiated provisions by The Crescent, which in such instance, to the extent inconsistent, shall supercede the recommended Order and notice herein), and shall compose a "Notice To Members" that emphatically exonerates the affected Employers from what is being withdrawn, while plainly stating that it may not necessarily apply again. In this sense, therefore, vision care benefits are to cease on the 91st day following compliance with this Decision. Such date is to be computed from the commencement of the last notice posting at any place where notices to the members and employees of any Charging Party are customarily posted. I choose a full 90-day period to allow effective dissemination of this change to and among employees during a customary 60-day notice posting period, plus an additional 30 days to cover delays in personal availability, arrangements for examination, and choice of eyeglasses.

[Recommended Order omitted from publication.]