

**Adolph Coors Company and Brewery, Bottling, Can
and Allied Industrial Union, Local 366, AFL-CIO.**
Case 27-CA-5238

March 21, 1978

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS
JENKINS AND MURPHY

On October 4, 1977, Administrative Law Judge Jerrold H. Shapiro issued the attached Decision in this proceeding. Thereafter, the General Counsel and Charging Party¹ filed exceptions and a supporting brief, and Respondent filed a brief in support of the Administrative Law Judge's Decision.

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,² and conclusions³ of the Administrative Law Judge and to adopt his recommended Order.

¹ Charging Party's request for oral argument is hereby denied as the record and briefs adequately present the issues involved.

² Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (C.A. 3, 1951). We have examined the Administrative Law Judge's credibility resolutions and find, on that basis, no reason to disturb them. They are hereby affirmed.

³ We agree with the General Counsel's contention that Respondent's savings and investment plan does not appear to have been accurately described by the Administrative Law Judge in part IV.(A).(1).(a) of his Decision. The plan, initially, provided that a member could contribute up to 1 percent of his or her salary as a basic contribution and nine additional percentage points of salary as an additional contribution. In turn, Respondent would contribute 10 percent of the basic contribution or, at maximum, 10 percent of 1 percent. Subsequently, the plan was modified to permit basic contributions to be increased to up to 6 percent of a member's salary, with additional contributions limited to a further 4 percent of the member's salary. In turn, Respondent would contribute 15 percent of the basic contribution or, at maximum, 15 percent of 6 percent. In any event, the Administrative Law Judge's error does not require a different result. In this connection, two additional statements of the Administrative Law Judge appear to be inadvertent errors. The bracketed language in sec. 8:05 of the contract proposal (fn. 13 of the attached Decision) was included in the expired contract but was sought to be deleted in the contract proposal. The phrase "in accordance with the Employer's requirements" (fn. 15 of the attached Decision) was *not* found in the recent contract but was included in the contract proposal.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

DECISION

STATEMENT OF THE CASE

Jerrold H. Shapiro, Administrative Law Judge: The hearing in this case held on July 19 and 20, 1977, is based on charges filed on February 11, 1977, by Brewery, Bottling, Can and Allied Industrial Union, Local 366, AFL-CIO, herein called the Union, and a complaint issued April 26, 1977, as amended May 27, 1977, on behalf of the General Counsel of the National Labor Relations Board, herein called the Board, by the Regional Director for Region 27, alleging that Adolph Coors Company, herein called Respondent, has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act, herein called the Act. Respondent filed an answer denying the commission of the alleged unfair labor practices.

Upon the entire record,¹ from my observation of the demeanor of the witnesses, and having considered the posthearing briefs, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent Adolph Coors Company is a Colorado corporation which maintains its principal office and place of business at Golden, Colorado, where it manufactures beer. Respondent annually sells and ships goods and materials valued in excess of \$50,000 directly to points and places outside of the State of Colorado. Respondent admits, and I find, it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

¹ Respondent offered into evidence several contract proposals, Resp. Exhs. 2 through 10, submitted by itself and the Union during contract negotiations. The General Counsel and Charging Party objected to their admission and I reserved ruling. I am of the view that the matters contained in these documents are not relevant to the disposition of the issues posed by this case. Accordingly, I reject these exhibits.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits and I find that the Union, Brewery, Bottling, Can and Allied Industrial Union, Local 366, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. BACKGROUND AND ISSUES

During the period material to this case Respondent employed more than 1,400 production and maintenance workers at its Golden, Colorado, facility. The Union has represented these workers for more than 20 years and has negotiated a series of collective-bargaining contracts with Respondent covering them. The most recent contract was effective from June 18, 1974, to December 31, 1976. The negotiations for a new contract began on or about November 4, 1976. During November and December 1976 and January 1977,² the parties held approximately 15 negotiation meetings without reaching agreement. In January an impasse occurred in the negotiations. On April 5, the Union called the workers out on strike. As of the dates of the hearing in this proceeding, July 19-20 the parties had not succeeded in reaching agreement and the strike continued.

On February 7, during the period when the negotiations had deadlocked, Respondent instituted the terms and conditions of employment which had been included in its so called best and final offer submitted to the Union on or about January 28 which was rejected by the Union. Included among the improved working conditions which Respondent implemented was an increase in the Company's contribution into the employees' savings and investment plan and an increase in the Company's contribution into the employees' retirement plan and an increase in the employees' retirement benefits.

On February 9, Respondent, by letter, notified all of the employees represented by the Union that effective February 7 the Company had implemented its contract proposal rejected by the Union and described the wage and benefit improvements it had placed into effect. The letter also informed the employees, "[t]he company also implemented . . . certain language provisions that were contained in our offer on January 28 The substance of these provisions are provided in the attachment to this letter." The "attachment" is a two-page document which purportedly describes the substance of the changes made by Respondent's contract proposal in the language of the recently terminated contract.

On April 15 Respondent, by letter, notified all of the unit employees that the assertion of the Union that Respondent had eliminated all of the employees' seniority rights was false and told the employees "the company has made no substantial changes in seniority under the terms of its final offer."

The ultimate questions for decision, as posed by the pleadings and litigated at the hearing, are:

1. Whether on February 7 Respondent unilaterally instituted changes in its retirement plan and savings and investment plan, affecting the employees represented by

the Union, without affording the Union an opportunity to bargain about these subjects.

2. Whether Respondent's letters of February 9 and April 15 misrepresented the terms of Respondent's contract proposal insofar as the letters indicated to the employees that Respondent's proposal with respect to employees' seniority and the employees' shift assignments was more favorable to the employees than the proposal Respondent had offered the Union and implemented. And, if this is so, did the misstatements tend to restrain the employees from supporting the Union and did Respondent make such misstatements for the purpose of undermining the Union's representative status.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Unilateral Conduct*

1. The facts

(a) *The savings and investment plan*

Respondent's employees, who are not represented by the Union, have been eligible to participate in the Company's savings and investment plan since approximately 1974. The plan, in pertinent part, provides that eligible employees may pay into the plan a certain percentage of their wages as savings and that the Company shall contribute a percentage of the actual money the employees save. The plan is not referred to in the 1974-76 collective-bargaining contract and the employees represented by the Union, covered by this contract, were not eligible to participate in the plan until about July 1, 1976, when, with the approval of the Union, Respondent extended the plan to cover these employees. The circumstances surrounding the plan's extension to cover the employees represented by the Union are as follows.

In May 1976 Hargis, Respondent's vice president of personnel, and several other company representatives met with Union President Silverthorn and Union Financial Secretary DeBey. Hargis indicated to the union representatives that Respondent wanted to extend participation in the savings and investment plan to the employees represented by the Union. Hargis explained the plan and asked if the Union wanted to submit the plan to a vote of its membership. Silverthorn stated he considered the plan as a gift, thus it was not necessary to submit it to the membership. Silverthorn asked whether himself and DeBey, who are not employees of the Company, would be eligible to participate in the plan. Hargis stated he would check into the matter. Thereafter, in June 1976, another meeting was held between Company and union representatives at which the savings and investment plan was discussed. Present for Respondent was Tom Robinson, the person in charge of administering the plan. Robinson advised Silverthorn and DeBey that they were not eligible to participate in the plan since they were not employees. He gave a copy of the plan to Silverthorn and told him that the Company intended to notify the employees represented

² Unless otherwise specified all dates herein refer to 1977.

by the Union that they were eligible to participate in the plan. The union representatives raised no objections.³ On or about July 1, 1976, Respondent extended the plan to cover the employees represented by the Union and a number of them opted to participate in the plan. Silverthorn testified that the plan's extension to cover the employees represented by the Union was done by Respondent "with Union approval."

The plan, at the time it was extended to cover the employees represented by the Union, provided that employees who participate could contribute from 1 to 6 percent of his or her wages and that Respondent would contribute 10 percent of the actual money the employees contribute. Thereafter, on a date not specified in the record, Respondent increased its contribution on behalf of those participants who were not represented by the Union from 10 to 15 percent.

The savings and investment plan was not included in Respondent's or the Union's initial contract proposals nor was the subject mentioned during the contract negotiations until the December 29, 1976, negotiating meeting.

Kaveny, Respondent's director of employee relations, and Union Representatives Silverthorn and Patrick were called as witnesses by the General Counsel, and Lerten, Respondent's attorney, was called as a witness by Respondent to testify concerning what was said about the savings and investment plan during the negotiations. Kaveny, who testified as an adverse witness for the General Counsel, did not impress me as a reliable witness. Accordingly, I have rejected his testimony whenever it conflicts with the testimony given by another witness. Regarding the testimony of the other witnesses, Lerten impressed me as the most credible of the three and I have credited his testimony whenever there is a conflict in their testimony.⁴ Specifically, I reject the testimony of the union representatives that Respondent refused to furnish the union representatives with a copy of the Savings and Investment Plan and told them that the plan was a nonnegotiable subject which the Union would have to take or leave without any negotiation.

During the December 29, 1976, negotiation meeting, Silverthorn, for the Union, took the position that the benefits under Respondent's retirement plan should be increased. Lerten, for Respondent, answered that the current retirement benefits were adequate considering that the employees could supplement them with social security benefits as well as by the savings they accrued in the

savings and investment plan. Silverthorn noted that there recently had been an increase in Respondent's contribution to the savings and investment plan and asked if the increase would be offered to the workers represented by the Union. Lerten said that if the Union wanted this increase for the workers it represented that Respondent was prepared to consider the savings and investment plan as a part of the total economic package it was offering the Union. The next day, when negotiations resumed, Kellogg, for Respondent, as a part of Respondent's contract proposal included the savings and investment plan and specifically offered to increase Respondent's contribution for the employees represented by the Union to the same extent that the contribution for the other employees had been raised, and set forth the amount of that increase. Silverthorn took the position that the Union desired an increase in Respondent's contribution to the retirement plan, rather than the savings and investment plan, and asked that Respondent contribute to the retirement plan the moneys it would normally contribute into the savings and investment plan. Kellogg rejected this proposal.⁵

During the January 4 negotiation meeting, Respondent's representatives offered the Union a complete contract proposal which included the Savings and Investment Plan with an increased company contribution from 10 to 15 percent. In addition, Respondent offered to increase its contribution to the retirement plan. The union representatives indicated they would consider the Company's entire proposal. Also at this meeting, when Union Representative Patrick asked for a copy of the savings and investment plan, Respondent's Representative Kellogg stated that the Union had been furnished a copy in 1976 when the plan was extended to cover the union-represented employees. Silverthorn, who had been given a copy of the plan in June 1976, stated he did not remember if he had received a copy of the plan but would search for it.⁶

On January 2 and 28, Respondent submitted to the Union complete contract proposals which included the savings and investment plan with an increase in the Company's contribution to 15 percent.

The negotiations, as indicated previously, reached a bargaining impasse during January⁷ and on February 7, Respondent implemented the terms of its last contract proposal including the aforesaid savings and investment plan proposal.

³ Hargis and Silverthorn testified about the circumstances surrounding Respondent's extension of the savings and investment plan to cover the employees represented by the Union. In instances where their testimony is not consistent I have credited Hargis' because he impressed me as the more credible witness. In particular I reject Silverthorn's testimony that he asked if the plan was negotiable and, in response, Hargis answered that the plan was not a subject for negotiation.

⁴ I have considered that due to the numerous negotiation meetings and the elapsed time since these meetings and the hearing that Lerten in most instances was not able to testify without using his notes taken contemporaneous with the negotiation meetings to refresh his recollection. This does not, in my opinion, detract from his credibility. I also reject the Charging Party's request that I strike Lerten's testimony on the ground that such testimony by an attorney constitutes a breach of the code of professional responsibility of the American Bar Association. See, *Local Union No. 9 of the International Union of Operating Engineers (The Fountain Sand & Gravel Company)*, 210 NLRB 129, fn. 1 (1974), and *Hill-Behan Lumber Company*, 175 NLRB 345, fn. 1 (1969).

⁵ As indicated, *supra*, Union Representative Patrick testified that at the meeting of December 30, 1976, Kaveny told the union representatives that the Union "could take it [referring to the savings and investment plan] or leave it, it was non-negotiable." On cross-examination, however, Patrick in effect admitted that Kaveny did not refuse to bargain about the savings and investment plan. Thus, Kaveny testified that in response to Silverthorn's request that the Company's contributions to the savings and investment plan be allotted to the retirement plan, Kaveny replied that the Company would not do this and told the union representatives that the Union would have to either take or leave the contributions as a part of the savings and investment plan.

⁶ No further request for a copy of the plan was made by the Union until after the events which are material to this case took place.

⁷ At the outset of the hearing the General Counsel conceded that when Respondent implemented the terms of its contract proposal there was an impasse in collective-bargaining negotiations.

(b) *The retirement plan*

The parties contract which terminated on December 31, 1976, provides for a retirement plan funded by contributions by the employees and Respondent. The plan is administered by a joint committee comprised of an equal number of company and union representatives with a provision for impartial arbitration in case of a deadlock.

During the negotiations for a new contract the Union proposed a 15-cent-per-hour increase in Respondent's contribution to the retirement plan and a 9-cent-per-hour increase in the employees' contributions. Respondent rejected this proposal insofar as it increased Respondent's contribution, and at the negotiation meeting of January 4, countered with a proposal which increased its contribution by 5 cents per hour. At this meeting Kellogg, for Respondent, told the union representatives that Respondent was willing to increase its retirement contribution by 5 cents per hour, and in regard to the employees' contributions, was amenable to whatever the Union proposed. On the subject of retirement benefits Kellogg stated that Respondent's representatives had consulted with the actuary for the retirement plan who had informed them that Respondent's 5-cent-an-hour increase in its contribution would raise a beneficiary's past service benefit from \$2 to \$6 per month and a beneficiary's future service benefit by 10 percent. The union representatives neither accepted or rejected this proposal, rather at the end of the negotiation meeting stated they would review and consider the Company's entire proposal. Thereafter, on January 28 Respondent submitted to the Union its so-called best and final offer which included the offer of a 5-cent-per-hour increase in the Company's retirement contribution and an increase in the retirement benefits to \$6 per month for past service benefits and an increase of future service benefits by 10 percent. The Union rejected Respondent's best and final offer and, on February 7, during a period when negotiations were deadlocked, Respondent placed into effect the terms of this offer, including the increase in its retirement contribution and the increase in the employees' insurance benefits.⁸

It is undisputed that Respondent and Union at all times material herein believed that the matter of insurance benefits was not a subject for collective bargaining during contract negotiations, but that the insurance benefits were fixed by the joint committee which administers the retirement plan. However, during the negotiation meeting of May 4, Lerten, for Respondent, stated that until just recently he had been unaware of the last amendment to the retirement plan, dated October 1, 1974, and based on this amendment it was his opinion that insurance benefits should be fixed during contract negotiations rather than by the joint committee. The parties agreed that Respondent's increased contribution would be placed in escrow pending the outcome of the negotiations and the two retired

⁸ During February and March, two employees retired and received the increased benefits.

⁹ The record establishes that on February 7 negotiations were at an impasse. In any event, the General Counsel at the start of the hearing conceded that when Respondent implemented the terms of its contract offer there was an impasse in the negotiations.

¹⁰ In reaching this conclusion I have taken into account that Respon-

employees who were currently receiving the increased benefits would continue to receive them and that the benefits paid to any future retirees would be the subject for negotiations.

2. Discussion and conclusionary findings

The complaint as amended alleges in substance that on February 7 Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally instituting a savings and investment plan and by unilaterally increasing retirement benefits for the employees represented by the Union without bargaining with the Union.

The law is settled that an employer violates its duty to bargain if, when negotiations are in progress, it unilaterally institutes changes in existing terms and conditions of employment. *N.L.R.B. v. Benne Katz, etc., d/b/a Williamsburg Steel Products Co.*, 369 U.S. 736 (1962). "On the other hand, after bargaining to an impasse, that is, after good-faith negotiations have exhausted the prospects of concluding an agreement, an employer does not violate the Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals." *Taft Broadcasting Company*, 163 NLRB 475, 478 (1967), *enfd. sub nom. American Federation of Television and Radio Artists, AFL-CIO, Kansas City Local*, 395 F.2d 622 (C.A.D.C., 1968).

As described in detail, *supra*, on February 7, after bargaining to an impasse, Respondent placed into effect the terms and conditions of employment contained in its contract proposal which had been rejected by the Union. Included among the changes instituted by Respondent was an increase of from 10 percent to 15 percent in its contribution to the savings and investment plan and an increase in retirement benefits to \$6 per month for past service benefits and an increase in future service benefits by 10 percent. These changes were among the terms included in Respondent's contract offer rejected by the Union. There is insufficient evidence that the impasse in negotiations⁹ occurred in the context of bad-faith bargaining or that Respondent did not bargain in good faith in connection with its savings, investment, and retirement benefit proposals.¹⁰

In summation, I find an impasse in contract negotiations had occurred when, on February 7, Respondent instituted the changes here in question. I find further that these changes were comprehended within Respondent's proposals which preceded impasse and were not made in the context of bad-faith bargaining. I hold, therefore, that Respondent, having taken the unilateral action discussed above, did not thereby violate Section 8(a)(5) and (1) of the Act. Accordingly, I shall recommend that all of the allegations set forth in the "Amendment to Complaint" be dismissed.

dent, as well as the Union, did not believe that the subject of retirement benefits was a matter for contract negotiations. Nonetheless, the evidence is insufficient to establish that Respondent did not afford the Union an adequate opportunity to bargain over retirement benefits, or their distribution, or that Respondent did not otherwise bargain in good faith over this subject.

B. *The Misrepresentations*

1. The facts

On February 7 Respondent placed into effect all of the terms and conditions of employment contained in its final contract offer. On February 9 Respondent distributed a letter to all of the employees represented by the Union which in substance notified them that the contract negotiations had reached an impasse and that Respondent had implemented the wage increases and benefit improvements contained in its contract proposal as well as certain "language provisions." In this last respect the letter states:

The company also implemented, effective February 7, 1977, certain language provisions that were contained in our offer on January 28. It is the company's belief that these changes are necessary to insure the continued efficient operation in the business and are in the genuine best overall interests of every employee. The substance of these provisions are provided in the attachment to this letter.

The General Counsel, as discussed *infra*, contends that two of the sections included in the attachment to Respondent's February 9 letter contain misleading language which does not accurately reflect the conditions of employment offered to the Union and implemented by Respondent. The two sections in dispute, as they appear in the attachment to the February 9 letter, read as follows:

SECTION 8 — REDUCTION IN WORK FORCE

Layoffs of employees with more than one year of P & M service will be governed by present contract language. Employees with less than one year's P & M service, who are laid off, cannot bump into another department.

SECTION 13 — SHIFT DIFFERENTIAL

* * * * *

The company may place employees on straight or rotating shifts. However, if the unit involves more than twenty (20) employees on straight shifts and the company desires to change all of the employees to rotating shifts, the company will give the Union at least one week's notice of the proposed change. This will give the Union the opportunity to discuss the proposed change with the company.

The portions of Respondent's contract proposal dealing with Section 8 — Reduction in Work Force and Section 13 — Shift Differential, which were implemented February 7 and which the General Counsel contends are misrepresented in Respondent's February 9 letter, read as follows:

8.02 In the event that an employee is reduced, pursuant to the provisions of Paragraph 8.01, such employee shall have the right to bump, within three (3) working

days, that employee in his/her department who has the least Departmental seniority and whose work the employee doing the bumping can perform without further training in accordance with the Employer's requirements. This privilege is limited to one "bump" and an employee shall not be permitted to "bump" into a leadman, assistant leadman, or production specialist job. *Further, no employee can bump into a higher paying job than one which the employee held immediately prior to exercising this bump.* If the reduction of personnel within a classification in a department results in a layoff, the provision of paragraph 8.03 or 8.04 shall apply depending upon the length of the employee's Production and Maintenance service. [Emphasis supplied.]¹¹

8.03 Layoffs of regular employees with more than one (1) year Production and Maintenance service shall be made on the basis of length of Production and Maintenance service, provided that the employee with the greater Production and Maintenance service has the ability and skill to perform the work available without further training *in accordance with the Employer's requirements, and provided further that the person with the lesser Production and Maintenance service does not have a higher paid job.* [Emphasis supplied.]¹²

8.05 [In case of circumstances beyond the control of the Employer] A shift or work week may be shortened without regard to the seniority provisions of this Agreement.¹³

13.04 The Employer *at its sole discretion* may place the employees, or any portion thereof, on straight shifts or on rotating shifts. However, where employees in a unit of more than twenty (20) employees are on straight shifts and the Employer desires to change all of the employees in that unit to rotating shifts, the Employer will give the Union at least one week's notice of the proposed change in shifts and during that week the Union will be afforded the opportunity to discuss with the Employer the proposed change in shifts. *However, the final decision with respect to the change in shifts will be made at the sole discretion of the Employer.* [Emphasis supplied.]¹⁴

On February 7 and 8 Respondent distributed to its supervisors and managers, who supervise the employees represented by the Union, a copy of the exact language contained in its contract proposal implemented February 7 and explained to the supervisors that a letter would be sent to the employees which would convey only the substance of the changes in the old contract implemented by Respondent, hence, supervision would be expected to be familiar with the exact language of Respondent's proposal so as to be able to intelligently answer questions posed by the employees.

proposal but not included in the recently terminated collective-bargaining contract.

¹⁴ The italicized language was not contained in this section (13.04), as set forth in the February 9 letter.

¹¹ The italicized language was not contained in the parties' recently terminated collective-bargaining contract.

¹² The italicized language was not contained in the parties' recently terminated collective-bargaining contract.

¹³ The language bracketed was included in Respondent's contract

During February Respondent posted the exact language contained in its contract proposal, including the sections in dispute, on bulletin boards in three departments for the employees to read. In April it posted an identical notice in a fourth department for the employees to read. Also, in February, a supervisor in a fifth department met with his employees and read them the exact language contained in the Company's contract proposal, including the sections in dispute.

Lastly, on April 15, Respondent distributed a letter to all of its employees which in pertinent part reads:

It is the Union's contention that the major issue between the Company and the union that is causing the strike is the allegation that the Company has taken away all seniority rights. That is not true! The Company has made no substantial changes in seniority under the terms of its final offer. Job bidding, shift preference, benefit accrual, including vacation selection, is no different under the Company's most recent proposal than it was under the recently terminated agreement. *The only significant modification regarding seniority involves layoff of those employees with less than one year service.* For those employees with less than one year service, should a layoff be deemed necessary, the layoff would occur on a departmental basis rather than on a plant-wide basis. *As for any employee with more than one year P & M service, the layoff provisions today would be exactly the same as provided for in our recent agreement.*

There is one other provision whereby the union is contending that the Company is again taking something away. This has to do with new contract language giving the employer sole discretionary rights to place employees on straight shifts or rotating shifts.

* * * * *

It is difficult to thoroughly discuss in detail complex, contract language in a letter to you. If you have additional questions concerning seniority, please feel free to call the Employee Relations Department.

2. Discussion and conclusionary findings

The complaint in substance alleges Respondent violated Section 8(a)(1) and (5) of the Act when on February 9 and April 15 it distributed letters to the employees which misstated certain terms and conditions of employment which Respondent had offered to the Union and implemented.

I am of the opinion Respondent's February 9 letter misrepresented the substance of its contract proposal. The letter states that in connection with the subject of the

¹⁵ In all other respects the assertion made in the February 9 letter that the attachment to the letter contains "the substance" of the Company's contract proposal does not constitute a misstatement. I reject General Counsel's contention that the letter misrepresented the substance of Respondent's proposal dealing with the assignment of employees to straight or rotating shifts by omitting the phrase "sole discretion," or by omitting the phrase "in accordance with the Employer's requirements," which is found in the recent contract, that the letter misrepresented the substance of Respondent's proposal dealing with employees' seniority rights. In any event, assuming the letter does misstate Respondent's contract proposal in

"reduction in work force" that "layoffs of employees with more than one (1) year of P & M service will be governed by" the recent contract, whereas Respondent's contract proposal concerning this subject deviates from the language of the recent contract in two significant respects:¹⁵ (1) Under the recent contract employees scheduled for layoff are not precluded from bumping less senior employees who occupy higher paying jobs, whereas under the terms of the Respondent's contract proposal this is prohibited; and (2) under the terms of the recent contract only "in case of circumstances beyond the control of the Employer" can Respondent shorten the work shift or workweek in disregard of the contractual seniority provisions, whereas under the terms of its contract proposal Respondent can engage in this conduct without any limitation. And, insofar as the aforesaid changes in the terms of the recent contract constitute substantial changes in the present seniority rights of employees with more than 1 year of service, the statement included in the April 15 letter that "[t]he company has made no substantial changes in seniority under the terms of its final offer . . . for any employee with more than one year P & M service, the layoff provisions today would be exactly the same as provided in our recent agreement," constitutes an additional misstatement.¹⁶

In sum, I find that in the above-described respects the February 9 and April 15 letters misrepresented the terms of Respondent's contract proposal. The remaining question is whether, as alleged in the complaint, these misrepresentations independently coerced and restrained employees in violation of Section 8(a)(1) and/or violated Section 8(a)(5) and (1) of the Act based on the theory that the misrepresentations evidenced an intent to bypass, undermine, or subvert the Union as the employees' bargaining representative.

Regarding the contention that the misrepresentations necessarily tend to interfere with employees' Section 7 rights in violation of Section 8(a)(1) of the Act, I note that none of the misstatements expressly or by implication threaten employees with reprisals or promise them benefits nor did they occur in a context of unfair labor practices. This is not a situation where Respondent has promised the employees more favorable terms and conditions of employment than offered to the Union. I recognize Respondent's February 9 letter misstates the terms of its contract proposal and made the proposal seem more favorable or less unfavorable, than it really was, to the employees. However, the entire proposal had previously been placed into effect in the exact terms it was offered to the Union. Under the circumstances, I find it difficult to imagine

these additional respects, it would not change the outcome of this proceeding for, as explained *infra*, whether the letter contains two, three, or several misrepresentations, as alleged in the complaint, this conduct in the context in which it took place does not constitute a violation of the Act.

¹⁶ The April 15 letter is also inaccurate insofar as Respondent's final proposal precludes a person from exercising his or her seniority in the case of layoff if the person does not have the ability and skill to perform the work available "in accordance with the Employer's requirements." The layoff provisions of the recent contract do not contain the limitation, "in accordance with the Employer's requirements."

misrepresentations that could be more effectively answered by the Union than the ones involved in this case.¹⁷ Indeed, soon after it had transmitted the February 9 letter, Respondent itself brought to the attention of the employees in several departments the exact contract language which had been offered the Union and placed into effect. Under all of these circumstances I find that the misrepresentations found herein did not tend to interfere with employees' Section 7 rights in violation of Section 8(a)(1) of the Act.

Regarding the contention that the misrepresentations communicated to the employees constitute a refusal to bargain in violation of Section 8(a)(5) of the Act, the law is settled that "the fact that an employer chooses to inform employees of the status of negotiations, or of proposals previously made to the Union, or of its version of a breakdown in negotiations will not alone establish a failure to bargain in good faith." *The Proctor & Gamble Manufacturing Company*, 160 NLRB 334, 340 (1966). For, "while there are cases in which employers have been held to have violated Section 8(a)(5) of the Act by communicating with employees during collective-bargaining negotiations, such violations have been found only when the employer's language was itself coercive, or could reasonably be construed as coercive in the context of other unfair labor practices of the employer." *Wantagh Auto Sales, Inc.*, 177 NLRB 150, 154 (1969). Also, see *Stokely-Van Camp, Inc.*, 186 NLRB 440, 450 (1970). As I have found, *supra*, the disputed communication involved in this case is not coercive and did not occur in the context of unfair labor practices. This does not however completely put an end to this matter because it is also settled law that an employer's communication to employees during the course of contract negotiations is not entitled to protection, even though couched in noncoercive language, where it merely serves the tactical purpose of implementing a bargaining table strategy which is itself unlawful. Two examples of such an approach were presented in *General Electric*¹⁸ and *Fitzgerald Mills*¹⁹ which are cited by the General Counsel to support his contention that Respondent's misrepresentations violated Section 8(a)(5) of the Act. In *General Electric* the union was "confronted with a communication campaign, which, coupled with the employer's fixed position at the bargaining table, effectively excluded the union from meaningful bargaining, and represented a patent attempt to bypass and undermine the union as bargaining agent." See *The Proctor & Gamble Manufacturing Company*, 160 NLRB 334, 340 (1966). In *Fitzgerald Mills* the employer, as in *General Electric*, was found to have bargained in bad faith with no intention of reaching agreement. His unlawful conduct included: Unilateral action on mandatory subjects of bargaining and use of negotiators whose authority was limited, and this was coupled with an "uncompromising" attitude at the bargaining table. (313 F.2d at 268.) The employer also sent notices to employees which went

beyond merely criticizing the union's bargaining tactics, for the notices credited the company alone for a negotiated wage increase, indicated that the amount had been determined unilaterally, without reference to the bargaining process, and wrongly placed the onus of delay in effectuating the increase on the union. See 313 F.2d at 268 and 133 NLRB at 883. Also, see *Texas Electric Coop, Inc.*, 197 NLRB 10, 12, 14 (1972), where the employer told his employees in substance that the union was subordinating the employees' interest to its own by linking a dues-checkoff provision to a wage proposal that was less attractive than the wage increase offered by the company. The Board held that this conduct was unlawful because the employer's message was "placed in context of offering the employees a benefit described as being more advantageous to them than sought by the Union," thereby, "creat[ing] the impression that the employer rather than the union is the true protector of the employees' interests." 197 NLRB at 14. Indeed, the speech was but the first step in an unlawful campaign in which the employer helped the employees circulate a decertification petition and then withdrew recognition from the Union. 197 NLRB at 14-16.

The rationale of *General Electric* and *Fitzgerald Mills* and *Texas Electric Coop* does not apply here. The nature of the misrepresentations communicated to the employees was not calculated to create the impression that Respondent rather than the Union is the true protector of the employees' interests nor have the misrepresentations been shown to have been a part of an unlawful bargaining table strategy. Indeed, the General Counsel put on no evidence of Respondent's bad faith during negotiations.²⁰ These circumstances, plus the circumstances relied upon, *supra*, in concluding that Respondent's conduct did not independently violate Section 8(a)(1) of the Act, persuade me that Respondent's misstatements to the employees cannot be characterized as having been made to undermine or subvert the Union. Respondent's conduct represents no more than the legitimate tactic of notifying the employees about a lawful course of action which Respondent, having already notified the Union about, was committed to engage in; namely, its implementation of the terms of its last contract proposal after a bargaining impasse. The fact that in the process Respondent misstated to the employees the substance of certain parts of its contract proposal and thereafter expressed the incorrect opinion to the employees that it had made no substantial changes in the employees' existing seniority privileges is not the type of conduct which constitutes an unfair labor practice, absent circumstances not present in this case. It is for all of these reasons that I have concluded that Respondent did not violate Section 8(a)(5) of the Act as alleged in the complaint.

¹⁷ This is especially true with respect to the April 15 letter in which, in answer to the Union's contention that the Company's contract proposal had impaired employees' seniority rights, Respondent expressed the opinion that it did not believe the terms of its proposal had made a substantial change in employees' seniority rights.

¹⁸ *General Electric Company*, 150 NLRB 192 (1964), *enfd.* 418 F.2d 736 (C.A. 2, 1969).

¹⁹ *Fitzgerald Mills Corporation*, 133 NLRB 877, 882 (1961), *enfd.* 313 F.2d 260, 268 (C.A. 6, 1963).

²⁰ It would be a violation of due process to even consider whether there was an overall failure on the part of Respondent to bargain in good faith inasmuch as the complaint did not include or fairly encompass such an allegation and the matter was not litigated.

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

²¹ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec.

ORDER²¹

The complaint is dismissed in its entirety.

102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.