

**Automatic Plastic Molding Company and International Longshoremen's and Warehousemen's Union, Local 6. Case 32-CA-109<sup>1</sup>**

February 3, 1978

**DECISION AND ORDER**

BY MEMBERS JENKINS, PENELLO, AND MURPHY

On September 1, 1977, Administrative Law Judge Stanley Gilbert issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, the Charging Party filed a brief, and the Respondent filed an answering brief, cross-exceptions, and supporting brief.

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

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge dismissed in its entirety the complaint which alleged that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to execute an agreed-upon collective-bargaining contract and by withdrawing recognition from and refusing to bargain with the Union. Although we adopt the Administrative Law Judge's findings of fact, including his resolutions of credibility,<sup>2</sup> we disagree with the conclusions he drew therefrom and for the reasons below find that Respondent unlawfully withdrew recognition from the Union.

The Union was certified as collective-bargaining representative for Respondent's employees on October 6, 1975. Negotiations began in December 1975 and continued through 20 sessions ending on September 28, 1976. Throughout the bargaining sessions, the employees were represented by Union Business Agent Paul Martin and an employee negotiating committee. Crucial to resolution of this case are the last four bargaining sessions at which Respondent's attorney, William S. Bonnheim, took over negotiations for Respondent. At the August 10 session no real negotiations occurred because Bonnheim was unfamiliar with the prior negotiations and did not know what progress had been made. The Union did

request Bonnheim to come up with counterproposals. Prior to the next session, the Union sent Bonnheim its contract proposal with notations indicating the then current state of negotiations.

At the August 24 meeting Bonnheim proposed a 3-year contract effective May 1, 1976, through April 30, 1979, with one 55-cent-per-hour wage increase, no second and third year increases, and no cost-of-living provision. He also stated that Respondent could not afford the proposed health and welfare insurance program and that he would come in with both a health and welfare proposal and a seniority proposal.

On August 30 Bonnheim presented his seniority proposal. Bonnheim then presented the Union with a letter allegedly signed by employees which stated they no longer wanted the Union to represent them. Bonnheim said the employees would file a decertification petition and that Respondent did not feel it was obligated to bargain with the Union but would check with the Board's Regional Office to see if his position were correct. On September 21 Bonnheim sent Martin a letter stating that no RD petition was on file and that Respondent was now willing to resume negotiations.

At the final meeting on September 28, Respondent proposed to pay \$30 per month per eligible employee into a health and welfare fund. Martin said the Union had no such plan, and Respondent said it would check with its present insurance carrier to see what coverage could be obtained for \$30 per month. Bonnheim also stated Respondent's proposal on sick leave and a proposal to give Respondent flexibility to start the day shift anytime between 6 and 7:30 a.m. Bonnheim made no further proposals and indicated that all things previously agreed to remained agreed to. Bonnheim requested that an employee ratification vote take place at Respondent's premises or at the Federal Mediation and Conciliation Service. Martin said that ratification was an internal union matter and any such vote would be taken at the union hall. Martin then caucused with the employee negotiating committee who agreed to recommend to employees that Respondent's proposals be accepted. After the caucus, Martin asked for another meeting stating he had to submit the proposed contract to the Union's general executive Board. Martin also said he would give Respondent an answer by October 4, the date of the next scheduled meeting.

On September 30 Martin telephoned Bonnheim and told him the Union had accepted Respondent's

<sup>1</sup> The case number was changed from 20-CA-11923 when the case was administratively transferred to Region 32 in Oakland, California.

<sup>2</sup> The Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the brief adequately present the issues and positions of the parties.

The 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), *enfd.* 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

proposal. Bonnheim replied that he thought the Union would accept it. Thereafter the Union was notified by the Federal Mediation and Conciliation Service that Respondent had canceled the October 4 meeting. Also, Bonnheim sent the following letter to the Union dated October 4:

Last week Automatic Plastic Molding Company tendered to your local union a proposal for a collective bargaining agreement. On Thursday, September 30, 1976 Mr. Martin notified the undersigned that Local 6, ILWU had accepted the Employer's final proposal for a new agreement.

Significantly, however, it has become increasingly apparent that the overwhelming majority of employees at Automatic Plastic Molding Company do not wish to be represented by Local 6, ILWU.

Additionally, it was both Mr. Loughmiller's and my understanding at the bargaining table that Local 6 would seek a ratification vote from all the employees concerning the Employer's offer. It is also our understanding that not one single employee currently working at APM had an opportunity to vote on the Employer's proposal.

Consequently, in light of this information and in view of the fact that the certification year is about to expire, this is to advise that we intend to file an RM petition on October 7, 1976, with the National Labor Relations Board. My client would agree to an expedited election so that the employees may fairly determine whether they wish to be represented by Local 6 ILWU for collective bargaining purposes.

On the morning of October 5, before the Union received the above letter, the employees present<sup>3</sup> at the meeting voted to accept Respondent's contract proposal. Martin sent a telegram to Respondent stating that the contract had been ratified and requesting a meeting to sign the agreement. Martin received no response. Martin made several fruitless attempts to contact Bonnheim, both directly and through the Federal Mediation and Conciliation Service. Bonnheim's testimony that he did not receive any of the messages was specifically discred-

ed. Instead, Bonnheim filed an RM petition on Respondent's behalf on October 8.<sup>4</sup>

On October 29, Martin sent a contract to Bonnheim with a letter stating it was a copy of the agreement reached during negotiations and ratified on October 5. The letter requested a meeting to sign the contract. On November 4, Bonnheim wrote to Martin stating that there were several discrepancies between the contract Martin sent and what had been agreed to by them. Although the letter indicated that Bonnheim would later specifically outline the discrepancies, Respondent never did so.

We agree with the Administrative Law Judge that the contract submitted by Martin to Bonnheim for signature contained discrepancies. Thus, as set out by the Administrative Law Judge, Martin had added to Respondent's seniority proposal language which seriously altered its meaning. In addition there was a minor discrepancy in the sick leave language and a possible discrepancy in the shift starting time provision. The contract submitted by Martin contained a health and welfare proposal which reads in its entirety, "The Company shall provide each eligible employee coverage for health and welfare at a cost of \$30.00 per month to the Employer." Respondent, however had not proposed to *provide* such coverage but one to *check with* its insurance carrier to *see* what coverage could be provided at that cost.

We agree with the Administrative Law Judge that because of these discrepancies<sup>5</sup> Respondent was not obligated to execute the document submitted by Martin. The issue here, however, is not whether the document submitted by Martin contained discrepancies but whether, in fact, an oral understanding was reached. If, as found by the Administrative Law Judge, an oral agreement was reached, Section 8(d) of the Act requires that it be reduced to writing, if requested by either party. Contrary to the Administrative Law Judge, we find that no such agreement was reached.

The record shows that after the September 28 meeting the Union accepted Respondent's final proposal. However, Respondent's proposal with respect to health and welfare was insufficient to form the basis of an agreement. Although the proposal contained the most important part of any such plan—the economic aspect—there was no proposal

<sup>3</sup> An economic strike began on April 19, 1976, and is still in progress. Employees hired after the strike had begun (i.e., replacements) were not notified of the meeting or allowed to vote. Nonstriking employees hired before the strike were allowed to vote.

<sup>4</sup> The petition was dismissed after the complaint herein was issued.

<sup>5</sup> At the hearing and in its cross-exceptions and brief, Respondent contends that the document contains a number of items which were never discussed and were not agreed to. We find no merit in this contention.

Bonnheim did not attempt to raise these issues in the final bargaining sessions and indicated that everything already agreed to remained agreed to. We presume, of course, that in the earlier sessions Respondent bargained in good faith. To accept Respondent's contentions would be to indicate that Respondent had engaged in surface bargaining. Respondent also contends that the document is defective because it has no effective dates. Although true so far as it goes, the record shows that Bonnheim proposed specific dates at the August 24 meeting.

on, discussion of, or agreement to any other details of such plan, including who would provide the plan,<sup>6</sup> what type plan would be implemented, or even if such a plan were available. The Union's original proposal consisted of extensive language and included both medical benefits and life insurance. Although which employees would be eligible under the Respondent's proposal could be inferred from the Union's proposal, other aspects could not be so inferred because of the differences in costs. Accordingly, we find that no understanding had been reached on health and welfare benefits.

Health and welfare benefits constituted a substantial and significant part of the proposed contract. In fact, Respondent's offer of \$30 per month per eligible employee is equivalent to approximately 30 percent of its proposed 55-cent-per-hour wage increase. As there was no agreement with respect to a substantial provision of the proposed contract, we find that there was no orally agreed-upon collective-bargaining contract. Accordingly, Respondent was not obligated to execute a collective-bargaining agreement, and we shall dismiss that part of the complaint.<sup>7</sup>

As indicated above, after September 28 when the Union had decided to accept Respondent's final offer, the only unresolved issues concerned details (albeit critical details) of the health and welfare proposal. By that time Respondent had submitted a complete economic package, which the Union (and later the employees) had, under the then prevailing circumstances, agreed to accept. It is thus apparent that complete agreement was extremely close. Yet at this crucial juncture Respondent canceled the October 4 bargaining session, wrote to the Union that it would file an RM petition at the first available opportunity,<sup>8</sup> failed to respond to the Union's request to sign an agreement, and refused to accept or respond to Martin's attempts to set up a meeting. We find that Respondent thereby effectively withdrew recognition from the Union as of October 4.

Respondent may have believed that the Union failed to represent a majority of employees, as shown by its intention to file an RM petition and its statement at the August 30 meeting that Respondent was not obligated to bargain with the Union because

the employees were going to file a decertification petition.<sup>9</sup> Whether Respondent's belief in this regard was a reasonable one based on objective considerations is not before us for determination here, for it is apparent that, at least by October 4, Respondent was looking to the end of the certification year in anticipation of an election being held which would establish that the Union lacked majority status. The October 4 letter states that Respondent would file an RM petition in part because "of the fact that the certification year was about to expire."

It is established law that a certified union enjoys an irrebuttable presumption of majority status during the certification year, and that an employer is obligated to bargain in good faith for at least that year. *Roy Brooks v. N.L.R.B.*, 348 U.S. 96 (1954). Respondent, however, discontinued bargaining with the Union at least by October 4, a date close to but still prior to the expiration of the certification year. Thus, we find that Respondent has, in violation of Section 8(a)(5) and (1) of the Act, refused to bargain in good faith.

Although Respondent withdrew recognition from the Union only days before the expiration of the certification year, its doing so is no mere technical violation of the Act. What would have happened had Respondent bargained in good faith for an additional one, two, or three sessions is of course speculative. However, agreement was at that time extremely close, with only details to be worked out. The Union had accepted the essence of Respondent's proposals. Instead of seizing the opportunity to reach an agreement favorable to it, the Respondent, in anticipation of the expiration of the certification year, withdrew recognition from the Union.<sup>10</sup> That withdrawal completely precluded any agreement from being reached.<sup>11</sup>

There remains for consideration whether Respondent's unlawful refusal to bargain prolonged the strike and converted it into an unfair labor practice strike. We find that it did. As indicated above, a strike was called on April 19 for economic reasons, continued through the remaining negotiations, and, so far as the record shows, is still in effect.<sup>12</sup> Respondent, by unlawfully withdrawing recognition

<sup>6</sup> Respondent's statement that it would check with its insurance carrier is not equivalent to proposing that it would provide such a plan.

<sup>7</sup> *Local 295, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Emery Air Freight Corporation)*, 197 NLRB 26 (1972).

<sup>8</sup> The Union was certified on October 6, 1975.

<sup>9</sup> That issue was not fully litigated, if litigated at all. The refusal-to-bargain issues, as framed by the complaint's allegations, were that an agreement had been reached which Respondent unlawfully repudiated, and, in any event, withdrawal of recognition within the certification year was itself unlawful; and these were the only 8(a)(5) issues litigated by the parties.

<sup>10</sup> Nothing in this Decision should be construed to mean or imply that, if the certification year had expired at the time recognition was withdrawn, such withdrawal would have been lawful. As noted previously, the issue of

whether Respondent had objective considerations upon which to withhold recognition from the Union is not before us.

<sup>11</sup> Member Jenkins also finds that, by refusing to bargain with the Union after October 4, Respondent failed to present a health and welfare proposal as it had agreed to do on August 24 and failed to prepare a written contract containing the agreed-upon terms as it had said it would do on September 30. In view of the failure of Respondent in these circumstances to present to the Union such a full and complete written contract (including a health and welfare plan costing Respondent \$30 per month per employee as Respondent had agreed) which the latter could have accepted, he would issue an order providing for a remedy parallel to that provided in *Sumner Home for the Aged*, 226 NLRB 976 (1976), which ordered the respondent therein to prepare such a complete collective-bargaining agreement.

<sup>12</sup> On October 13 Martin sent the Respondent a telegram stating that all

from the Union, precluded any chance that an agreement would be reached and the strike settled. Accordingly, we find that Respondent's unfair labor practices were a factor in prolonging the strike and that the strike, which was economic in origin, was thereby, as of October 4, 1976, converted into an unfair labor practice strike. *Cantor Bros., Inc.*, 203 NLRB 774 (1973). Accordingly, we shall order Respondent, upon application, to offer to striking employees reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, as follows:

1. Striking employees whose jobs were not filled by permanent replacements before October 4, 1976, are, upon application, to be offered immediate reinstatement, dismissing persons hired on or after that date, if necessary, to make room for them.

2. Any striker whose job was filled by a permanent replacement prior to October 4, 1976, is, upon application, to be offered reinstatement upon departure of that replacement.

We shall also order that in the event the Respondent does not reinstate the striking employees in the manner set forth above within 5 days from the date reinstatement is required, backpay shall commence running from the date on which the 5 days expires,<sup>13</sup> in the manner as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest to be computed as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977).<sup>14</sup>

The number of striking employees and the situation with regard to replacements were not litigated at the hearing. These matters, together with anything else required to determine to whom offers of reinstatement must be made and what backpay, if any, is due, may, if necessary, be litigated in a backpay proceeding.

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Automatic Plastic Molding Company, Berkeley, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and meet and bargain with International Longshoremen's and Warehousemen's Union, Local 6, as the exclusive representatives of its employees in the following unit:

striking employees were ready to return to work. Although the telegram appears on its face to be an unconditional offer to return to work, the record shows that it was predicated on Respondent's executing a collective-bargaining agreement.

<sup>13</sup> For reasons stated in his dissent in *Drug Package Company, Inc.*, 228 NLRB 108 (1977), Member Jenkins would not provide for an automatic 5-day grace period.

All production and maintenance employees including warehouse shipping and receiving employees and truckdrivers employed by Respondent at its location in Berkeley, California; excluding office clerical employees, guards and supervisors, as defined in the Act.

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

2. Take the following affirmative action necessary to effectuate the purposes of the Act:

(a) Bargain collectively with International Longshoremen's and Warehousemen's Union, Local 6, as the exclusive representative of its employees in the appropriate unit in respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Upon application reinstate the unfair labor practice strikers and make them whole for any loss of earnings that they may have incurred in the manner set forth in this Decision.

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

(d) Post at its Berkeley, California, plant copies of the attached notice marked "Appendix."<sup>15</sup> Copies of the notice, on forms provided by the Regional Director for Region 32, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

<sup>14</sup> See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

<sup>15</sup> In the event that this Order is enforced by a Judgment of the 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."

## APPENDIX

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

The National Labor Relations Board having found, after a hearing, that we violated the National Labor Relations Act, has ordered us to post this notice. We intend to abide by the following:

WE WILL NOT refuse to recognize or meet or bargain with International Longshoremen's and Warehousemen's Union, Local 6, as the exclusive collective-bargaining representative of the appropriate unit of our production and maintenance employees.

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

WE WILL resume bargaining in good faith with the Union, and, if an understanding is reached, embody it in a written agreement.

WE WILL, upon application, reinstate our striking employees, who it has been found were on and after October 4, 1976, protesting our unlawful refusal to bargain with the Union, as follows:

- (1) Striking employees whose jobs were not filled by permanent replacements before October 4, 1976, will, upon application, be offered immediate reinstatement and persons hired on or after that date will be dismissed if necessary to make room for them.
- (2) Any striker whose job was filled by a permanent replacement prior to October 4, 1976, will, upon application, be offered reinstatement upon departure of that replacement.
- (3) If we do not reinstate striking employees in the manner set forth above within 5 days from the date reinstatement is required, backpay with interest shall begin running from the date on which the 5 days expire.

AUTOMATIC PLASTIC  
MOLDING COMPANY

## DECISION

## STATEMENT OF THE CASE

STANLEY GILBERT, Administrative Law Judge: Based on a charge filed by International Longshoremen's and Warehousemen's Union, Local 6, hereinafter referred to as the Union, on September 15, 1976, as amended on October 26, 1976, the complaint herein was issued on October 28, 1976. Said complaint alleges that Automatic Plastic Molding Company, hereinafter referred to as Respondent or the Company, engaged in conduct violative of Section 8(a)(5) and (1) of the Act. Respondent, by its answer, as amended, denies that it engaged in the alleged unlawful conduct.<sup>1</sup>

Pursuant to notice, a hearing was held in San Francisco, California, on April 5, 6, and 8, 1977, before me, the duly designated Administrative Law Judge. Appearances were entered on behalf of the General Counsel and Respondent and briefs were timely filed by said parties.

Based on the entire record<sup>2</sup> in this proceeding and my observations of the witnesses as they testified, I make the following:

## FINDINGS OF FACT

## I. THE BUSINESS OF RESPONDENT

As is admitted by it, at all times material herein, Respondent, a California corporation with a place of business in Berkeley, California, has been engaged in the manufacture and wholesale distribution of plastic molding, and during the past year, in the course and conduct of its business operations, Respondent purchased and received directly from suppliers located outside the State of California goods valued in excess of \$50,000.

As is admitted by Respondent, it is, and all times material herein has been, an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

## II. THE LABOR ORGANIZATION INVOLVED

As is admitted by Respondent, the Union is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

## The Bargaining Unit Involved

Respondent has admitted the following allegations in the complaint:

All production and maintenance employees including warehouse shipping and receiving employees and truck drivers employed by Respondent at its location in Berkeley, California, excluding office clerical employees, guards and supervisors, as defined in the Act, constitute a unit appropriate for the purposes of

<sup>1</sup> Said answer, as amended, alleges certain affirmative defenses which are considered hereinbelow.

<sup>2</sup> General Counsel has filed an unopposed motion to correct the transcript of the hearing. Said motion is hereby granted and corrections to the transcript have been approved and noted accordingly.

collective bargaining within the meaning of Section 9(b) of the Act.

On September 26, 1975, under the supervision of the Regional Director for the Twentieth Region of the Board, an election by secret ballot was conducted among the employees in the unit described above in paragraph VI in which the Union was selected as collective bargaining representative by a majority of those employees voting.

On October 6, 1975, the Regional Director for the Twentieth Region of the Board, pursuant to Section 9(c) of the Act, issued a Certification of Representative in which she certified that a majority of the employees of Respondent in paragraph VI [the above-described bargaining unit] designated and selected the Union as their collective bargaining representative and certified the Union as exclusive representative of said unit of employees for the purpose of collective bargaining with respect to rates of pay, hours of employment and other terms and conditions of employment.

#### Chronological Summary of Events

Commencing on December 3, 1975, the Union and Respondent engaged in 20 bargaining sessions, the last of which was on September 28, 1976. A strike by employees of Respondent began on April 19, 1976, and the strike was still in progress at the time of the unfair labor practice hearing. The employees were represented in said negotiations by Paul Martin, a business representative for the Union, and by an employee negotiating committee of Janice Walters, Florence Pool, and Dorothy Pelot. Martin took part in all 20 of the bargaining sessions. In the 16 bargaining sessions which took place between December 3, 1975, and July 14, 1976, Respondent was represented by Keith Fleming and Carlton Tom of the Industrial Employees and Distributors Association (I.E.D.A.), an organization which represents employers for purposes of collective bargaining. Also present for these negotiations was Burt Loughmiller, vice president and general manager of Respondent. On July 14, 1976, Respondent removed the I.E.D.A. representatives as its representative in the negotiations, and in the last four negotiating meetings, between August 10 and September 28, 1976, Respondent was represented by attorney William Bonnheim.

It appears that the negotiations were based on a draft of a contract which I assume was prepared by the Union. When Bonnheim entered into the negotiations, it is apparent from the record that he had little or no knowledge of what had been accomplished in the previous 16 sessions. Martin credibly testified that he had made notations on the draft which reflected what had been accomplished through the session on March 10. Martin furnished Bonnheim a copy of said draft and notations and a covering letter which indicated there had been additional agreements as to portions of the draft not reflected in the copy he received. No substantial purpose would be served in setting forth herein the details of the course of the negotiations prior to

advent of Bonnheim, commencing with the meeting on August 10.

It appears that no negotiations took place at the meeting on August 10, since Bonnheim indicated that he did not know what progress had been made up to that date. Prior to the next meeting, on August 24, Bonnheim received the aforementioned copy of the contract draft with notations and the covering letter. Following is a summary of what occurred thereafter based on portions of the credited testimony of either Martin, Bonnheim, or both.

The Union was represented at the August 24 meeting by Martin and employee negotiation committee members Pool and Walters, while Bonnheim alone represented Respondent. Bonnheim indicated that the union shop provision was still on the table, although Martin's notation on the contract draft indicated that agreement was reached on the union security provision on February 5, 1976. It appears that Bonnheim proposed a 3-year contract, effective May 1, 1976, through April 1979, with only one 55-cent-per-hour wage increase<sup>3</sup> for the life of the agreement, which was the amount of the first year wage increase previously agreed to by Martin and Fleming, but the second and third year wage increases as well as the cost-of-living increases that had been agreed to with Fleming would have to be deleted. Bonnheim indicated that Respondent could only afford the one 55-cent-per-hour increase consisting of 45 cents in wages and 10 cents in benefits, for the 3-year contract period. Bonnheim advised the Union on August 24 that Respondent would be coming in with seniority language and a health and welfare proposal. Mention was made of medical coverage, but there was no cost package put on the table in regard to health and welfare other than statements to the Union that Respondent could no longer afford the health and welfare proposal that had previously been agreed to. There was additional discussion on starting and quitting times, an item which had previously been agreed to, because Respondent wanted additional flexibility on starting and quitting times. The August 24 meeting was rather short because Bonnheim indicated that he had to leave, due to an illness or death in the family.

At the next meeting on August 30, no real negotiations took place, Bonnheim presented a proposal on seniority language which was ultimately incorporated into the contract subsequently submitted by Martin to Bonnheim.<sup>4</sup> Respondent presented the Union with a letter allegedly signed by employees which stated that they no longer wished to be represented by the Union. Respondent asserted that employees were going to file an RD petition in an effort to decertify the Union and that because an RD petition was being filed, Respondent did not feel it was obligated to bargain with the Union any further and was going to check with the NLRB to see if its position was correct.

Thereafter, on September 22, Martin received a letter from Bonnheim dated September 21, indicating that there was no RD petition on file with the Board and that Respondent was now willing to resume bargaining. After receipt of this letter, Martin contacted the Federal Media-

<sup>3</sup> Which apparently by that time had already been implemented.

<sup>4</sup> But as noted hereinbelow, the contract contained additional provisions regarding seniority to which Bonnheim had not agreed.

tion and Conciliation Service and arranged for a meeting on September 28 at the F.M.C.S. offices in San Francisco. At the September 28 meeting, the Union was represented by Martin and employee negotiating committee members Walters and Pool, while Respondent was represented by Bonnheim and by Loughmiller with a federal mediator present.

At that meeting, the Union asked for Respondent's health and welfare proposal. Respondent stated that it would pay \$30 per month per eligible employee into a health and welfare plan and asked if the Union had a plan at such a price. The Union only had two health and welfare plans, and Martin advised Respondent that the Union could not provide a plan at that price. Respondent said it would check with its present insurance carrier to see what coverage could be obtained for \$30 per month.

With regard to sick leave, Bonnheim proposed that effective January 1, 1977, Respondent would follow the 1973-76 master contract but with 6 days of sick leave rather than 5 days as provided in that agreement. Bonnheim's proposal was that employees would accrue sick leave at the rate of one-half-day per month until January 1, 1977. As to starting time, Respondent wanted greater flexibility in day shift starting time because it had changed the shift since the strike and wanted to be able to begin that shift anytime between 6 a.m. and 7:30 a.m., while the previous agreement to follow the master contract would have allowed for a first shift starting time only between 7 and 8 a.m.

Bonnheim did not indicate that he had any further proposals to make beyond those that he had made in this meeting and in the three previous meetings. Martin testified that he then asked Bonnheim if all things previously agreed to remained agreed to and Bonnheim answered in the affirmative. Bonnheim indicated that he wanted an employee vote on ratification of a contract to take place at Respondent's premises or at the offices of the Federal Mediation and Conciliation Service in the presence of a Federal mediator. Martin replied that ratification was an internal union matter, and that any ratification vote that was taken would be at the union hall without any supervision of a Federal mediator.

Martin credibly testified that the Union asked for a caucus, that in the caucus he asked the employee negotiating committee if they would agree to accept Respondent's proposals and recommend it to the employees, and that the committee members said that they would. After the caucus, Martin asked for another meeting stating that he would have to go back to the Union to talk to the officers and submit the proposed contract to the Union's general executive board. Martin further stated that the Union would give Respondent an answer by October 4, the date of the next scheduled meeting between the parties.

On Thursday, September 30, Martin telephoned Bonnheim and informed him that the Union accepted the Respondent's contract proposal. According to Martin, Bonnheim replied that he thought the Union would accept it. On the other hand Bonnheim testified he merely expressed surprise and could not remember whether he stated anything else. In the circumstances, Martin's testimony is credited. It appears that Bonnheim did not

indicate that he wanted to make any additional proposals. Martin testified that he asked Bonnheim if Bonnheim would have a contract prepared before the October 4 meeting, and Bonnheim replied that he would do so. This testimony was denied by Bonnheim which denial is credited since he was the more convincing witness on this point.

Thereafter, the Union was notified by the Federal Mediation and Conciliation Service that Respondent had called and cancelled the October 4 meeting, Bonnheim sent a letter to the Union dated October 4, which stated as follows:

Gentlemen:

Last week Automatic Plastic Molding Company tendered to your local union a proposal for a collective bargaining agreement. On Thursday, September 30, 1976 Mr. Martin notified the undersigned that Local 6, ILWU had accepted *the Employer's final proposal for a new agreement.* [Emphasis supplied.]

Significantly, however, it has become increasingly apparent that the overwhelming majority of employees at Automatic Plastic Molding Company do not wish to be represented by Local 6, ILWU.

Additionally, it was both Mr. Loughmiller's and my understanding at the bargaining table that Local 6 would seek a ratification vote from all the employees concerning the Employer's offer. It is also our understanding that not one single employee currently working at APM had an opportunity to vote on the Employer's proposal.

Consequently, in light of this information and in view of the fact that the certification year is about to expire, this is to advise that we intend to file an RM petition on October 7, 1976, with the National Labor Relations Board. My client would agree to an expedited election so that the employees may fairly determine whether they wish to be represented by Local 6 ILWU for collective bargaining purposes.

On the morning of October 5, before the Union had received the above-quoted letter from Bonnheim, the Union held an employee meeting at the union hall to discuss and to vote on Respondent's contract proposal. Telegrams had been sent by Martin to all employees of Respondent who had been employed before the strike began, but he did not send telegrams to persons hired after the strike began. The latter were not allowed to attend the meeting, but all employees who had been employed prior to the strike were eligible to attend and take part in the meeting, whether or not they were still on strike. Martin credibly testified that the contract changes that Respondent had proposed were explained to the employees, and a secret ballot vote was taken on whether or not the employees accepted Respondent's contract proposal. The tally of ballots showed 20 votes to accept the contract and 9 to reject it.

Martin sent a telegram to Bonnheim with a copy to Loughmiller and a copy to the Federal Mediation and Conciliation Service, informing them of the outcome of the ratification vote and requesting a meeting to sign the contract. Martin did not receive any response to this

telegram from either Bonnheim or Loughmiller. Martin testified that he telephoned Bonnheim several times and each time when he was unable to reach him, Martin left a message, but Bonnheim never returned any of the telephone calls. Martin credibly testified that he also contacted the Federal Mediation and Conciliation Service in an effort to set up a meeting but received no response from Bonnheim as a result of these efforts. Bonnheim's testimony that he did not receive any of the messages was not persuasive and is not credited. Instead, as Bonnheim had indicated he would do in his October 4 letter, Bonnheim filed a representation petition on Respondent's behalf on October 8, 1976, in Case 20-RM-2038; this petition, however, was dismissed by the Regional Director after the complaint herein was issued.

On October 29, 1976, Martin sent a copy of a contract to Bonnheim with a cover letter stating that it was a copy of the contract agreed upon during negotiations and ratified on October 5, 1976. The letter further stated that the Union desired a meeting to sign the contract. On November 4, Bonnheim sent a letter to Martin indicating that there were "several discrepancies" between what was contained in the contract and what Bonnheim and Loughmiller thought had been agreed to. Although Bonnheim's letter stated that he would send another letter specifically outlining the "discrepancies," it appears that neither Bonnheim nor Loughmiller ever contacted Martin or notified him as to what the "discrepancies" were. On the other hand, it appears that no representative of the Union ever made any request for said information.

#### Concluding Findings

##### The Issues

There are three issues raised herein by the following allegations of the complaint which Respondent denies:

##### XII

Since on or about October 4, 1976, and continuing to date, Respondent has refused, and is refusing, to bargain in good faith by failing to execute a written contract incorporating the agreement reached between the Union and Respondent, as described above in paragraph X.

##### XIII

Since on or about October 4, 1976, and continuing to date, Respondent has refused, and is refusing, to bargain in good faith by withdrawing recognition from the Union.

##### XIV

(a) On or about April 19, 1976, the employees employed by Respondent began an economic strike in support of the Union's bargaining demand.

(b) On or about October 4, 1976, the economic strike referred to above in paragraph XIV(a), was converted to an unfair labor practice strike because of Respon-

dent's actions described above in paragraphs XII and XIII.

It appears from the above-credited testimony, particularly the reference in Respondent's letter of October 4 to the Union's acceptance of "the Employer's final proposal for a new agreement," that the parties had arrived at an oral understanding on September 30, 1976. However, that is not dispositive of the issues herein, i.e., whether Respondent refused to execute a written agreement embodying said understanding, and whether Respondent withdrew its recognition of the Union.

While Respondent's cancellation of the meeting scheduled for October 4 and announcement in its aforesaid letter of October 4 of its intention to file an RM petition would tend to indicate that it might not have executed a written agreement if it had been presented with one at the time, this amounts to mere speculation. That it cannot be more than mere speculation is predicated on the following: I find that there had not been a ratification vote by October 4 and that it was the understanding of the parties that there would be a ratification vote taken, as evidenced by the discussion of where it would be held, and Respondent's subsequent reaction to the Union's request that it sign the agreement which the Union sent on October 29 tends to indicate that it might have signed such an agreement if it had not contained "discrepancies." By the aforementioned letter dated November 4, which the Respondent sent in response to that request, Respondent limited its refusal to sign solely to the contention that there were "several discrepancies" between the written instrument and what Respondent's representatives believed the parties had agreed to, which position (for the reasons set forth hereinbelow) I cannot find to have been unfounded.

As to the issue of whether Respondent had withdrawn recognition, the mere stating of an intention to file an RM petition and the filing of said petition cannot be said to constitute a withdrawal of recognition, since it is well established that such action would not relieve an employer of a preexisting duty to recognize and bargain with a union representing its employees. Moreover, by its subsequent action it is clear that Respondent did not believe it was relieved of that duty, as evidenced by its above-described response on November 4 to the request to sign the agreement and the mailgram sent on December 21 to striking employees which contains the statement, "A copy of this telegram is being sent to your bargaining representative, Warehouse Union Local 6."

Therefore, it is concluded that the General Counsel has failed to prove by a preponderance of the evidence the allegation that Respondent unlawfully withdrew its recognition of the Union.

As to Respondent's refusal to sign the agreement sent to it on October 29 because it contained several discrepancies, Martin admitted in his testimony that the section dealing with seniority included a provision which the parties had not agreed to. Also in his testimony Martin admitted that the section dealing with sick leave was not in accordance with what the parties had agreed to. In addition, the written instrument contained a section dealing with health and welfare which reads as follows: "The Company shall provide each eligible employee coverage for health and

welfare at a cost of \$30.00 per month to the Employer." According to the credited testimony, Respondent never agreed to *provide such coverage* but only agreed to contribute \$30 per month towards such a benefit.

Respondent further argues in effect that there was a discrepancy because the written instrument contained provisions based upon "off the record agreements" between Keith Fleming (Bonnheim's predecessor as the Respondent's negotiator) and Martin of which Respondent had no knowledge. I am of the opinion that there is no merit to this argument, inasmuch as it appears from Respondent's conduct that no issue was raised by Bonnheim as to any such provision in the contract draft and it further appears from Bonnheim's referral to the proposals it made as being "final," that there was no indication that any other provisions in the draft remained unresolved.

Also Respondent argues that the written instrument is faulty in that the starting times for the first shift was modified, but that the starting times for the remaining two shifts were not, so that they did not conform to the change and therefore the entire provision "makes no sense and would be unworkable in practice." There appears to be some merit to this argument.

In view of the above findings as to the "discrepancies" asserted by Respondent as a reason for not signing the agreement submitted to it, I am of the opinion that it cannot be concluded that its said reason was not well-founded. Therefore, it is concluded that General Counsel has failed to prove by a preponderance of the evidence the allegation that Respondent violated the Act by refusing to sign a written agreement with the Union.

In view of the above conclusions, it follows that the General Counsel has failed to prove by a preponderance of the evidence that the economic strike which was continuing at the time of the hearing had been converted into an unfair labor strike, as alleged.

#### Respondent's Affirmative Defense

In view of the above conclusions it appears that no purpose would be served in considering Respondent's affirmative defense. Nevertheless, I make the following brief comment with regard to it. As I understand it,

Respondent contends that the Union, by agreeing to Respondent's "incomplete proposal" with knowledge of the "decertification drive" and "the lack of continued majority", engaged in conduct violative of Sections 8(b)(1)(A) and (2) of the Act in that it was an act of reprisal against the majority of Respondent's employees. There appears to be no merit to this defense, since as found hereinabove the verbal agreement was reached within the certification year and moreover, by its letter of November 4, the only reason given by Respondent for not signing the written agreement submitted to it was that it was not in conformity with what Respondent's representatives thought had been the understanding of the parties (i.e., because of the "discrepancies").

Upon the basis of the foregoing findings of fact and upon the entire record of this case, I make the following:

#### CONCLUSIONS OF LAW

1. The Respondent is, and at all times material herein has been, an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has failed to prove by a preponderance of the evidence the allegation that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to sign a written agreement embodying the understanding reached by the parties.

4. The General Counsel has failed to prove by a preponderance of the evidence the allegation that Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition of the Union as the bargaining representative of an appropriate bargaining unit of its employees.

5. There is no basis for finding that the strike which commenced on April 19, 1976, was ever converted into an unfair labor practice strike.

[Recommended Order for dismissal omitted from publication.]