

Wayne's Olive Knoll Farms, Inc., d/b/a Wayne's Dairy and General Teamsters and Food Processing Local 87, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America. Cases 31-CA-5048 and 31-CA-5199

March 24, 1976

DECISION AND ORDER

BY CHAIRMAN MURPHY AND MEMBERS FANNING
AND JENKINS

On October 15, 1975, Administrative Law Judge Richard J. Boyce issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief,¹ and General Counsel filed limited cross-exceptions.

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

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,² and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified, and hereby orders that the Respondent, Wayne's Olive Knoll Farms, Inc., d/b/a Wayne's Dairy, Bakersfield, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as modified below:

1. Substitute the following for paragraph 1:

"1. Cease and desist from:

(a) Refusing to bargain collectively with General Teamsters and Food Processing Local 87, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, as the representative of its employees in the appropriate unit described below, by unilaterally discontinuing pension and health and welfare contributions, or by unilaterally instituting new health and welfare plans.

"(b) In any like or related manner interfering with, restraining, or coercing its employees in the ex-

ercise of the rights guaranteed them in Section 7 of the Act."

2. Substitute the attached notice for the notice provided by the Administrative Law Judge.

² The Administrative Law Judge apparently inadvertently found that Respondent violated Sec. 8(a)(5) of the Act by instituting unilaterally a new pension program. The record reveals that Respondent instituted only a new health and welfare plan, and not a pension program. Accordingly, this error is hereby corrected.

Respondent contends that it was justified in discontinuing payments to the pension fund because of the experience of another company, Ideal Woodbury. Ideal Woodbury continued payments after the expiration of its contract but the funds were not credited to the accounts of the Ideal Woodbury employees. They were held in escrow instead. Respondent obviously has an interest in making sure that the funds it pays into the pension trust fund on behalf of its employees are properly credited to their accounts. Here, however, Respondent ceased the payments without notifying or bargaining with the Union. This failure to seek bargaining precluded the Union from providing the necessary assurances that the funds would be properly credited or making any other proposals on the subject. Thus, while Respondent may have been justified in discontinuing the payments following bargaining with the Union if the Union were unable to assure Respondent that the accounts would be properly credited, it was not justified in ceasing the payments without such bargaining. Accordingly, we adopt the Administrative Law Judge's finding that Respondent violated Sec. 8(a)(5) and (1) by discontinuing these payments.

APPENDIX

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

The hearing held in Bakersfield, California, on July 14, 15, and 16, 1975, in which we participated and had a chance to give evidence, resulted in a decision that we had committed certain unfair labor practices in violation of Section 8(a)(1) and (5) of the National Labor Relations Act, and this notice is posted pursuant to that decision.

WE WILL NOT refuse to bargain collectively with General Teamsters and Food Processing Local 187, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, as the representative of our employees in the appropriate unit described below, by unilaterally discontinuing pension and health and welfare contributions, or by unilaterally instituting new health and welfare plans.

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

WE WILL bargain on request with the aforementioned Union as the representative of our employees in the appropriate unit concerning wages, hours, pension and health and welfare benefits, and other terms and conditions of employment; and, if an understanding is reached,

¹ The Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the brief adequately present the issues and the positions of the parties.

embody it in a signed document. The appropriate unit is:

All employees employed by the Employer at its Chester Avenue, Bakersfield, California plant and at depots in Taft, McFarland, and between Wasco and Shafter, California; excluding professional employees, guards and supervisors as defined in the Act.

WE WILL make whole our employees in the above unit by paying all pension and health and welfare contributions as required by the bargaining contract and pension trust agreement that expired September 1, 1974, to the extent that such contributions have not been made or that the employees have not otherwise been made whole for their ensuing medical expenses, and continue such payments until we have negotiated in good faith with the Union to a new agreement or to an impasse.

WAYNE'S OLIVE KNOLL FARMS, INC., d/b/a
WAYNE'S DAIRY

DECISION

STATEMENT OF THE CASE

RICHARD J. BOYCE, Administrative Law Judge: This matter was heard before me in Bakersfield, California, on July 14, 15, and 16, 1975. The charge in Case 31-CA-5048 was filed January 31, 1975, that in Case 31-CA-5199 was filed April 7, 1975, both by General Teamsters and Food Processing Local 87, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (herein called the Union). A complaint in Case 31-CA-5048 issued March 26, 1975, which was superseded by an amended complaint that issued May 30, 1975, consolidating Cases 31-CA-5048 and 31-CA-5199. The amended complaint alleges violations by Wayne's Olive Knoll Farms, Inc., d/b/a Wayne's Dairy (herein called Respondent) of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended.

The parties were given opportunity at the hearing to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally. Briefs were filed for the General Counsel and Respondent.

I. ISSUES

The amended complaint alleges, in essence, and the answer denies, that Respondent violated Section 8(a)(5) and (1) by unilaterally ceasing its pension and health and welfare contributions upon expiration of its 1971-74 bargaining contract and an ancillary pension trust agreement with the Union; by forcing the ensuing negotiations to impasse by refusing to cure that misconduct, and by insisting that the retail delivery personnel and clerical employees be excluded from the bargaining unit; and by unilaterally insti-

tuting its own pension and health and welfare coverages as of February 1, 1975.

II. JURISDICTION

Respondent is a California corporation engaged in and around Bakersfield in the production and distribution of dairy products. Respondent annually purchases goods of a value exceeding \$50,000 from suppliers within California who in turn obtain said goods, in substantially the same form, directly from suppliers outside California.

Respondent is an employer engaged in and affecting commerce within Section 2(2), (6), and (7) of the Act.

III. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

Background: Respondent and the Union have had a bargaining relationship since 1945. On May 18, 1972, following a Board election in Case 31-RM-275, certification issued reaffirming the Union's standing to represent Respondent's employees. The certification contained this unit description:

All employees employed by the Employer at its Chester Avenue, Bakersfield, California plant and at depots in Taft, McFarland, and between Wasco and Shafter, California; excluding professional employees, guards and supervisors as defined in the Act.¹

The unit at the time of certification consisted of approximately 77 employees. Among them were roughly 30 retail route drivers, concerned chiefly with home deliveries; 6 or so wholesale drivers, who delivered mainly to institutional customers; an unspecified number of in-plant employees engaged in bottling and loading; and several office clerical employees.

In June 1973, consistent with a growing trend in the industry, Respondent instituted a policy of placing its retail route drivers under distributorship agreements, so called, the idea being to convert them from employees to independent contractors and thus remove them from the bargaining unit. As Respondent's president, Frank Peacock, explained, Respondent no longer could afford to pay them union wages and other benefits. By the time of the conduct now in issue, about two-thirds of the retail route drivers were operating under distributorship agreements. The goal is to convert newly hired retail route drivers from "company men" to "distributors" after a 90-day break-in period. Some of the drivers seem to be permanently ensconced as company men, however, because they have failed to satisfy Respondent of their ability to function profitably given the added independence that goes with being a distributor.

The last contract between Respondent and the Union preceding the above certification ran from September 1,

¹ It is found that this is an appropriate unit within Sec. 9(b) of the Act.

1970, to September 1, 1971. A succeeding contract was entered into on July 30, 1973, was retroactive to September 1, 1971, and expired September 1, 1974. Coincident with their entry into the 1971-74 contract, the parties executed a separate document requiring that Respondent make periodic payments on behalf of the unit employees to the Western Conference of Teamsters Pension Trust Fund, to provide for employee retirements. This document likewise bore a beginning date of September 1, 1971, and an expiration date of September 1, 1974. Successors to the 1971-74 bargaining contract and pension agreement have not been entered into.

The 1971-74 contract: The 1971-74 contract specified, among other things, that Respondent make monthly payments on behalf of the unit employees to the Milk and Ice Cream Employees' Welfare Plan, to provide for employee medical and dental expenses. Contrary to the situation of the pension plan, all indications are that the parties' total understanding regarding the welfare plan was embodied in the labor contract. There is neither evidence nor contention that a collateral instrument exists.

Among its other terms, the 1971-74 contract provided for the payment of overtime after 9-1/2 hours of work on any given day; and, concerning placement of the retail route drivers under distribution agreements, stated:

4. The Employer and the Union ratify their agreement that all retail delivery routes have been transferred to independent contractor distributors as of June 1, 1973, either by subcontract, transfer, lease, or assign or convey in whole or in part to independent contractor distributors.

5. As of June 1, 1973, except as set forth herein, no provisions of the collective bargaining agreement between the parties shall be applicable to retail route drivers.

* * * * *

7. With respect to owner-operator retail drivers, the union security provisions of the collective bargaining agreement shall apply to such owner operator thirty days after the date on which the owner operator took over his route.

8. It is understood by and between the parties that the distributorship agreement between owner operator and the Employer is not a subject for collective bargaining; the Employer and the owner operator may modify and amend such agreement as between themselves.

9. Any dispute between the Employer and the owner operator regarding the interpretation or application of the distributorship agreement between them shall be subject to resolution pursuant to the terms of the grievance procedure in the collective bargaining agreement.

The conduct in question: In anticipation of the September 1, 1974, expiration of the 1971-74 contract, the Union sent an opening letter to Respondent on June 17 and certain proposals on August 29. The first negotiating meeting took place in early September, but there were no serious negotiations until October, the Union wishing first to com-

plete its negotiations with the dairy "majors" in the area—Arden, Carnation, Challenge, Foremost, and Knudsen. Settlement with the majors was ratified by the Union's membership on October 3, and the Union sent Respondent a copy of the terms that same day.

The Union initially sought a contract with Respondent corresponding in large part with the majors' contract, while Respondent insisted on something more tailored. Two sessions each were held in October and November, with Vic Vincent, a business agent, the Union's spokesman, and Paul Routh, a vice president, serving for Respondent. The record contains little of the substance of these meetings,² although it is evident that they were informal in nature and that Vincent each time asked that Respondent submit written proposals.

Later meetings, more critical to the issues at hand, were held in Fresno December 2 and in Los Angeles December 20. George Branson, the Union's secretary-treasurer, took over as its chief spokesman at those meetings; and Virgil Eischen, a vice president and owner of 49 percent of Respondent's stock, assumed a dominant role for Respondent. Both December meetings also were attended by a conciliator of the State of California; and the December 20 meeting was attended by attorneys for both parties as well. The attorney for Respondent was David G. Miller, its representative in this proceeding. Although the record suggests that there may have been some informal meetings in the interim, the parties did not meet with a serious negotiating intent, after December 20, until April 30, 1975.

Upon expiration of the 1971-74 contract and the pension trust agreement, Respondent stopped making payments on behalf of the unit employees to the pension trust fund and the employees' welfare plan. Eischen testified that Respondent felt it had no obligation to continue the payments after the expiration date and that any resumption of coverage was subject to bargaining. Eischen elaborated that another dairy in which he has a substantial interest—Ideal-Woodbury in Fresno—had continued to make contributions to the same pension trust fund for 3 years after expiration of its contract with a sister local of the Union, only to find that the trustees of the fund had put the contributions in escrow rather than credit them to Ideal-Woodbury's employees. The trustees thereafter brought an interpleader action to determine whether the moneys should be credited to the employees or returned to Ideal-Woodbury.³

The Union first learned of Respondent's cessation of pension and health and welfare contributions in October, when it received notices of delinquency from the administrators of the two plans. It did not act on this information

² Vincent's recollection was uncertain and Routh, who no longer was with Respondent at the time of hearing, did not testify.

³ The complaint was filed in February 1975 in the State Superior Court, San Francisco County. It was prompted by a letter dated January 24, 1975, from David G. Miller, Ideal-Woodbury's attorney and Respondent's attorney herein, demanding that the trustees return the postexpiration contributions to Ideal-Woodbury. The letter stated: "[I]t is our position that those monies are being held unlawfully by you in violation of Section 302 of the Labor Management Relations Act, as amended." Decision on the suit has not been reached. The status of health and welfare contributions is not under similar challenge in the case.

until the December 2 bargaining meeting. Branson then voiced a protest, which was largely ignored by Respondent, and the discussion turned to other things.

Also at the December 2 meeting, Respondent for the first time presented a complete written proposal, which it held out to be its "final offer." Among its terms were these:

[T]he following classifications of employees will specifically be excluded from the agreement and will not work under the terms and conditions of the agreement.

- (1) Retail drivers, retail relief drivers or any other employee associated with retail delivery or sales.
- (2) Clerical employees with the exception of those individuals who are currently members of the union.

The proposal addressed itself to pension and health and welfare coverages only inferentially, through this catchall paragraph:

It is understood that with the exception of the above mentioned provisions all other terms and conditions will be those as outlined in the agreement that existed September 1, 1968, to September 1, 1971.

The proposal elsewhere provided for overtime pay for hours in excess of 40 in a week, as opposed to the provision in the 1971-74 contract for premium pay for hours in excess of 9-1/2 in any day.

Before meeting's end December 2, Respondent abandoned its position that all retail delivery personnel be outside the unit, suggesting instead that there be a continuation of the 1971-74 contract as concerns them. By this, Respondent meant for the company men to be under contract coverage for all purposes, while those converted to distributors would be covered only for purposes of union security and grievance handling. The Union neither accepted nor rejected this suggestion. The parties were in opposition throughout the meeting concerning the clerical employees and the overtime issue.⁴

At the December 20 meeting, the status of the retail drivers received further discussion. The question arose whether those working under distributorship agreements were independent contractors as a matter of law and thus outside the unit. Respondent took the affirmative of the proposition. The Union's Branson, on the other hand, contended neither that they were or were not, instead asserting that he was in doubt, would not accept Respondent's view of the matter, and wanted the issue settled through the Board unit clarification (UC) procedure. The record indicates that the attorneys for the two parties agreed to file a UC petition, but that nothing has been done to carry it out.

Also at the December 20 meeting, the parties collided once more over Respondent's proposal that the office clerical employees, save only the one then belonging to the Union, be outside the unit. Respondent at length reverted, as it earlier had concerning the retail delivery personnel, to the 1971-74 contract language regarding the office clericals. By this, Respondent meant for them to be covered for

all purposes. And, at this meeting, the overtime issue remained unsettled. Finally, the Union's Branson again protested Respondent's cessation of pension and health and welfare payments; and proclaimed that union agreement on a contract would be contingent upon Respondent's curing the "unfair labor practice"—i.e., restoring the *status quo ante* concerning pensions and health and welfare.⁵

The December 20 meeting closed on the understanding that Respondent would submit a new offer. Accordingly, by letter dated December 27 from Attorney Miller to Branson, Respondent conveyed what it termed its "last, best and final offer." Among its terms were these:

(2) Overtime to be paid at the rate of 1-1/2 times the employees' regular hourly rate *only* on hours worked in excess of 40 in any one work week

(3) Owner/Operator retail drivers (distributors) shall continue to be excluded from the coverage of the collective bargaining agreement.⁶

The letter did not specifically refer to pension and health and welfare coverages, but did state:

(5) Unless otherwise hereby modified, amended or deleted, all terms and conditions of the 1970-71 collective bargaining agreement as modified by the 1973 Memorandum Agreement shall remain unchanged and be deemed part of the new agreement.

It further provided for a January 1, 1975, effective date for the wage increase and for "all economic and other fringe benefits whether increased or not." The letter closed:

Should you wish to discuss these matters we remain available to meet with you at a reasonable and mutually convenient time and place.

The Union submitted this offer to membership vote at a meeting on January 2, 1975. Branson recommended that it be rejected because of the lack of curative provisions concerning the pension and health and welfare matters; and the membership honored that recommendation. Respondent thereupon sent a modified offer to the Union on January 6. Its only departure from that of December 27 was to make the wage increase effective November 15, 1974, instead of January 1, 1975. This offer was not submitted to the Union's membership, Branson and Vincent deciding that it would be pointless in view of the failure to deal curatively with the pension and health and welfare matters. Vincent later reported back to Eischen that the offer had been rejected because it did not "straighten up the unfair labor practices" and because of the overtime question.⁷

⁵ Both Branson and Vincent testified that Branson imposed this condition; and Respondent in its brief adopted this testimony as true despite Eischen's repeated testimony to the contrary.

⁶ Although a literal reading of this proposal would indicate an inconsistency with Respondent's December 2 suggestion that the distributors continue to be covered as per the 1971-74 contract—i.e., for union-security and grievance-handling purposes only—the weight of evidence reveals that it was Respondent's intent to adhere to its final December 2 position on the point, and that the Union so understood.

⁷ Eischen testified that Vincent isolated the overtime issue as "the primary hangup," and did not mention the pension/health and welfare problem. Vincent, by contrast, testified that his stress was on the latter problem. Both testified in a palpably self-serving manner from time to time, and Vincent displayed a poor memory besides. It is concluded from all the circumstances

Continued

⁴ This is not to say that the parties were in agreement on all other features of Respondent's proposals. Other of the bargaining issues are not of relevance to this proceeding.

The Union neither counteroffered to these latest offers by Respondent, nor sought further meetings until April 1975. As Vincent testified, "there was no sense of any further negotiations" until the pension and health and welfare items were resolved. Finally, at the suggestion of a Board agent, the Union brought Respondent to the bargaining table on April 30. There have been no meetings since. The April 30 meeting apparently was more or less a rehash of the December 20 meeting.

By letter dated January 24, 1975, Attorney Miller informed Branson in relevant part:

Because the collective bargaining agreement has expired, we cannot legally continue to contribute either to the Pension Plan or the Health and Welfare Plan. Accordingly, effective February 1, 1975, it is our present intention to provide alternative retirement and Health and Welfare Plan protection to our employees.

* * * * *

If you wish to discuss any of these matters, we shall be happy to meet with you at a mutually convenient time and place.

The Union did not respond to this letter, instead filing the charge in Case 31-CA-5048 on January 31. Effective February 1, Respondent extended to unit employees the pension and health and welfare coverages it previously had maintained for nonunit employees.⁸ During the period when there was no health and welfare coverage, Respondent assumed most if not all expenses of the employees as though there had been no lapse.

B. Analysis

The cessation of pension and health and welfare contributions: It is concluded, in agreement with the General Counsel, that Respondent violated Section 8(a)(5) and (1) by discontinuing pension and health and welfare contributions upon expiration of the 1971-74 bargaining contract and the ancillary pension trust agreement. As is stated in *Harold W. Hinson d/b/a Hen House Market No. 3 v. N.L.R.B.*, 428 F.2d 133, 138 (C.A. 8, 1970), with reference to an 8(a)(5) finding by the Board:⁹

The parties had agreed to a subsisting collective bargaining agreement which included the health, welfare, and retirement benefit provisions. The [Board's] order . . . simply requires [the employer] to abide by an obligation once extant by reason of the binding contract but then continuing on after its expiration, in limited form, *not by reason of the contract itself but because of the dictates of the policy embodied in the National Labor Relations Act.*

See also *Sir James, Inc.*, 183 NLRB 256 (1970).

that Vincent mentioned overtime as well as the pension/health and welfare problem as precluding acceptance.

⁸ Under the 1971-74 contract, and at all times since, the retail route drivers working under distributorship agreements have been responsible for their own coverage.

⁹ *Harold W. Hinson d/b/a Hen House Market No. 3*, 175 NLRB 596 (1969).

This conclusion does not ignore Respondent's argument that to have continued to make the contributions after expiration of the underlying contracts would have been a misdemeanor under Section 302 of the Act.¹⁰ Rather, it reflects disagreement with Respondent, in light of the policy considerations behind the enactment of Section 302, that continued contributions would have constituted a crime. The legislative intent was to enhance the bargaining process, not to truncate the traditional obligations of bargaining. To quote from the Supreme Court in *Arroyo v. U.S.*, 359 U.S. 419, 425-26 (1959):

The provision [Sec. 302] . . . was aimed at practices which Congress considered inimical to the integrity of the collective bargaining process Those members of Congress who supported the amendment were concerned with corruption of collective bargaining through bribery of employee representatives by employers

This congressional concern would not be served by permitting Respondent to escape its pension and health and welfare obligations in the present case because of the expiration of the underlying contracts; yet, the congressional concern on which Section 8(a)(5) is based would be significantly undermined. On the other hand, the latter concern would be served without visiting detriment on the former by treating the expired contracts as meeting the "written agreement" requirement of Section 302(c)(5)(B)—at least absent circumstances not present when Respondent discontinued its contributions.¹¹ Respondent's Section 302 defense is rejected, in short, because it breaches the familiar axiom that a construction bringing statutory schemes into harmony is presumed correct as against one placing them in conflict.

Respondent makes the additional argument that it was the intent of the parties, as revealed by the terms of the 1971-74 contract and the pension trust agreement, that Respondent's obligations to contribute were to end upon

¹⁰ Sec. 302 states in relevant part:

Sec. 302 (a) It shall be unlawful for any employer . . . to pay, lend, or deliver . . . any money or other thing of value—

* * * * *

(2) to any labor organization . . . which represents . . . any of the employees of such employer

* * * * *

Sec. 302 (c) The provisions of this section shall not be applicable . . . (5) with respect to money . . . paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer . . . : *Provided*, That . . . (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer

¹¹ Such as, perhaps, termination of the bargaining relationship or the entry into a superseding contract. Respondent's reliance upon *Moglia v. Geoghegan*, 403 F.2d 110 (C.A. 2, 1968), is misplaced. The employer in that case has never entered into any kind of written agreement concerning pension contributions—a distinction noted in *Hinson v. N.L.R.B.*, *supra*, 139. The Board, in *Ellex Transportation, Inc.*, 217 NLRB No. 120, fn. 1 (1975), expressly withheld adoption of the comment in the decision of the Administrative Law Judge that the employer might have violated Sec. 302 had it continued making pension and health and welfare contributions after expiration of the contract.

the expiration of those instruments. This is but another way of saying that the Union waived its right to bargain over the discontinuance of the pension and health and welfare coverages—and, correlatively, Respondent's basic statutory obligation to maintain benefit levels—after contract expiration. Such a waiver generally is not inferred unless revealed by clear and unmistakable evidence. *The Alliance Manufacturing Company*, 203 NLRB 437 (1973); *T.T.P. Corporation, Jam Handy Productions Division, A Wholly-Owned Subsidiary of Tele-Tape Productions, Inc.*, 190 NLRB 240 (1971). The documents in question at best are ambiguous on the point, and so lack the requisite clarity. This argument consequently must be rejected.

Respondent also contends that the Union acquiesced in the discontinuance of pension and health and welfare contributions by waiting until December 2 to object to a situation it learned about in October. This contention likewise fails to persuade. The cases cited by Respondent—*A.V. Corporation*, 209 NLRB 451 (1974); and *Hartmann Luggage Company*, 173 NLRB 1254 (1968)—involved situations in which unions failed to act with diligence, having learned in advance of the employers' plans to make changes, whereas the Union in the present case was met with a *fait accompli* of several weeks' standing. Pertinent to the present situation is this passage from *Ozark Trailers, Incorporated and/or Huteo Equipment Company and/or Mobilefreeze Company, Inc.*, 161 NLRB 561, 564 (1966):

It . . . appears that the Union, during the most critical period [before the change was made], and at the very time when bargaining would have been most productive, was completely unaware of Respondents' intentions After so concealing its intentions from the Union, Respondents cannot now persuasively argue that it was not required to bargain with the Union because the Union did not request such bargaining.

Then there is the argument that, since Respondent made the employees whole for medical claims arising during the hiatus between health and welfare plans, its discontinuance of the health and welfare contributions did not result in a change in the employees' health and welfare benefits. The problem with this is that Respondent instituted the alternative coverage without giving the Union a chance to bargain over it. Thus, while Respondent's assumption of employee medical expenses at first blush seems an heroic gesture, it not only flowed from the earlier unlawful discontinuance of coverage but was of a nature likely, in the eyes of the employees, to discredit the Union and the bargaining process as useful devices in dealing with Respondent. Two wrongs do not make a right.

The institution of new pension and health and welfare coverages: Respondent seems to contend that its unilateral institution of new pension and health and welfare plans, effective February 1, 1975, was privileged on the grounds that it was preceded by a bargaining impasse; and, regardless of impasse, that the Union waived any objection to the changes by failing to respond to Respondent's January 24 letter announcing its intentions and inviting a meeting concerning them.

The impasse argument is rejected for two reasons. First, since the breakdown in negotiations was largely if not

wholly attributable to Respondent's unlawful failure to restore the *status quo ante* regarding the preexisting coverages, there was not a good-faith impasse. A party cannot parlay an impasse resulting from its own misconduct into a license to make unilateral changes. See generally, Epstein, *Impasse in Collective Bargaining*, 44 Texas L. Rev. 769 (1966). Second, even supposing a good-faith impasse, the plans instituted by Respondent had not been contained in its preimpasse proposals to the Union. Instead, those proposals by implication had incorporated the preexisting coverages. Extracting from *Royal Himmel Distilling Company*, 203 NLRB 370, fn. 3 (1973):

[I]t is well established that an employer can only make unilateral changes in working conditions *consistent with its rejected offer to a union* after bargaining has reached an impasse. [Emphasis supplied.]

Respondent's waiver argument also fails. The new plans being in lieu of those Respondent unlawfully had discontinued, this argument presupposes that the Union clearly and unmistakably had relinquished its oft-stated insistence that Respondent cure that misconduct. The evidence, including the unfair labor practice charge filed before the new plans went into effect, is clearly and unmistakably to the contrary.

It is concluded, therefore, that Respondent's institution of the new pension and health and welfare plans violated Section 8(a)(5) and (1).

Respondent's bargaining posture vis-a-vis the retail delivery and office clerical employees: While Respondent initially sought to change the composition of the bargaining unit so that all retail delivery employees and all nonunion office clerical employees would be excluded, it had abandoned both of those goals in favor of the 1971-74 contract by the end of the December 20 negotiating session—i.e., before anything approximating impasse was reached. This signified Respondent's willingness that all office clerical employees and all of the retail delivery employees except those under distributorship agreements be in the unit and under contract coverage without qualification. Regarding the distributors, it signified Respondent's willingness that they be under contract coverage for the limited purposes, as before, of union security and grievance handling. It thus is clear, at least as to all but the distributors, that Respondent was not recalcitrant-unto-impasse on the nonmandatory subject of unit revision.

The matter of the distributors is more difficult, Respondent adhering to the position throughout that they were independent contractors as a matter of law and thus outside the unit. Significantly, however, the Union did not voice disagreement with this position, Branson merely raising the question of the distributors' status—independent contractor as employee—and proposing that it be resolved by a unit clarification proceeding rather than by taking Respondent's word for it. The record suggests that Respondent was amenable to this manner of resolution; but, even if it were not, the Union could have filed a unit clarification petition without its joinder.¹²

It is concluded in these circumstances that an impasse

¹² See Sec. 102.60(b) of the Board's Rules and Regulations.

did not arise over the unit status of the distributors; hence, that Respondent's position concerning them did not violate Section 8(a)(5).¹³ Nor, as indicated above, did Respondent violate Section 8(a)(5) concerning the unit status of the other retail delivery personnel or the office clerical employees.

CONCLUSIONS OF LAW

1. By unilaterally discontinuing pension and health and welfare payments as found herein, and by thereafter unilaterally instituting new pension and health and welfare coverages as found herein, Respondent in each instance engaged in unfair labor practices within Section 8(a)(5) and (1) of the Act.

2. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

3. Respondent did not otherwise violate the Act as alleged.

REMEDY

Respondent shall be ordered to cease and desist from the unfair labor practices found; and, affirmatively, to make whole the unit employees by paying all pension and health and welfare contributions as required by the bargaining contract and pension trust agreement that expired September 1, 1974, to the extent that such contributions have not been made or that the employees have not otherwise been made whole for their ensuing medical expenses,¹⁴ and to continue such payments until Respondent negotiates in good faith with the Union to a new agreement or to an impasse.

Additionally, since the first violation occurred in the context of contract negotiations, and contributed materially to the breakdown of those negotiations, Respondent shall be ordered generally to bargain in good faith with the Union.

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:

¹³ It being unnecessary to the disposition of this issue to determine whether the distributors are independent contractors or employees, or whether the Union bargained them out of the unit in the 1971-74 contract in any event, no opinion is ventured on those questions.

¹⁴ To the extent that Respondent provided the employees with alternative health and welfare coverage, they would not benefit from a requirement that Respondent now duplicate that coverage retroactively. Such a requirement therefore would be of a punitive character, without redeeming justification in terms of the policies of the Act, and so will not be incorporated in the Order. See *Service Roofing Company*, 200 NLRB 1015 (1972).

ORDER¹⁵

Respondent, Wayne's Olive Knoll Farms, Inc., d/b/a Wayne's Dairy, Bakersfield, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from refusing to bargain collectively with General Teamsters and Food Processing Local 87, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, as the representative of its employees in the appropriate unit described below, by unilaterally discontinuing pension and health and welfare contributions, or by unilaterally instituting new pension and health and welfare plans.

2. Take the following affirmative action:

(a) Bargain on request with the aforementioned Union as the representative of its employees in the appropriate unit concerning wages, hours, pension and health and welfare benefits, and other terms and conditions of employment and, if an understanding is reached, embody it in a signed document. The appropriate unit is:

All employees employed by the Employer at its Chester Avenue, Bakersfield, California plant and at depots in Taft, McFarland, and between Wasco and Shafter, California; excluding professional employees, guards and supervisors as defined in the Act.

(b) Make whole the employees in the above unit by paying all pension and health and welfare contributions as required by the bargaining contract and pension trust agreement that expired September 1, 1974, to the extent that such contributions have not been made or that the employees have not otherwise been made whole for their ensuing medical expenses, and continue such payments until Respondent negotiates in good faith with the Union to a new agreement or to an impasse.

(c) Post at each of its locations where unit employees work copies of the attached notice marked "Appendix."¹⁶ Copies of said notice, on forms provided by the Regional Director of Region 31, after being 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 customarily are posted. Reasonable steps shall be taken to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director of Region 31, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

The complaint is dismissed to the extent that violations have not been found.

¹⁵ All outstanding motions inconsistent with this recommended Order hereby are denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

¹⁶ In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."