American Protective Services, Inc. ***and*** **International Union of Security Officers.** Case 32–CA–12887

December 11, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS COHEN AND TRUESDALE

On January 26, 1994, Administrative Law Judge Jerrold H. Shapiro issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed a cross-exception and a supporting brief, and also an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent lawfully withdrew its final contract offer and that the Respondent's attendant breach of its ratification agreement with the Union did not constitute an unlawful refusal to bargain. For the following reasons, we reverse the judge's dismissal of the allegations that the above conduct violated Section 8(a)(5) of the Act.

The relevant facts, as stipulated by the parties, are as follows. Since 1985, the Union has represented the Respondent's guards in five separate units defined by geographical jurisdiction. In August 1992,[2] the parties commenced negotiations for successor agreements. On November 8, the Respondent presented its final offer for each unit, which the Union agreed to submit for a vote by its members. Although the Union indicated that it planned to recommend that the members not accept the final offers, it agreed to enter into collective-bargaining agreements if the members voted in favor of ratification.

Regarding the parties' ratification agreement, the parties' stipulation of facts states in pertinent part:

> The Union did not accept any of the offers extended by Respondent, but stated that it intended to submit the offers for a vote among Respondent's employees. The Union advised Respondent that it would recommend to its members that they not accept Respondent's offers. It was understood by the parties that, if the employees ratified the agreements, *in accordance with the Union's ratification procedures*, they would enter into a binding contract(s). [Emphasis added.]

The record does not contain a copy of the ratification agreement, and the stipulation does not provide additional information clarifying or explaining the purpose and operation of the Union's ratification procedures.

The Union had trouble locating the unit employees to send them ratification ballots and asked the Respondent to provide a label list. The Respondent agreed to provide the labels if the Union would agree to certain conditions, including that the ballots would be counted by a mediator no later than December 7. The Union agreed to the conditions and mailed the ballots to the unit employees.

On December 4, employee Ohman filed a decertification petition for unit 3. Although Ohman wrote on the petition that there were 200 unit employees, of which at least 30 percent supported the petition, there were actually 576 unit employees and only 61 signatures on the petition.

That same day, following receipt of the petition, the Respondent withdrew its final offer for the unit 3 employees, stated that it would submit a new contract proposal within 10 days, and advised the mediator not to count the unit 3 ratification ballots. The Union has since refused to negotiate further, contending that the unit 3 ballots should first be counted. Thereafter, the Regional Office advised the decertification petitioner that additional signatures were needed to support the showing of interest, and on December 17 Ohman submitted 124 additional signatures.[3]

The judge found that the Respondent lawfully removed its contract offer from the table in reliance on the December 4 decertification petition and, therefore, that the Respondent's subsequent direction to the mediator not to count the ratification ballots did not evince an intent to frustrate bargaining. We disagree. Unlike the judge, we begin our analysis not with the Respondent's withdrawal of its contract offer, but with the Respondent's conduct regarding the ratification agreement setting the ground rules governing the

[1] We adopt the judge's dismissal of the complaint's allegation that the Respondent violated Sec. 8(a)(1) of the Act by soliciting employees in units 4 and 5 to file decertification petitions. The complaint alleged that on December 7, 1992, the Respondent issued a memorandum to all unit employees discussing the decertification petition filed in unit 3 and the Respondent's subsequent withdrawal of its final contract offers and encouraged the employees in units 4 and 5 to file similar petitions. The judge found, however, no evidence that the Respondent sent the letter to the employees in units 4 and 5 and no reason to presume that the letter's contents were communicated to them. The General Counsel contends that the judge failed to consider the geographical proximity of the Respondent's employees in units 3, 4, and 5, and that employees in these units would be likely to communicate. The parties' stipulation of facts states only that ''[o]n or about December 7, 1992, the Respondent sent a letter to all employees covered by Agreement 3 advising of Respondent's actions.'' Therefore, the record before us contains no basis for a finding that the unit 4 and 5 employees either knew about or read the Respondent's letter.

[2] All dates are in 1992 unless otherwise indicated.

[3] Prior to the hearing, the parties settled all bad-faith bargaining allegations concerning the unit 4 and 5 employees.

Union's response to the Respondent's final contract offer. We find, for the reasons set forth below, that the Respondent violated Section 8(a)(5) and (1) by repudiating the agreed-upon ratification procedure. We further find that because the ratification procedure had been substantially completed the Respondent was not privileged to withdraw its offer and that this withdrawal also violated Section 8(a)(5).

A breach of an agreement to obtain employee ratification generally will not constitute bargaining in bad faith because ratification, taken alone as an internal union matter, is not a mandatory subject of bargaining. In our view, however, this case presents several unique factors which, considered together, warrant a finding that the Respondent abrogated its ratification agreement with the Union in bad faith in violation of Section 8(a)(5) and (1) of the Act.

The parties here devised the ratification agreement to set the ground rules for an important phase of the collective-bargaining process: the Union's response to the Respondent's final contract offer. The Board has recognized that unilateral deviations from established bargaining procedures may violate Section 8(a)(5).[4] Here, the Respondent breached the agreement at a time when the ratification process was essentially complete and all that remained was the counting of the ballots.[5]

In concluding that the Respondent's conduct was not indicative of bad faith, the judge relied, inter alia, on the Union's recommendation against acceptance of the Respondent's offer to find that the Respondent did not withdraw its offer in the face of actual or imminent acceptance. We find the judge's assessment of the probable outcome of the ratification vote speculative. As noted above, the parties stipulated that ''[i]t was understood . . . that, if the employees ratified the agreements, in accordance with the Union's ratification procedures, they would enter into a binding contract(s).'' In addition, the cover letter to the unit employees that accompanied the ratification ballots stated in pertinent part:

> The union and the company have entered into an agreement to assist one another in the conduct of a revote with the most accurate member/employee information and mailing information that can be assembled. The new ballots and ballot envelope will be returned to the Federal Mediation Service for independent tally.
>
> The union and the company have both agreed to terminate their letter writing campaigns so members/employees can vote in an environment free of antagonism.

Further, the Union's cover letter that accompanied its initial mailing of ratification ballots advised the employees ''that by voting 'no' you are authorizing the Union to call a strike if necessary to get APS to move.'' It is quite possible that despite the Union's position, employees voted in favor of the contract when

[4] *Proctor & Gamble Mfg. Co.*, 248 NLRB 953, 953 (1980), enfd. in pertinent part 658 F.2d 968 (4th Cir. 1981) (employer violated Sec. 8(a)(5) and (1) by discontinuing its longstanding practice of making its premises available for negotiations and of paying employee-members of the unions' bargaining committee for worktime spent in negotiations).

[5] Relying on the statement in the stipulation of facts that the Union ''intended'' to submit the Respondent's contract offer for a ratification vote, our dissenting colleague contends that an ''intention'' is not the equivalent of a promise and, therefore, that the Union and the Respondent did not exchange promises—or reach a bilateral agreement—to use or follow through with the ratification procedure. In the dissent's view, the parties agreed only as to the consequences that would ensue *if* they followed the ratification procedure to finality, but either party was entitled to abandon the procedure prior to its completion.

Contrary to the dissent, we do not view the Union's ''intent'' to submit the final offer for a ratification vote as less than a pledge to implement the ratification procedure. The evidence demonstrates that the Union was firmly committed to ratification as the agreed-upon method for determining its response to the Respondent's final contract offer. The stipulation itself announces what the Union ''would recommend'' to its members respecting their vote, indicating certainty that the Union would make a recommendation and that the employees would have the opportunity to vote. Indeed, the parties engaged in conduct clearly indicating their reliance on the use of the procedure; the Respondent provided mailing labels for the ballots in return for the Union's agreement to several conditions, including that the ballots be counted by a mediator by a specified date. Additionally, the cover letter to the unit employees that accompanied their ballots, set forth in pertinent part, infra, refers to the ''agreement'' between the Union and the Respondent to assist one another in conducting a revote and to terminate their letter-writing campaigns prior to the vote. These facts, considered together, indicate that far from possessing a mere tentative intent to submit the Respondent's offer to a ratification vote, the Union had agreed on the procedure as the mechanism by which negotiations would proceed.

Moreover, even accepting the dissent's view of the nature of the exchange between the parties, we find that the Respondent was not entitled to abandon the ratification procedure and withdraw its final offer, because the procedure had in fact reached ''finality.'' According to the dissent, the Respondent promised that ''if the Union used the procedure and *if* the ballot count showed employee acceptance, Respondent would then be bound to a contract.'' Thus, the Respondent, as offeror, proposed not an exchange of promises, but the exchange of a promise (to be bound to the contract) for an act (the Union's submitting the final offer to a ratification vote) that would reveal whether the Respondent was bound (the employees voting in favor of ratification). Under the dissent's scenario, the salient fact remains that the Union had accepted the Respondent's unilateral contract offer by *full* performance when the Respondent sought to abandon the ratification procedure. In other words, the Union had submitted the offer to a ratification vote and, significantly, the employees had already cast their ballots. To conclude, as the dissent does, that ratification had not reached ''finality'' merely because the mediator had not counted the ballots is to accord too much significance to the ministerial task of recording the tally, a routine process to determine the outcome of the parties' agreed-upon and fully implemented ratification procedure. Rather, we find that for all practical purposes, the ratification process was complete because the employees had already voted and, therefore, that the Respondent could not lawfully abrogate the procedure to ensure that the Union would be unable to communicate the possible acceptance of its final offer.

faced with the consequences of a negative vote. In these circumstances, we find, contrary to the judge, that the employees may have accepted the final offer when the Respondent repudiated the ratification procedure and withdrew its final offer. In any event, the judge's opinion, or our own, as to the possible outcome of the employees' ratification vote is not the issue. The stipulated facts state that the vote, which had already been taken, and not the Union's recommendation to the employees, would determine whether the Union would sign the agreements.

Moreover, because the employees had already voted to either accept or reject the contract when the Respondent withdrew its offer, it is immaterial whether the Respondent's conduct came in the midst of ''actual'' or ''imminent'' acceptance. In this regard, the timing of the Respondent's conduct supports a finding of bad faith and distinguishes this case from *Loggins Meat Co*.[6] In *Loggins*, as in this case, the union did not accept the employer's final contract proposal but agreed to submit the proposal to the unit employees for a ratification vote, with a recommendation against acceptance. Although the employees voted in favor of the proposal, the Board, relying on the contract principle that an acceptance is not effective until communicated to the offeror,[7] refused to find that the employer's subsequent withdrawal of its wage offer was unlawful because the employer withdrew the offer before the employees' acceptance was communicated. In this case, unlike *Loggins*, the Respondent itself selected the December 7 date by which the mediator would count the ballots. Just 3 days before that date, however, the Respondent unilaterally precluded a determination of whether the employees had ratified the contract, thus ensuring that the Union would be unable to communicate the possible acceptance of its final offer that would trigger the formation of a binding contract.[8]

It is the Board's obligation ''to protect the process by which employers and unions may reach agreements with respect to terms and conditions of employment.''[9] To permit the Respondent to prevent the mediator from counting the ratification ballots when the final offer may already have been accepted would undermine this obligation and the Act's policy of promoting stable labor relations.[10] In *Felbro, Inc*., above, the Board agreed with the judge's finding that the employer was not permitted to withdraw its final offer, which had been accepted by the union, at a time when it had informal notice of the agreement's ratification but had not received official notification of that fact from union officials. Relying on the premise that Federal labor policy encourages the formation of collective-bargaining agreements,[11] the judge in *Felbro* characterized the provision of official notice of ratification as a ''ministerial'' task, and certainly an insufficient basis on which to withdraw a contract proposal.[12] In analogy with the judge's reasoning in *Felbro*, we find that in this case the Respondent should not be permitted to breach the ground rules for collective bargaining by curtailing an agreed-upon ratification procedure that was complete except for the mediator's ''ministerial'' task of counting the ratification ballots.[13]

Thus, although we agree with the General Counsel that the Respondent violated Section 8(a)(5) by withdrawing from the ratification agreement, we disagree with his contention that this case is analogous to *Sea Bay Manor Home for Adults*,[14] in which the Board found that the employer violated Section 8(a)(5) by refusing to abide by a stipulation agreement to submit the contract under negotiation to interest arbitration. We find the cases distinguishable. Although an interest arbitration clause, like a ratification clause, is typically a permissive subject of bargaining,[15] the Board found that the clause in *Sea Bay* assumed the characteristics of a mandatory subject because the parties agreed to the arbitration during contract negotiations and designated arbitration as the means of establishing the contract's terms and conditions of employment; thus, the arbitration was, in effect, a substitute for further negotiations over mandatory subjects.

The General Counsel contends that the ''special circumstances'' of *Sea Bay* are present in this case because, after being unable to reach agreement during bargaining negotiations, the parties agreed to have the contract's unresolved mandatory terms decided by employee vote. As noted above, however, in this case the record contains no copy of the ratification procedure

[6] 206 NLRB 303, 307–308 (1973).

[7] The Board cited *Williston on Contracts*, 3d ed. vol. 1, sec. 70.

[8] The Board in subsequent cases has sought to distinguish or limit *Loggins*. See *Tri-Produce Co*., 300 NLRB 974, 974 fn. 2 (1990); *Ben Franklin National Bank*, 278 NLRB 986, 986 fn. 2, 993–994 (1986) (technical rules of contract law do not necessarily control the making of collective-bargaining agreements); *Felbro, Inc*., 274 NLRB 1268, 1282 (1985), enfd. in pertinent part sub nom. *Garment Workers Local 512 v. NLRB*, 795 F.2d 705 (9th Cir. 1986).

[9] *Sea Bay Manor Home for Adults*, 253 NLRB 739 at 741 (1980).

[10] See 29 U.S.C. § 151.

[11] See *Pepsi-Cola Bottling Co. v. NLRB*, 659 F.2d 87, 89 (8th Cir. 1981).

[12] The Ninth Circuit, in upholding the Board's finding that the employer in *Felbro* unlawfully failed to execute the contract, reasoned that because the parties' ground rules specified ''ratification'' as the critical act, and not notification of the ratification vote, then even under traditional rules of contract law, the parties' own expressed intent would govern. Above, 795 F.2d at 713.

[13] Cf. *Long Island Day Care Services*, 303 NLRB 112, 129 (1991), in which the Board found that the employer violated Sec. 8(a)(5) and (1) by delaying the submission of a conditionally approved collective-bargaining agreement to its board of directors for ratification vote.

[14] 253 NLRB 739 (1980), enfd. mem. 685 F.2d 425 (2d Cir. 1982).

[15] Chairman Gould is of the view that interest arbitration is a mandatory subject of bargaining. See *Sheet Metal Workers Local 162 (Dwight Lang's Enterprises)*, 314 NLRB 923, 926 fn. 12 (1994).

and few details concerning it. Under the circumstances, we find insufficient evidence to conclude that the ratification at issue here, like the interest arbitration procedure in *Sea Bay*, is ''so intertwined with the mandatory terms and conditions for the contract being negotiated as to take on the characteristics of the mandatory subjects themselves.''[16] For example, in contrast to the procedure in *Sea Bay* which set the contract's terms in place of further collective bargaining, the ratification procedure here, if the employees have voted *against* ratification, would not determine the contract's terms on mandatory subjects or preclude further contract negotiations.

Although the record contains insufficient evidence to find that the parties' ratification agreement was designed to establish the contractual terms and conditions of employment, as in *Sea Bay*, however, it is undisputed that ratification was the agreed-upon mechanism through which the Union would accept or reject the Respondent's final offer.

Because, as noted above, ratification of a contract is a permissive subject of bargaining,[17] neither party could have compelled the other to acquiesce to a proposal that it be used or to its terms. When, however, the parties have discussed ratification during negotiations and have agreed to use it as a tool in formulating a collective-bargaining agreement, the Board has countenanced a union's failure to follow the ratification procedures as a defense to 8(a)(5) charges alleging an employer's refusal to execute an agreed-upon contract.[18] The Board has thereby recognized that, through mutual agreement, the parties can make ratification an integral part of the bargaining process.[19]

Based on the above, we find that the Respondent violated Section 8(a)(5) by repudiating the agreed-upon ratification procedure. The evidence discussed above clearly indicates that the parties entered into an agreement on how to proceed with negotiations. The Board has found that the repudiation of agreements of this nature violates the duty to bargain in good faith.[20] Applying this principle, we find that the Respondent's conduct in advising the mediator not to count the ratification ballots constituted bad-faith bargaining. It follows that where the Respondent had agreed to the mechanisms for the Union's acceptance or rejection of its final contract offer, and the procedure had been substantially completed, the Respondent was not privileged to withdraw its offer. We therefore find that the Respondent further violated Section 8(a)(5) and (1) by withdrawing its final contract offer.[21]

CONCLUSION OF LAW

By repudiating the agreed-upon ratification procedure and withdrawing its final contract offer with respect to unit 3, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order the Respondent to cease and desist and to take certain affirmative action to effectuate the policies of the Act. We shall order the Respondent to advise the mediator to open and count the unit 3 ratification ballots and, if the employees have ratified the Respondent's November 8, 1992 final offer in accordance with the Union's ratification procedures, the parties shall enter into a binding collective-bargaining agreement.[22] If the employees have voted against ratification, then we shall order the Respondent, on request, to bargain in good faith with the Union with respect to terms and conditions of employment.

ORDER

The National Labor Relations Board orders that the Respondent, American Protective Services, Inc., Oakland, California, its officers, agents, successors, and assigns, shall

[16] See *Tampa Sheet Metal Co*., 288 NLRB 322 at 326 fn. 12 (1988).

[17] *Hertz Corp*., 304 NLRB 469 at 469 (1991) (citing *Allied Chemical Workers Local 1 v. Pittsburgh Plate Glass Co*., 404 U.S. 157 (1971)).

[18] *Beatrice/Hunt-Wesson*, 302 NLRB 224 (1991). Cf. *R.P.C. Inc*., 311 NLRB 232, 234 fn. 13 (1993); *Hertz Corp*., above. Contrast *Childers Products Co*., 276 NLRB 709 (1985), affd. mem. 791 F.2d 915 (3d Cir. 1986)(statement on standard agreement that it was subject to ratification was internal matter when parties never discussed ratification or its meaning during negotiations).

See also *Nichols Homeshield, Amsco Div*., NLRB General Counsel Advice Memo, Case No. 18–CA–8439, 114 LRRM 1287 (1983) (Board's General Counsel refused to issue a complaint against an employer that insisted that the union honor an agreement to permit nonmembers to vote on the contract's ratification, reasoning that the union had acquiesced in the demand and could not evade its agreement with the employer).

[19] See *Beatrice/Hunt-Wesson*, above at 224 fn. 1.

[20] See *Natico, Inc*., 302 NLRB 668 at 668 (1991) (parties' agreement to implement an incentive wage proposal for a trial period in order to enable both parties to determine whether it should be included in the collective-bargaining agreement was an agreement by the parties on how to proceed with negotiations that was not subject to repudiation).

[21] Because of this nexus between the 8(a)(5) violations, we find it unnecessary to reach whether the Respondent demonstrated good cause or the absence of bad faith by withdrawing its final offer. Cf. *Natico*, above.

[22] Although the General Counsel has requested the Board to order the Respondent to reinstate its final offer, we find that such reinstatement would be redundant under the circumstances here. The employees had already voted to either accept or reject the contract when the Respondent unlawfully withdrew its offer, and we have ordered the Respondent to abide by the agreed-upon procedure to determine whether the Union has accepted its offer. Thus, the final offer remains on the table for the purpose of determining whether the Union accepted it.

1. Cease and desist from

(a) Refusing to bargain collectively with International Union of Security Officers by repudiating the agreed-upon ratification procedure by advising the mediator to not count the unit 3 ratification ballots.

(b) Withdrawing its final contract offer when the agreed-upon ratification procedure had been substantially completed.

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

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

(a) Advise the mediator to open and count the unit 3 ratification ballots and thereafter take appropriate action in accordance with the terms of the ratification agreement, as set forth in the remedy section of this decision.

(b) On request, bargain with the Union as the exclusive collective-bargaining representative of the unit 3 employees with respect to terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. Unit 3 is:

> All full-time and regular part-time employees employed by Respondent as guards, watchmen, patrolmen, fire patrol, and/or security officers in the cities of Fremont and Newark in Alameda County, San Mateo County and that portion of Santa Clara County located north of County Road G10, excluding all employees of Respondent covered by the agreement between the Union and Respondent known as the ''Waterfront Agreement,'' office clerical employees, professional employees, and supervisors as defined in the Act.

(c) Post at its facility in Oakland, California, copies of the attached notice marked ''Appendix.''[23] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

MEMBER COHEN, dissenting.

Contrary to my colleagues, I agree with the judge and I find that the Respondent did not violate Section 8(a)(5) and (1) by withdrawing from a contract ratification procedure.[1]

The parties stipulated that during negotiations for a successor contract the Union did not agree to the Respondent's proposals. It did, however, state its intention to submit the proposals to the employees in each of the five bargaining units.[2] The stipulation says:

> The Union did not accept any of the offers extended by Respondent, but stated that it intended to submit the offers for a vote among Respondent's employees. The Union advised Respondent that it would recommend to its members that they not accept Respondent's offers. It was understood by the parties that, if the employees ratified the agreements, in accordance with the Union's ratification procedures, they would enter into a binding contract(s).

The ballots were mailed. They were to be returned to a mediator, and then counted on December 7.

On December 4, an employee in one of the units filed a decertification petition and the Respondent instructed the mediator not to count the ballots in that unit. The petition was not supported by a majority of the unit employees. Although the Respondent offered to submit a new contract proposal, the Union declined to negotiate until the ratification ballots were counted.

The majority concludes that the ratification procedure set forth ''ground rules'' for negotiations. Therefore, they find that the Respondent violated the Act by repudiating the procedure. Further, because they find that the procedure was substantially completed, the Respondent could not withdraw its final offer, and such withdrawal therefore additionally violated the Act.

Based on the stipulation, I find that the evidence fails to establish that there was a bilateral agreement to utilize the ratification procedure. Phrased differently, there was not a promise for a promise. The Union did not promise to use the ratification procedure. It simply stated its *intention* to use that procedure. Thus, for example, if the Union had changed its intention and decided not to use the procedure, it was free to do so. Similarly, the Respondent's promise was simply that *if* the Union used the procedure and *if* the ballot count showed employee acceptance, the Respondent would then be bound to a contract.

My colleagues point to the fact that the Respondent agreed to supply mailing labels to the Union. This fact does not establish, however, a bilateral agreement to use the ratification procedure. Rather, this fact merely reaffirms that the Union *intended* to use that proce-

[23] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals enforcing an Order of the National Labor Relations Board.''

[1] I concur in the majority's adoption of the judge's dismissal of the allegation of unlawful solicitation.

[2] This case involves only one of the units.

dure. Consistent with that intent, the Respondent would provide mailing labels.

My colleagues also argue that the Union, in its letter to employees, spoke of an agreement between the Respondent and the Union. The contention has no merit. A party does not establish an agreement simply by declaring that one exists.

In sum, there was no bilateral agreement to use, much less follow through with, a ratification procedure.[3] There was only an agreement to the consequences that would flow if the procedures were used to finality and if the count showed employee approval.

As there was no bilateral agreement to use and follow through with the ratification procedure, it follows that either party was free to abandon the procedure at any time prior to finality. That is precisely what the Respondent did.[4]

Further, assuming arguendo that there was a bilateral agreement, there would nonetheless be no violation of Section 8(a)(5). The subject of employee ratification is an internal union matter and is therefore not a mandatory subject of bargaining.[5] It follows that the breach of an agreement to utilize employee ratification is not a violation of Sections 8(a)(5) or 8(b)(3).[6] Accordingly, the Respondent's breach of the agreement (assumed arguendo) did not violate Section 8(a)(5) of the Act.

Thus, I conclude that the Respondent did not violate the Act, and I would dismiss the complaint.

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 has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with International Union of Security Officers by repudiating the agreed-upon ratification procedure by advising the mediator to not count the unit 3 ratification ballots.

WE WILL NOT withdraw our final contract offer when the agreed-upon ratification procedure had been substantially completed.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL advise the mediator to open and count the unit 3 ratification ballots and thereafter take appropriate action in accordance with the terms of the ratification agreement.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of the unit 3 employees with respect to terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. Unit 3 is:

> All full-time and regular part-time employees employed by us as guards, watchmen, patrolmen, fire patrol, and/or security officers in the cities of Fremont and Newark in Alameda County, San Mateo County and that portion of Santa Clara County located north of County Road G10, excluding all our employees covered by the agreement between the Union and us known as the ''Waterfront Agreement'', office clerical employees, professional employees, and supervisors as defined in the Act.

AMERICAN PROTECTIVE SERVICES, INC.

[3] Cf. *Beatrice/Hunt-Wesson*, 302 NLRB 224 (1991), where there was a bilateral agreement to use ratification procedures and indeed an agreement as to how the procedures would operate.

[4] My colleagues argue that finality had been reached, i.e., all conditions had been met. They are in error. The final condition was not the casting of the ballots; it was the counting of the ballots by a mediator. That event never occurred.

[5] *North Country Motors*, 146 NLRB 671 (1964). See also *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958).

[6] *Allied Chemical Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971).

Valerie Hardy-Mahoney, Esq., for the General Counsel.
Judy S. Coffin (Littler, Mendelson, Fastiff & Tichy & Mathiason), for the Respondent.
Victor C. Thuesen, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge. This proceeding, in which a hearing was held before me on September 27, 1993, is based on an unfair labor practice charge filed by International Union of Security Officers (the Union), on December 14, 1992, and on a complaint issued on February 25, 1993, on behalf of the General Counsel of the National Labor Relations Board (the Board), by the Regional Director for Region 32, alleging that American Protective Services, Inc. (Respondent) engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act).

The complaint, in substance, alleges the following violations of the Act: by issuing a memo on December 7, 1992,[1] to its employees represented by the Union, which encouraged and solicited the employees employed in units 4 and 5 to file petitions with the Board seeking the decertification of the Union as the employees' bargaining representative, Respondent violated Section 8(a)(1) of the Act; violated Section 8(a)(5) and (1) of the Act, when, on December 4, it withdrew a final contract proposal previously submitted to the Union covering the employees employed in unit 3; and, further violated Section 8(a)(5) and (1), when, on December 4,

[1] All dates are in 1992 unless otherwise indicated.

it refused to honor an agreement with the Union, pursuant to which Respondent and the Union had agreed that the unit 3 employees would vote whether or not to accept Respondent's final contract proposal.[2] In its answer to the complaint filed on March 11, 1993, Respondent denied the commission of the alleged unfair labor practices.[3]

On the entire record, and after considering the posthearing briefs filed by the General Counsel and Respondent, I make the following[4]

FINDINGS OF FACT

I. ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*[5]

Respondent, a corporation with an office and place of business in Oakland, California, is engaged in the business of providing security services for its customers. Since at least 1985, and at all times material, the Union has been the exclusive collective-bargaining representative of Respondent's employees employed as guards, watchmen, patrolmen, fire patrol men, and/or security officers. Respondent recognizes the Union as the exclusive bargaining representative of these employees in five separate bargaining units. These units (units 1–5, respectively) are defined by their geographic location: Contra Costa County and Northern Alameda County (unit 1); city and county of San Francisco (unit 2); cities of Fremont and Newark in Alameda County, San Mateo County and that part of Santa Clara County located north of County Road G10 (unit 3); counties of San Joaquin, Stanislaus and Merced (unit 4); and counties of Fresno, Madera, Marin, Kings, Tulare, and that part of Santa Clara County south of County Road G10 (unit 5).

The employees in units 1 through 3 were covered by separate collective-bargaining agreements between Respondent and the Union effective from October 1, 1990, through September 30, 1992, and the employees employed in units 4 and 5 were covered by separate collective-bargaining agreements between Respondent and the Union effective October 1, 1989, through September 30, 1990 (unit agreements 1–5).

Beginning on or about August 21 and continuing through on or about November 8, the Union and Respondent engaged in collective bargaining over the terms and conditions of successor agreements for each of its five collective-bargaining agreements. On or about November 8 Respondent presented the Union with its ''last, best and final'' offer for each of the five bargaining agreements. The Union did not accept any of the offers extended by Respondent but stated it intended to submit the offers for a vote among Respondent's employees. The Union advised Respondent it would recommend to its members that they not accept Respondent's offers. It was understood by the parties that if the employees ratified the agreements, in accordance with the Union's ratification procedures, Respondent and the Union would enter into ''a binding contract(s).''

On or about November 9, the Union sent a ratification ballot to Respondent's employees with a cover letter which set forth what the Union considered to be the significant provisions of Respondent's last offer, explained why the Union felt that it was not an offer the employees should accept, recommended that the employees vote to reject the offer and to authorize the Union to call a strike to get Respondent to change its bargaining position.

After mailing the initial ratification ballots to its members, the Union began receiving calls from employees who had not received ballots. Other ballots were returned to the Union due to employees' change of addresses. At the same time, the Company began receiving calls from employees who had not received ratification ballots. Company officials notified the Union of these calls. Because of the confusion in the balloting process, the Union extended the time for receipt of ballots to November 24.

Even with the extended deadline, the Union continued to have problems with the balloting process. Because of the problems, the Union's vice president, Robert Ulreich, on or about November 24, called Respondent's president, Dwight Pedersen. Ulreich explained to Pedersen the problems with the balloting process and asked if Respondent would be willing to provide the Union with a ''Label List'' of the employees. In the past Respondent had given the Union a current listing of employees printed on mailing labels so the Union could mass mail various documents to Respondent's employees. The mailing labels contain only the employee's name and home address and do not include their work location or address.

On November 24 Pedersen called Ulreich back and told him Respondent was willing to print mailing labels and provide them to the Union, if the Union would agree that: (1) no further campaigning for or against ratification be undertaken by either side; (2) the ratification vote ballots be counted by a state or Federal mediator; (3) the ballots be counted no later than December 7; (4) Respondent assist the Union in stuffing the envelopes containing the new ratification ballots; (5) a joint letter would be included with the ratification ballots which would be signed by both parties; and (6) the parties split the cost of postage. Ulreich agree to all of the aforesaid conditions.

Thereafter, Ulreich and Pedersen jointly drafted a letter to the employees which was included with the new ratification ballots. The Union and Respondent also agreed that Tony Capello would serve as the mediator for the vote count. On or about November 25 the new ballots with the joint letter from the Union and the Company were mailed.

On December 4, a decertification petition was filed by one of Respondent's employees, Stan Ohman, seeking to decer-

[2] The complaint also alleged that Respondent's alleged unlawful refusals to bargain, described supra, encompassed the employees represented by the Union who were employed by Respondent in units 4 and 5. At the start of the hearing, however, all the parties to this proceeding, with my approval, entered into a settlement agreement which disposed of those allegations.

[3] Respondent, in its answer to the complaint, admits it is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act and meets the Board's applicable discretionary jurisdictional standard. Also, the Respondent's answer, as amended by the stipulation of facts entered into by the parties, admits that the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

[4] Respondent's motion to strike certain portions of the General Counsel's brief is denied in its entirety because the motion is really a reply brief, the Board's Rules and Regulations do not provide for reply briefs at this stage of the proceeding, and Respondent did not seek my permission to file a reply brief.

[5] The facts are based on the stipulation of facts (Jt. Exh. 2) entered into by the parties.

tify the Union as the collective-bargaining representative of Respondent's employees employed in unit 3, the unit whose employees were covered by the expired collective-bargaining agreement sometimes referred to as agreement 3.

The decertification petition was docketed by the Board's Regional Office as Case 32–RD–1112. In filling out the petition, Petitioner Ohman wrote in the appropriate spaces that there were at present approximately 200 employees employed in unit 3 and that the petition was supported by 30 percent or more of the employees in that unit. Section 101.18 of the Board's Statements of Procedure requires that a decertification petition must be supported by the signatures of at least 30 percent of the voting unit or the Board will not process it.

The decertification petition was supported by 61 signatures submitted with it to the Board's Regional Office. These signatures did not constitute 30 percent or more of the unit 3 employees, because there were approximately 576 employees employed in unit 3.

On December 4 Respondent received a copy of the decertification petition. It was personally delivered by Petitioner Ohman to Respondent's chief negotiator, Thomas Sutak. In response, on December 4 Respondent sent a letter to Union Vice President Ulreich stating Respondent was withdrawing its final proposal for agreement 3 and would make a new proposal within 10 days. The exact language contained in this letter was: ''We have reviewed our final proposal for Agreement 3 and are withdrawing it at this time. We will make a new proposal to you within ten days.''

Also, on December 4, Respondent sent a letter to Federal Mediator Capello notifying him of Respondent's withdrawal of its final contract proposals for agreements 3, 4, and 5 and requesting that he not count the ratification ballots for those agreements. In this regard, Respondent's letter to Capello reads:[6]

> Today, we withdrew our final proposals to the IUSO for Agreements 3, 4 and 5. Accordingly, we are requesting that you not count the ratification ballots for these agreements on Monday, December 7. Within the next several days, we may offer other proposals for these agreements. We would request that you hold and not count these ballots.
>
> We have not withdrawn our proposals for Agreements 1 and 2 and request that the ballot count continue as scheduled for those agreements.

Federal Mediator Capello did not count the ballots for agreements 3, 4, and 5. He did, however, count the ballots for agreements 1 and 2.

On or about December 7 the Respondent sent a letter to all employees covered by agreement 3 advising them of Respondent's actions. This letter reads as follows:

> Re: Status of Union Negotiations—Agreements 3, 4 & 5
>
> As you are aware, we failed to reach an agreement with the union in our labor negotiations. This is called impasse. The union put our final offer out to a vote for either ratification or a strike. The first vote was highly disorganized and the results questionable, so the union decided to scrap it and hold a revote. We assisted. The new results were due to be counted today.
>
> But in the interim period we were inundated with complaints from our employees about the requirement for union membership and the requirement to pay dues for no apparent services. Many, many of our employees wanted to know why they had to join, and how they could get rid of the union. Our **ONLY LEGALLY PERMISSIBLE RESPONSE** is that the inquiring employee must direct his or her questions to the National Labor Relations Board.
>
> Well, apparently one of our employees took that response to heart, because we have been notified by the NLRB that a petition has been filed by a group of our employees who wish to decertify the union as their representative and bargaining agent. This petition pertains to all our employees covered by Agreement #3 in our San Jose, Santa Clara and San Mateo branches. The clamor has been just as loud in the San Joaquin Valley, but we have not as yet received any petition from the valley.
>
> For this reason, APS has withdrawn our final offers for labor agreements #3, #4 and #5 from the bargaining table. The new and improved health plan has already been implemented, so it is not being withdrawn. It is our firm belief that we must rethink our offers and the nature of our union agreements in light of our employees' very strong negative feelings about union representation. San Francisco and East Bay areas are so far unaffected by this action.
>
> We will communicate with you again just as soon as we have determined what course our company should adopt on behalf of our employees.

Since the withdrawal of Respondent's final contract offer on December 4, the Union has refused Respondent's offer to meet for the purpose of presenting a new contract proposal with respect to agreement 3. The Union has taken the position that before further negotiations occur the ratification ballots for unit 3 should be counted and a determination made as to whether the employees in that unit voted for the contract. In view of the Union's position, at no time since December 4 has Respondent presented a new proposal for agreement 3.

Petitioner Ohman was notified by the Board's Regional Office, by its letter of December 14, that he needed additional signatures to cure his original showing of interest. The letter reads as follows:

> As a result of the administrative investigation of the showing of interest, it appears that there are 500 to 600 employees in the branches which you petitioned to decertify. You submitted about 61 signatures (we have not yet checked for duplicate signatures) in support of your petition. However, it appears that you will need to have 150 to 200 signatures in total.

[6] As noted, supra, the question of the legality of Respondent's withdrawal of its contract proposals for bargaining units 4 and 5 is no longer an issue in this case having been resolved by the parties' settlement agreement. I also note the parties stipulated that Respondent's withdrawal of its contract proposals for bargaining units 4 and 5 was not predicated on receipt of an NLRB decertification petition.

> You need to submit additional signatures in support of your petition, and those signatures must be received in the Regional Office prior to close of business on December 18, 1992. Otherwise, I will have no alternative but to recommend that the petition be dismissed for having an inadequate showing of interest.

On December 17 and 18, Ohman submitted 124 additional signatures to the Board's Regional Office in support of the petition's 30-percent showing-of-interest requirement. However, no further action has been taken by the Board's Regional Office concerning the petition because the processing of the petition has been blocked by the unfair labor practice allegations involved in this case.

The 124 additional signatures were dated as follows: 12–December 4; 16–December 5; 7–December 6; 15–December 7; 9–December 8; 1–December 9; 19–December 10; 10–December 11; 11–December 12; 3–December 13; 13–December 14; 7–December 15; and 1–December 16.

B. *Discussion*

1. Respondent's withdrawal of its ''last, best and final'' contract proposal

In early November Respondent presented the Union with its ''last, best and final'' contract offer for the employees represented by the Union employed in unit 3. The Union rejected the offer, but told Respondent it would submit it to a vote among the unit employees, with the recommendation that they reject it. Respondent and the Union, ''understood'' that if the unit 3 employees ratified the agreement, in accordance with the Union's ratification procedures, that Respondent and the Union would enter into a binding contract.

On December 4 a decertification petition was filed with the Board's Regional Office by one of the unit 3 employees in Case 32–RD–1112, seeking to decertify the Union as the exclusive representative of the unit 3 employees. Prior to December 4, the unit 3 employees had cast their ballots to decide whether to ratify the Respondent's ''last, best and final'' contract offer, but the ballots had not been counted by the Federal mediator responsible for counting the ballots, under the procedure agreed to by Respondent and the Union.

On December 4, upon its receipt of the decertification petition, Respondent informed the Union it had ''reviewed'' Respondent's ''last, best and final'' contract offer for unit 3 and was withdrawing it and would make a new proposal to the Union within 10 days.

On December 7 Respondent wrote to all the employees employed in unit 3 informing them, among other things, that a group of employees employed in unit 3 had filed a petition with the Board to decertify the Union as their bargaining representative and that it was for this reason Respondent had withdrawn its ''last, best and final'' contract offer for unit 3 and that it was Respondent's firm belief that ''[Respondent] must rethink our offer(s) and the nature of our union agreement(s) in light of our employees' very strong negative feelings about union representation.''

The parties stipulated that if Respondent's vice president for administration, Thomas Sutak, testified he would testify Respondent withdrew its ''last, best and final'' contract offer on December 4, solely based on Respondent's desire to reexamine its final contract offer in light of the decertification action by its employees and that, more specifically, Sutak would further testify that Respondent, in light of the decertification movement, wanted ''*to consider*'' withdrawing the union-security and dues-checkoff provisions included in the final contract offer. The parties further stipulated that neither the General Counsel nor the Charging Party had evidence to dispute this testimony.

Since the date of Respondent's December 4 withdrawal of its ''last, best and final'' contract offer covering unit 3, the Union has refused Respondent's offer to meet for the purpose of presenting a new contract proposal. The Union has taken the position that before further negotiations occur, the ratification ballots cast by the unit 3 employees should be counted and a determination made as to whether the unit 3 employees voted to accept Respondent's ''last, best and final'' contract offer. Thus, Respondent has been unable to present a new proposal to the Union for an agreement covering the unit 3 employees.

The complaint alleges that, on December 4, by withdrawing its ''last, best and final'' contract offer covering the unit 3 employees, Respondent refused to bargain with the Union within the meaning of Section 8(a)(5) of the Act, because ''Respondent has engaged in bad-faith bargaining by withdrawing tentative offers without demonstration of a good reason for doing so.''

The withdrawal of a contract proposal by an employer prior to its acceptance by the union does not in and of itself establish the absence of good-faith bargaining, but represents only one factor to be considered in determining whether the withdrawal of the contract proposal constitutes bad-faith bargaining. *NLRB v. Tomco Communications*, 567 F.2d 871, 877–878 (9th Cir. 1978); *Mead Corp. v. NLRB*, 97 F.2d 1013, 1023–1024 (11th Cir. 1983) (''[t]he withdrawal of previous proposals . . . does not in and of itself establish the absence of good faith''). Rather, in considering whether a party has failed to bargain in good faith by withdrawing its contract proposal, the Board looks to the totality of the circumstances reflecting the employer's motive for withdrawing the contract proposal, namely, whether the employer was motivated by a desire to avoid agreement or to frustrate bargaining, e.g., *Pennex Aluminum Corp.*, 271 NLRB 1205 (1984).

During the hearing, as discussed further infra, counsel for the General Counsel represented that the allegation that Respondent failed to bargain in good faith, when on December 4 it withdrew its contract offer, was established *solely* by the fact that the decertification petition relied on by Respondent to justify its withdrawal of the contract offer was defective on its face. In this regard, counsel stated, ''[t]he only evidence that the General Counsel has in support of the Respondent's absence of good faith is the fact that it was relying on a decertification petition that was defective on its face.'' In her posthearing brief, however, counsel now states that, besides the defective decertification petition, there are two other factors relied on by the General Counsel which, when considered together with the defective decertification petition, establish Respondent failed to bargain in good faith when it withdrew the contract proposal. These two additional factors are Respondent's December 7 letter to the employees that, as alleged in the complaint, unlawfully solicited employees represented by the Union to file decertification petitions and Respondent's repudiation of its ratification vote

agreement with the Union. For the reasons below, the General Counsel's contentions lack merit, and I find that there is insufficient evidence to establish that Respondent was bargaining in bad faith, when, on December 4, it withdrew its contract offer covering the unit 3 employees.

In her posthearing brief counsel for the General Counsel argues that because Respondent knew from the face of the decertification petition that petitioner Ohman had understated the number of unit 3 employees by almost 400, it follows Respondent must have also known that the decertification petition could not have been signed by 30 percent or more of the approximately 576 unit employees and because of this was invalid. It would not be permissible for me to draw this conclusion, however, because there is no evidence Respondent knew the number of employees who had signed the decertification petition and, based on the face of the petition, Respondent could have believed that a sufficient number of the approximately 200 employees, who Petitioner Ohman stated constituted the bargaining unit, had signed the petition, so as to meet the 30-percent requirement for a unit of approximately 576.[7]

In any event, the fact that the decertification petition incorrectly estimated the number of unit employees as approximately 200 rather than the approximately 576 who were in fact employed does not detract from the fact that Respondent had been placed on notice that an insignificant number of unit employees had supported a petition indicating they no longer desired union representation. Under the circumstances, in the light of the decertification movement, it was not unreasonable for Respondent to withdraw its contract offer for the purpose of ''*considering*'' whether to withdraw the union-security and dues-checkoff provisions contained in the offer. Although Respondent engaged in this conduct knowing that the unit employees' scheduled ratification vote had already been held, the Respondent also knew that the Union had recommended that the unit employees vote to reject Respondent's offer, and there was no reason for Respondent to anticipate that the unit employees would ratify Respondent's proposed agreement despite the Union's recommendation that they reject it. In other words, this is not a situation where an employer has withdrawn a contract proposal in the face of actual or even imminent acceptance by a union. Nor is this a situation when an employer has withdrawn a contract proposal and substituted a regressive proposal which on its face is the type of proposal the employer must have known the union could not accept. Here, in order to ''*consider*'' whether to withdraw the union-security and dues-checkoff provisions contained in the contract offer, Respondent withdrew its contract offer and offered to meet with the Union for the purpose of presenting a new contract proposal. However, the terms of Respondent's new proposal were never presented because of the Union's refusal to resume negotiations with the Respondent, preferring instead to resolve the legitimacy of Respondent's bargaining conduct by litigating this proceeding. Nor does the stipulated record contain evidence of what, if any, changes were included in the ''new'' contract proposal which Respondent would have presented to the Union, if the Union had accepted Respondent's offer to continue with the contract negotiations.

It is for the foregoing reasons that I find there is insufficient evidence to establish that Respondent's withdrawal of its December 4 contract offer for unit 3 was made in bad faith or for the purpose of avoiding agreement or obstructing bargaining. *Olin Corp.*, 248 NLRB 1137, 1141 (1980). See also *Aero Alloys*, 289 NLRB 497 (1988).

In so concluding I considered the General Counsel's contention that Respondent's bad faith in withdrawing the contract proposal was further established by Respondent's repudiation of its ratification vote agreement with the Union. As I have found, infra, Respondent's repudiation of this agreement does not constitute a refusal to bargain within the meaning of Section 8(a)(5) of the Act, as alleged in the complaint, inasmuch as it involves a nonmandatory subject of bargaining. Thus, Respondent was privileged, as far as the Act is concerned, to repudiate that agreement by instructing the Federal mediator to not count the ratification vote ballots casts by the unit 3 employees. Nor does the stipulated record contain evidence that Respondent was motivated by a desire to obstruct bargaining or to prevent the parties from entering into a collective-bargaining agreement when it instructed the Federal mediator not to count the ratification vote ballots. The evidence is to the contrary. For, it is undisputed that Respondent knew the Union had recommended to the unit employees that they vote to reject Respondent's contract proposal, and there was no reason for Respondent to anticipate that the unit employees would vote to accept Respondent's contract proposal despite the Union's recommendation that they reject it. Moreover, since Respondent's contract proposal was no longer on the bargaining table, having been withdrawn for a permissible reason, it was not unreasonable for Respondent to instruct the Federal mediator, who was responsible for counting the ratification vote ballots, not to count the ballots that had been cast by the unit 3 employees.

Likewise, without merit is the General Counsel's contention that Respondent's bad faith in withdrawing the contract proposal is established by the fact that, as alleged in the complaint, Respondent violated Section 8(a)(1) of the Act when, by its letter of December 7, it solicited the employees employed in units 4 and 5 to file decertification petitions. For the reasons set forth infra, I have found that Respondent did not engage in this conduct.

As I have indicated previously, the record in this case consists entirely of the parties' stipulation of facts entered into at the commencement of the hearing and the other stipulations entered into later during the hearing. The Charging Party, although a party to these stipulations, took the position there was other evidence, not contained in the stipulations, which was relevant to and supported the allegation that in

[7] Also without evidentiary support is the General Counsel's contention that the record establishes that, when, on December 4, employee Ohman personally delivered a copy of the decertification petition to the Respondent, that Respondent encouraged him to continue to solicit additional unit 3 employees to sign the petition so as to cure the defect in the petition. In support of this contention counsel points to the stipulation of facts which establish that Ohman, on a daily basis, continued to solicit additional signatures for the petition between December 4, when he delivered a copy of the petition to Respondent, and December 14, when he was informed by the Board's Regional Office that he needed to submit additional signatures in support of the petition. This evidence, however, by itself, does not establish that it was due to the encouragement or solicitation of Respondent that Ohman during this period continued to solicit employees to sign the petition, and there is no record evidence sufficient to warrant an inference as to what prompted Ohman to continue soliciting signatures during this period.

violation of Section 8(a)(5) of the Act, ''Respondent has engaged in bad faith bargaining by withdrawing tentative offers without demonstration of a good faith reason for doing so.''

In this regard, counsel for the Charging Party represented that the Charging Party was prepared to prove the following: Respondent unlawfully assisted Petitioner Ohman in Case 32–RD–1112 when he filed the decertification petition relied upon by Respondent to justify the withdrawal of its contract proposal; and, after the employees in units 1 and 2 voted to ratify Respondent's contract offers for those units, Respondent attempted to change the seniority provision contained in those offers, and only after the Charging Party filed an unfair labor practice charge alleging that Respondent's conduct in this respect was unlawful did Respondent change its position and sign the contracts containing the seniority provision that the Union contended had been embodied in Respondent's final contract proposal ratified by the employees.

The Charging Party's contention that Ohman filed the decertification petition with Respondent's unlawful assistance was the subject of two unfair labor practice charges filed against Respondent by the Charging Party, which the Board's Regional Office, after investigations, found were without merit. Likewise, the Charging Party's contention that Respondent attempted to change the seniority provision of its final contract proposals for units 1 and 2, after those proposals were ratified by the units' employees, was the subject of an unfair labor practice charge filed by the Charging Party with the Board's Regional Office against Respondent. This charge was withdrawn by the Charging Party when, following the filing of the charge, Respondent changed its position regarding the contractual seniority provision and signed the agreements submitted to it by the Charging Party.

Counsel for the General Counsel objected to the Charging Party's attempt to litigate the matters set forth in its above-described offers of proof. In a prehearing telephone conference and at the start of the hearing, counsel for the General Counsel argued that whether Respondent had provided illegal assistance to the employee who filed the decertification petition and whether Respondent unlawfully refused to execute the agreements ratified by the employees employed in units 1 and 2, were not matters encompassed by paragraph 10(d) of the complaint, as contended by the Charging Party, and that the Charging Party's efforts to litigate those matters constituted an effort by the Charging Party to expand the theory of the complaint over the objection of the General Counsel. In support of this argument, counsel for the General Counsel represented that the General Counsel's theory for paragraph 10(d) of the complaint, which alleges that ''Respondent has engaged in bad faith bargaining by withdrawing tentative offers without demonstrating a good faith reason for doing so,'' was that the decertification petition relied on by Respondent for withdrawing its contract proposal covering the unit 3 employees was not a valid decertification petition. More specifically, counsel represented that ''[t]he *only evidence* that the General Counsel has in support of the Respondent's absence of good faith [referring to the allegations in paragraph 10(d) of the complaint], is the fact that it was relying on a decertification petition that was defective on its face.'' (Tr. 24–25.) As I have discussed supra, however, in her posthearing brief counsel for the General Counsel now asserts that the totality of the circumstances which establishes Respondent acted in bad faith when it withdrew its unit 3 contract proposal includes not only the fact that Respondent relied on a defective decertification petition to justify the withdrawal, but engaged in the following additional conduct—realizing the decertification petition was defective, Respondent encouraged Petitioner Ohman to cure the defect by soliciting additional signatures by its letter of December 7 unlawfully solicited the employees employed in units 4 and 5 to file decertification petitions and, repudiated its ratification vote agreement with the Union.

I agreed with counsel for the General Counsel that the Charging Party's offer to prove unlawful assistance by the Respondent in the filing of the decertification petition and to prove Respondent unlawfully refused to sign the agreements for units 1 and 2 were matters not encompassed by the theory of the complaint, as specifically clarified by the General Counsel during the prehearing telephone conference call and on the record at the hearing, and for that reason I ruled that I was without authority to expand the theory of the complaint, as requested by the Charging Party, over the objection of the General Counsel. See *Sheet Metal Workers Local 104 (Brisco Sheet Metal)*, 311 NLRB 99 (1993), and cases cited therein.

Alternatively, I ruled that even if I had erred in concluding that the General Counsel's theory of the complaint precluded the Charging Party's offer to prove that Respondent had illegally assisted Petitioner Ohman when he filed the decertification petition, I was of the opinion that the facts set forth in the Charging Party's offer of proof failed to establish illegal assistance, and for that *additional* reason I rejected that Charging Party's offer of proof. Now that I have had an opportunity to consider at greater length the Respondent's offer to prove illegal assistance, I find no reason to reverse my ruling that accepting the facts set forth in the offer of proof as true, they are legally insufficient to establish unlawful assistance.

In ruling at the hearing that the General Counsel's theory of the case precluded the Charging Party from introducing evidence which would establish that the decertification petition relied on by Respondent to withdraw its contract proposal was the product of Respondent's illegal assistance, I indicated that, because of Respondent's use of the decertification petition as a defense to the allegation that its withdrawal of its unit 3 contract proposal was unlawfully motivated, my ruling was not free from doubt because it could be reasonably argued that because Respondent had made an issue of the bona fides of the decertification petition by raising it as a defense, the Charging Party was privileged to present evidence challenging the petition's legality, regardless of the General Counsel's theory of the complaint. In view of the position taken by counsel for the General Counsel in her posthearing brief that, as set forth supra, substantially expands the General Counsel's theory from what was represented at the hearing, I am of the view that my ruling precluding the Charging Party from presenting evidence to establish that the decertification petition was the product of Respondent's unlawful assistance is now even more questionable. I have not reopened the hearing, however, to permit the Charging Party to present its evidence on this issue because, as I ruled at the hearing, which ruling I have reaffirmed supra, the facts set forth in the Charging Party's offer of proof are insufficient to establish unlawful assistance.

I also ruled at the hearing that even if I had erred in concluding that because of the General Counsel's theory of the complaint the Charging Party was precluded from proving Respondent had changed the seniority provision of its final contract offers for units 1 and 2, after those employees had voted to accept the contract offers, that the facts set forth in the Charging Party's offer of proof, when viewed in the context of the other facts set forth in the parties' stipulation of facts, were legally insufficient to establish that Respondent had engaged in bad-faith bargaining by withdrawing its final contract proposal covering the unit 3 employees. Now that I have had an opportunity to consider this matter at greater length, I find no reason to change my ruling.

2. Respondent's repudiation of its agreement with the Union that the unit 3 employees would have the opportunity to vote on whether they would accept Respondent's ''last, best and final'' contract offer

In November the Union rejected Respondent's ''last, best and final'' contract offer for unit 3, but told Respondent it would submit the offer to a vote by the unit employees with the recommendation that they reject it. It was ''understood'' by Respondent and the Union that if the unit 3 employees voted to accept the Respondent's contract offer that the Union would likewise accept the offer.

After the Union scheduled the ratification vote and mailed the ballots to the unit 3 employees, it discovered that a substantial number of employees had not received their ballots, apparently because the Union did not have their current home addresses. As a result, on or about November 24 the Union met with Respondent and explained the problems it was having with the balloting process and asked if Respondent would be willing to provide the Union with a ''label list''; a list of the unit employees and their home addresses, printed on mailing labels. Respondent agreed to provide the Union with a ''label list'' of the unit 3 employees, if the Union agreed that the ratification procedure would be conducted pursuant to certain rules and regulations which Respondent enumerated. One of these rules was that the ratification vote ballots be counted by a state or Federal mediator and be counted no later than December 7. The Union agreed to conduct the ratification procedure according to the rules and regulations proposed by Respondent and Respondent furnished the Union with the ''label list.''

On December 4 a decertification petition was filed by one of the unit 3 employees with the Board's Regional Office in Case 32–RD–1112, seeking to decertify the Union as the exclusive representative of the unit 3 employees. Prior to December 4 the unit 3 employees had cast their ballots to decide whether to accept the Respondent's ''last, best and final'' contract offer, but the ballots had not been counted by Federal Mediator Capello, who had been designated to count the ballots under the ratification procedure agreed to by Respondent and the Union.

On December 4, upon receipt of the decertification petition, Respondent sent a letter to Federal Mediator Capello notifying him, among other things, of Respondent's withdrawal of its ''last, best and final'' contract offer for unit 3 and requesting that Capello not count the ballots cast by the unit 3 employees, as called for by the ratification procedure agreed to by Respondent and the Union, but instead to hold those ballots. The Federal mediator has complied with Respondent's request.

Based on the foregoing, I find that after the Union had decided to submit Respondent ''last, best and final'' contract proposal to a ratification vote to expedite and regulate the balloting the Union entered into an agreement with Respondent whereby they agreed that Respondent would supply the Union with the names and home addresses of the voters on printed envelope labels and that, in connection with the conduct of the balloting, the Union and Respondent would abide by certain rules and regulations one of which was that the ballots would be counted no later than December 7 and be counted by Federal Mediator Capello. I also find that on December 4 Respondent repudiated its aforesaid agreement with the Union when it instructed Federal Mediator Capello not to count the ballots.[8]

The complaint alleges that by refusing to allow the Federal mediator to count the ratification ballots cast by the unit 3 employees, Respondent refused to honor the terms of an agreed-upon ratification balloting procedure and that by engaging in this conduct Respondent refused to bargain with the Union within the meaning of Section 8(a)(5) of the Act because, as the complaint alleges, ''Respondent has abrogated the ratification procedure.[9] This allegation lacks merit for the reasons below.

The subject of the ratification by employees of a collective-bargaining contract and the procedure used to conduct such a contract ratification vote are internal union matters that are ordinarily of no legitimate concern to the employer and because of this are permissive subjects, rather than mandatory subjects, of bargaining. See *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349–350 (1958). See also *Hertz Corp.*, 304 NLRB 469 (1991). (''It is true that ratification is only a permissive subject of bargaining.'') In view of this, under the authority of *Chemical Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), the Respondent's breach of its agreement with the Union, that Federal Mediator Capello would count the ratification ballots cast by the employees employed in unit 3 and do so no later than December 7, does not constitute a refusal to bargain within the meaning of Section 8(a)(5) of the Act. See also *Tampa Sheet Metal Co.*, 288 NLRB 322, 325–326 (1988).

Painters Local 1385 (Associated Building Contractors), 143 NLRB 678 (1963), is distinguishable in significant respects from the instant case. There, the respondent union and the employer reached a verbal agreement on all the terms of a collective-bargaining contract, which included a provision for an industry advancement program, a nonmandatory subject of bargaining. When the employer reduced the parties' verbal agreement into writing for the respondent union to

[8] I reject Respondent's contention that it had no obligation under the parties' agreement to refrain from obstructing the implementation of the provisions of the agreement, but that its only obligation was to supply the Union with the ''label list.''

[9] In her posthearing brief counsel for the General Counsel does not, as alleged in the complaint, contend that Respondent's repudiation of the ratification vote agreement constitutes a refusal to bargain within the meaning of Sec. 8(a)(5) of the Act, but, as I have found, infra, concedes that by engaging in this conduct Respondent did not refuse to bargain within the meaning of Sec. 8(a)(5), because the ratification vote agreement concerns a nonmandatory subject of bargaining.

sign, the union refused to sign the agreement because it contained the industry advancement program provision. The Board held that the respondent union's refusal to sign the agreed-upon contract violated Section 8(b)(3) of the Act. However, the Board required the respondent union to sign the contract at the employer's request, not because Section 8(b)(3) reaches permissive terms, but because the union's refusal obstructed the execution of an agreement on mandatory terms (143 NLRB at 680). This is not such a case. Here, Respondent's repudiation of its ratification vote agreement with the Union, by its refusal to allow the Federal mediator to count the ratification ballots, did not directly or indirectly obstruct the execution of an agreement on mandatory terms, because prior to the counting of the ballots, Respondent had withdrawn the contract offer which the employees had voted on, and, as I have found, supra, Respondent's withdrawal of its contract offer did not violate Section 8(a)(5), as alleged in the complaint.[10]

3. Respondent allegedly solicits employees employed in units 4 and 5 to file decertification petitions

As described in detail, supra, on December 7 Respondent sent a letter to the employees employed in unit 3 stating, among other things, although contract negotiations between Respondent and the Union had failed to produce agreements covering the employees in units 3, 4, and 5, the Union had agreed to allow the employees employed in those units to vote on whether to ratify Respondent's final contract offer or to strike: the ballots were due to be counted that day (December 7); between the date the employees voted and December 7, Respondent had received complaints from employees about the requirement that they join the Union and pay union dues, that employees had asked Respondent why they had to join the Union and how they could get rid of the Union; Respondent's only legal permissible response to the aforesaid complaints and questions was to inform the employees that they must direct their questions to the National Labor Relations Board; and, one of the employees apparently had gone to the NLRB because Respondent had been notified by the NLRB that a decertification petition had been filed by a group of Respondent's employees who desired to decertify the Union as the representative of the employees employed in unit 3. The December 7 letter then immediately went on to say, ''[t]he clamor has been just as loud in the San Joaquin Valley [referring to the geographical area encompassed by units 4 and 5], but we have not as yet received any petition from the valley.'' The letter concluded with Respondent stating it had withdrawn its final offers from the bargaining table for contracts covering units 3, 4, and 5, because it believed it must rethink its contract offers and the nature of the agreements ''in light of our employees' very strong negative feelings about union representation.''

The complaint alleges that Respondent, by virtue of its December 7 letter, violated Section 8(a)(1) of the Act, because it solicited the employees employed in units 4 and 5 to file decertification petitions with the Board. In support of this allegation, counsel for the General Counsel at the hearing (Tr. 10–11) and in her posthearing brief contended that when viewed in the context of the entire letter, the part of the letter stating, ''the clamor has been just as loud in the San Joaquin Valley [referring to the geographical area which encompasses units 4 and 5], but we have not as yet received any petition from the valley,'' was calculated to encourage the employees employed in units 4 and 5 to file decertification petitions.[11] Respondent argues that its December 7 letter, including the portion relied on by the General Counsel, was merely a factual report of what had occurred and that the recipients of the letter would have viewed it in this light and not as a suggestion by the Respondent that the employees employed in units 4 and 5 file decertification petitions with the Board. I agree with the Respondent and for the reasons set forth recommend the dismissal of this allegation.

The portion of the December 7 letter stating that ''the clamor has been just as loud in the San Joaquin Valley, but we have not as yet received any petition from the valley,'' when considered in the context of the entire letter, could not have been reasonably construed by the recipients as a suggestion that Respondent wanted the employees employed in units 4 and 5 to file decertification petitions with the Board seeking to decertify the Union. Rather, it could only have been reasonably construed by the recipients, when considered in the context of the entire letter, as Respondent's explanation of what had taken place; that unit 3 employees had filed a petition with the Board seeking to decertify the Union and that employees employed in units 4 and 5 had not filed decertification petitions as of the date of the Respondent's letter, even though employees employed in units 4 and 5, like those employed in unit 3, had asked Respondent why they had to pay union dues and join the Union and how they could get rid of the Union, and had been informed by Respondent that they must direct such questions to the Board and not to Respondent.

The conclusion that Respondent's December 7 letter was not reasonably calculated to encourage or solicit the employees employed in units 4 and 5 to file decertification petitions is further supported by the fact that there is no evidence that the letter was sent to those employees and it is not reason-

[10] I need not decide whether Respondent's repudiation of its agreement with the Union concerning the ratification vote would have constituted a refusal to bargain within the meaning of Sec. 8(a)(5), if Respondent's withdrawal of its ''last, best and final'' contract offer had violated Sec. 8(a)(5), as alleged in the complaint.

[11] Also, in her posthearing brief, counsel for the General Counsel for the first time contends that Respondent violated Sec. 8(a)(1) of the Act, because the December 7 letter was reasonably calculated to encourage the employees employed in *unit 3* to sign and/or to support the decertification petition filed by employee Ohman in Case 32–RD–1112 on December 4. I have not considered this contention because it was not encompassed by the complaint's unfair labor practice allegations and the issue was not litigated. Respondent, as indicated, supra, called no witnesses but entered into a stipulation of facts, presumably believing that the only unfair labor practices which were being litigated were those specifically alleged in the complaint. As I have found supra, the complaint does not allege Respondent violated the Act by soliciting the employees employed in unit 3 to file or support a decertification petition. Rather, it alleges that Respondent violated the Act because it solicited the employees employed in *units 4 and 5* to file decertification petitions. Moreover, during the hearing, when asked to explain the theory of this violation, counsel for the General Counsel, as described in more detail supra, stated that the language of Respondent's December 7 letter was reasonably calculated to encourage the employees employed in units 4 and 5 to ''file a decertification [petition] as their colleagues had in the other unit'' (Tr. 10–11).

able to presume that the contents of the letter was communicated to the unit 4 and 5 employees. In this regard, the parties did not stipulate that the letter was sent to the unit 4 and 5 employees, but stipulated that the letter was sent ''to all employees covered by agreement 3,'' referring to the unit 3 employees, and there is no reason for me to presume that the unit 3 recipients would have communicated the contents of the letter to the unit 4 and 5 employees, because the record indicates that the unit 4 and 5 employees are employed in different geographical areas than the unit 3 employees.

[Recommended Order omitted from publication.]