

Wycoff Steel, Inc. and United Steelworkers of America, AFL-CIO. Cases 34-CA-4531 and 34-CA-4578

June 26, 1991

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

On December 19, 1990, Administrative Law Judge Jesse Kleiman issued the attached decision. The General Counsel filed an exception. The Charging Party filed a response in support of the General Counsel's exception. The Respondent filed 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 exception, the response, and the brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.¹

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Wycoff Steel, Inc., Putnam, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ The General Counsel, supported by the Charging Party, has filed an exception seeking to have the judge's order modified to make it clear that all issues involving the termination date of the Respondent's backpay liability will be left to the compliance stage. The Respondent has filed an answering brief. The Respondent correctly points out that there is no issue in this case as to the Respondent's closure of its Putnam, Connecticut mill or as to any failure to bargain order because there is nothing in it which precludes the General Counsel from asserting, at a compliance proceeding, that the Respondent's backpay liability extends past the closure date of the discontinuance of employment of unit employees.

We correct the record to show that the correct spelling of the Respondent's name is "Wycoff Steel, Inc."

Jaye Bailey, Esq., for the General Counsel.
Salvatore V. Faulise, Esq., of Hartford, Connecticut, and
Russ R. Mueller, Esq., of Milwaukee, Wisconsin, for the Respondent.¹

DECISION

STATEMENT OF THE CASE

JESSE KLEIMAN, Administrative Law Judge. The charge and amended charges in Case 34-CA-4531 were filed on December 1 and 12, 1989, and February 7, 1990, and the

¹ At the hearing the Respondent was represented by Faulise. However, subsequent to the closing of the hearing and on joint intention for withdrawal of Faulise and the substitution of Mueller as attorney for the Respondent, dated August 13 and 7, 1990, respectively, and the written consent of the Respondent on August 30, 1990, I granted the motion for withdrawal and substitution of counsel.

charge in Case 34-CA-4578 was filed on January 19, 1990, by United Steelworkers of America, AFL-CIO (the Union) and a consolidated complaint was issued on February 26, 1990. The consolidated complaint alleges that Wycoff Steel, Inc., a successor to Ampco-Pittsburgh Corporation (the Respondent or the Company) violated Section 8(a)(1) and (5) and Section 8(d) of the National Labor Relations Act (the Act) by designating an individual as its bargaining representative who did not have the authority to negotiate or consummate a collective-bargaining agreement with the Union and by intentionally misinforming the Union as to her authority, by unilaterally implementing changes in terms and conditions of employment without affording the Union an opportunity to negotiate and bargain with respect thereto, and by failing to make contractually required insurance premium payments for its employees. The Respondent filed its answer on April 9, 1990, denying the material allegations in the consolidated complaint. This case was tried in Hartford, Connecticut, on June 11 and 12, 1990.

On the entire record² and the briefs filed by the General Counsel and the Respondent and on my observation of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, a Connecticut corporation, operated a steel mill in Putnam, Connecticut, wherein it produced "cold finished steel products," steel bars cut and formed to customer specifications. The Respondent annually purchased and received products, goods, and materials valued in excess of \$50,000 directly from places outside the State of Connecticut. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. Additionally, the parties stipulated and I find that Irene Levesque who occupied the position of the Respondent's general manager had been at all times material, a supervisor of the Respondent within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act, and that by virtue of Section 9(a) of the Act, the Union is the exclusive bargaining representative for the purposes of collective bargaining of the Respondent's employees in a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act composed of:

All employees employed at the Putnam, Connecticut plant but excluding supervisors, foremen, office managers, salesmen, watchmen, guards and executives.

² I correct what is an obvious error in the transcript of this hearing as regards the parties making the various statements on Tr. 102, L. 24, and Tr. 103, LL. 1-5 as follows:

MS. BAILEY: I'm raising an objection.

JUDGE KLEIMAN: What is the basis?

MS. BAILEY: That she hasn't reviewed them in order to testify.

MR. FAULISE: I would inspect these to determine conformance with her testimony and use them as a basis for cross-examination.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Evidence*

Ampco Pittsburgh Corporation (AMPCO) owned and operated steel mills located in Chicago, Illinois; Plymouth, Michigan; and Putnam, Connecticut; the latter being the steel mill involved in the instant case. With regard to the Putnam mill and beginning in 1959, AMPCO recognized the Union as the exclusive collective-bargaining representative of its approximately 30–35 employees therein embodying such recognition in successive collective-bargaining agreements, the most recent of which was effective by its terms from May 1, 1986, through October 31, 1989. Under the terms of the agreement, AMPCO was obligated, *inter alia*, to provide health insurance, a severance plan, a supplemental unemployment benefit (SUB) plan and a pension plan for employees, and life insurance for retirees. The bargaining agreement also lists all bargaining unit positions and corresponding wage rates and vacation benefits.

By “Assets Purchase Agreement” dated April 28, 1987, AMPCO sold its steel mills to the Respondent and under the terms of the sale the Respondent agreed to assume the obligations of the collective-bargaining agreement including the SUB plan, insurance plans, and the pension agreement. The uncontradicted testimony here shows that the sale caused no interruption or change in the business of the Putnam mill, all bargaining unit and management personnel were retained and the equipment and production process remained the same. The Respondent continued to produce the same “cold finish steel products” which had been made by AMPCO, and retained AMPCO’s customers. The only changes which occurred on sale were the change of name of the company, including that on the pension plan and the substitution of the Respondent’s own health insurance carrier. The Respondent continued, in full force and effect, all the terms of the collective-bargaining agreement after the sale.

In July 1988, the Respondent appointed then Putnam Sales Manager Irene Levesque, as “interim General Manager” of the Putnam plant, a position she continued to hold until her layoff in November 1989. Levesque, a witness for the General Counsel, testified that after her appointment as interim general manager she conferred regularly with Bill Albrecht, the Respondent’s chief operating officer, and with Gene Marsh, the general manager of the Respondent’s Chicago mill, regarding the daily operations of the Putnam mill. Sometime in July 1989, with the current collective-bargaining agreement’s expiration date of October 31, 1989, approaching, and having had no experience herself in contract negotiations, Levesque spoke to Albrecht in connection with “who was going to be doing the negotiating” with the Union and Albrecht advised her that it would “probably” be Marsh. Levesque then contacted Marsh who confirmed that he would be coming to Connecticut to conduct the negotiations for the Putnam facility with the Union.

Pursuant to Marsh’s instructions and on his approval of its contents, Levesque prepared and sent to the Union, under Marsh’s name, as signed by Levesque, a letter dated August 2, 1989, requesting the opening of negotiations for a new contract and the scheduling of a meeting for that purpose. By letter dated August 3, 1989, addressed to Marsh in Putnam, Connecticut, the Union agreed to meet and negotiate with the Respondent regarding a new collective-bargaining agreement.

As would be her practice thereafter regarding any communications from the Union, Levesque forwarded the Union’s letter to Marsh in Chicago by FAX machine. Levesque testified that subsequently she was informed by Marsha Peterson, the Putnam plant’s comptroller, that the Respondent’s attorney, Lew Shaffer had advised Peterson that “Putnam would be doing their own negotiations.” On contacting Marsh in the latter part of August 1989, Levesque was told by Marsh that she would be conducting the contract negotiations because the Respondent considered it too costly to fly Marsh to Connecticut from Chicago.

In this connection, Levesque stated that Marsh instructed her to meet with the Union’s representatives, but she was not to make any decisions on behalf of the Respondent. Instead, Levesque was to contact Marsh in Chicago who would in turn consult with the Respondent’s owner, Arthur Lorch, and its attorney and accountant, Lew Shaffer and Jim Sutcliffe, respectively, who were located in New York, regarding any proposals or agreements during the negotiations. Marsh further instructed Levesque to review the provisions of the current bargaining agreement and “to do it in two sections, a language section and an economics section and to arbitrarily pick out items for negotiation.” Levesque was supposed “to make up” her own proposals. Levesque requested and received from Marsh a copy of the recently negotiated bargaining contract regarding the Chicago facility to assist her in choosing contract items for negotiation because Levesque had no prior experience in bargaining agreement negotiations. Using the Chicago contract as a guide, Levesque prepared a wage proposal and language and other economic issue proposals which she FAX’d to Marsh for approval through “New York.” Levesque’s proposals were approved except for the wage scale proposal which was still under consideration.

1. The negotiation sessions

The parties met at the Respondent’s Putnam facility on September 5, October 11 and 31, and November 3, 8, 10, and 22, 1989, to negotiate a new collective-bargaining agreement. The Union was represented at these meetings by Francis Farrell, the United Steelworkers of America, District One representative, Local Union President William Livengood, and Roger Sarette, the Union’s financial secretary, while present for the Respondent was Levesque. The following account of what occurred there is based on the testimony of Levesque and Livengood and the exhibits introduced into evidence by the General Counsel. The Respondent called no witnesses at the hearing nor presented any other evidence there.

Based on my observation of the demeanor of the witnesses, the weight of the respective evidence, established and admitted facts, inherent probabilities and reasonable inferences which may be drawn from the record as a whole, I credit the account of what occurred here, as given by the General Counsel’s witnesses Levesque and Livengood. *Gold Standard Enterprises*, 234 NLRB 618 (1978); *V & W Castings*, 231 NLRB 912 (1977). Their testimony was given in a forthright manner, was corroborative and consistent with each other, and most importantly, consistent with the other evidence in the record and therefore most believable. Furthermore, of compelling significance in crediting their testimony is the failure of the Respondent to call Marsh, Shaffer,

or Lorch as witnesses to rebut any of the testimony given here. Especially, Marsh was knowledgeable as to what was transpiring at the time, although Shaffer or Lorch could have also testified on behalf of the Respondent with sufficient awareness of what transpired. They being material witnesses, the failure to produce at least one of them at the hearing, being obviously within the Respondent's control and without any explanation therefore, leads me to draw the inference that their testimony would have been unfavorable to the Respondent's case. *7-Eleven Food Store*, 257 NLRB 108 (1981), and cases cited there.

Furthermore, I do not find the Respondent's assertion that Levesque "demonstrated herself to be biased against Respondent's position," supported here. Although Levesque's testimony regarding the Respondent's actual sales figures was forgetful she did testify that there was a "dramatic drop" in the Respondent's sales and earnings in 1989 and she also approximated overall sales figures. Although her expressed unhappiness with the Respondent's actions during the latter part of the negotiations and her layoff at the closing of the Putnam plant might not have endeared the Respondent to her, there is no real evidence to show that this caused her to testify in any manner other than truthfully, nor can I infer this from the record as a whole. And again, significantly, the documentary evidence herein totally and thoroughly supports her testimony as given.

2. The September 5, 1989 meeting

At the commencement of the meeting, Farrell asked if there would be anyone else attending the negotiations for the Respondent besides Levesque, and she responded that she would be the Respondent's only representative at the meetings. Levesque also advised the Union's representatives that she in effect had no authority to approve any contract proposals, that she was required to check with Marsh in Chicago who then would be "in touch with New York" for approval of any proposals made by the parties during these negotiations. Farrell raised concern that there was no one present at the negotiations who had authority to make decisions for the Respondent then and there. Although the Union offered no contract proposals at this meeting, Farrell requested a 1-year extension of the current bargaining agreement. Levesque informed the Union that she would submit the Union's request to Marsh for consideration but that it would take time for the decision to be made. The meeting was then ended with Levesque stating that she would contact the Union as soon as she received word on the extension request. Levesque FAX'd the request to Marsh who answered that the Union's extension request was denied. The next day she telephoned Farrell and told him of the Respondent's rejection thereof.

By letter dated September 13, 1989, addressed to Marsh at the Putnam plant, Farrell advised that if it were the Respondent's position at the negotiations that the Respondent was "looking for concessions," then the Company would have to open its books to the National Union's auditors" to confirm the Company's need for such relief." Levesque FAX'd the letter to Marsh in Chicago who advised Levesque that he would have to get approval of this from New York. Subsequently, by letter dated September 25, 1989, signed with Marsh's name by Levesque, the Respondent agreed to a review of its financial records by the Union.

3. The October 11, 1989 meeting

Levesque presented the union representatives with the Respondent's "language and economic section" proposals at this meeting after the Union had informed her that it would have no proposals to offer until after it had the opportunity to look at the Respondent's books. The Respondent's proposals did not include, as yet, a proposed wage scale. Farrell expressed disappointment that the Respondent's proposals were entirely concessionary and stated that he would be in touch with the International Union in Pittsburgh regarding review of the Respondent's financial records, which the Union had not as yet received. The meeting was then concluded having lasted about 50 minutes.

By letter dated October 16, 1989, addressed to Marsh at the Putnam plant, the National Union in Pittsburgh, Pennsylvania, repeated the Union's request for the Respondent's business records expressly detailing the financial information sought, which letter Levesque FAX'd to Marsh. In a subsequent telephone conversation, Marsh advised Levesque that he would send the request to New York and then instructed her to lay off the Putnam mill employees for 2 weeks commencing on October 23, 1989. On October 19, 1989, at Levesque's request, Marsh, via FAX, sent her a copy of the note he had forwarded to the Respondent's attorney, Shaffer, in New York about the Union's request for financial information and containing Marsh's suggestions regarding the Putnam negotiations. In the note Marsh suggested that the Respondent give the Union its proposed wage scale before the expiration date of the bargaining agreement on October 31, 1989, so that if the employees were called back from layoff, there would be a wage scale to use after the current contract had expired. On Marsh's instructions, on October 26, 1989, Levesque sent the Respondent's "wage recommendations" to the Union under Marsh's signature as signed by Levesque.

That same day, Levesque received a letter from the Union dated October 24, 1989, and addressed to Marsh, requesting an extension of the contract until November 30, 1989, which letter Levesque FAX'd to Marsh. In a telephone conversation between them, Marsh informed her that he would need New York's approval for the extension. Levesque asked Marsh if the Union had been sent the financial information it had requested and Marsh answered that he would also check with New York about this. Marsh called Levesque back and advised her that the Respondent's accountant, Sutcliffe, had told him that Putnam's controller, Marsha Peterson, was working on the financial information. When Levesque questioned Peterson about this Peterson denied that anyone had asked her to prepare the information, whereupon Levesque called Marsh and apprised him of this. Marsh became "quite upset" about this turn of events. During the conversation Marsh also instructed Levesque to tell the Union that the Respondent had denied its request for an extension of the bargaining agreement and that the Company's proposal remained the same as previously submitted to the Union at the negotiations. Levesque called Farrell on October 30, 1989, and advised him that the Union's extension request had been denied and a negotiation meeting was then arranged for the next day.

4. The October 31, 1989 meeting

At this meeting Levesque informed the Union that the Respondent's contract proposals remained the same. The Union then submitted its proposals to the Respondent. Although these proposals had been drafted earlier, the Union had not presented them to the Respondent at prior negotiation meetings due to its desire to wait until the National Union had reviewed the Respondent's financial information. Levesque then FAX'd the Union's contract proposals to Marsh for consideration. Farrell was "very upset" accusing the Respondent of not bargaining in good faith because there was no one at the negotiations with authority representing the Respondent. Farrell stated that the Union would file unfair labor practice charges against the Respondent unless an extension of the contract was granted. Levesque called Marsh and apprised him of what Farrell had said and Marsh responded that she should not worry about it and that he would send the Union's proposals to New York by FAX along with his recommendations.

Levesque and the Union's representatives then waited approximately 3 to 4 hours for a response during which no negotiation discussions were engaged in and during which Levesque called Marsh repeatedly until Marsh finally told her that it was taking this long because "Lorch's wife was sick in the hospital." Later on, Marsh called Levesque and informed her that the Respondent had rejected the Union's "proposal in its entirety," and that an extension of the contract until November 3, 1989, would be granted, all of which she repeated to the Union. Levesque also asked Marsh to FAX her a copy of the written recommendation he had sent to New York, which he did. On learning of the Respondent's answer, Farrell informed Levesque that the Union was going to file charges against the Respondent because the Company was not negotiating in good faith. The Union then agreed to the limited extension of the bargaining agreement and the meeting ended.

5. The November 3, 1989 meeting

Additionally present, at this meeting was Federal Mediator Thom Carroll. Levesque informed the Union that the Respondent's proposals remained the same. Farrell responded that the Union wanted a more realistic proposal and would file charges against the Respondent because the Company was not bargaining in good faith and Levesque did not have any bargaining authority. Farrell also requested a contract extension until mid-June 1990. Levesque called Marsh and informed him of what had transpired and Marsh said that "he would fax the recommendation to New York." Again the parties waited for several hours during which time there were no negotiations being conducted. Marsh finally called Levesque and told her that the Respondent would grant an extension to November 10, 1989, to which the Union agreed.

6. The November 8, 1989 meeting

At this meeting Levesque told the Union that the Respondent's proposals had not changed and the Union said that "they were flexible on all items." The parties then discussed the Respondent's proposal, item by item. The Union stated that it would agree to remain at the current 10 holidays a year; was flexible on wages, vacation, medical contributions,

and the language proposals;³ offered 9 months on life insurance instead of the 3 proposed by the Respondent but also indicated their continuing flexibility on this proposal also; and rejected the Respondent's proposed SUB plan. The Union also asked for a guarantee that the Respondent would operate the Putnam mill for "a couple of years." Levesque offered no counterproposals on the Respondent's behalf but instead called Marsh and reviewed the Union's position regarding the contract proposals with him. Marsh was then to contact her thereafter regarding the Respondent's next move. Although the parties waited 3 or 4 hours for Marsh's reply, during which no negotiations took place, no answer was forthcoming or received and the meeting was ended.

The following day, November 9, 1989, Levesque called Marsh and asked him to FAX her the note he had sent to New York regarding the negotiation meeting on November 8, 1989, which he did. Therein Marsh had advised Shaffer that the Union had threatened to file unfair labor practice charges with the Board concerning Levesque's lack of authority to negotiate a collective-bargaining agreement and the Respondent's lateness in furnishing the Union with requested financial records. Marsh suggested in the note that the Respondent "drop" its proposal to reduce the number of holidays in the contract because it "might show some willingness on our part and would not be financially significant in the grand scheme." Marsh then informed Levesque that there had been no decision made as yet regarding the Union's proposals.

That same day Levesque received a telephone call from Shaffer who informed her that he had been unaware that she had told the Union that she had no authority to make decisions at the negotiations and that she should never have told its representatives that. Shaffer also said that he didn't know how she was going to accomplish it but "to get it straightened out." Levesque was surprised about this and called Marsh who instructed her to tell the Union at the negotiation meeting scheduled for the next day, that there had been a "misunderstanding" and that she had been "making decisions all along and would continue to do so." Marsh also told her to withdraw the Respondent's holiday proposal "to show we were making movement on that part of it" and to advise the Union that the remainder of the Company's proposal would remain the same.⁴

On November 10, 1989, prior to the start of the negotiation meeting, Levesque received a telephone call from Marsh who instructed her to prepare a letter, this time under her own signature as general manager, advising employee members of the Union "not on lay off status," that there was work available for them commencing November 13, 1989, with wages and benefits to be based on the Respondent's proposal submitted to the Union on November 10, 1989. Marsh also FAX'd to her a copy of the Respondent's proposals "#2," which he had sent to New York, with the date changed from October 11 to November 10, 1989, which sug-

³Levesque testified that the Union had said it "would be willing to give up something" as regards the meaning of the term "flexible" as used by her.

⁴After her telephone conversation with Marsh, Levesque became "quite upset" because of what Marsh wanted her to do regarding the issue of her authority at the negotiations and told Peterson that she was going to quit. Livengood also testified as to her state of agitation stating that Levesque started to cry in his presence and told him of her intention to quit the Respondent's employ. Livengood told her to think about such a drastic step before she made the move. Levesque did not quit her job as "interim general manager."

gested changes in two items of the Respondent's prior initial proposal and the withdrawal of its proposed change in the number of holidays. Marsh suggested there a change in the length of employment required of initial on layoff necessary to secure life and medical insurance coverage during the lay-off period and the number of months of such coverage applicable. He also suggested a change in the amounts of medical insurance contributions.

7. The November 10, 1989 meeting

At the commencement of this meeting, Levesque told the Union's representatives that "there must be a misunderstanding" and that she had been making the decisions during the negotiations and would continue to do so. Levesque then presented the Union with the Respondent's "Company Proposal #2," "which indicated that the Respondent's holiday proposal had been withdrawn. Marsh's other suggested changes in the Respondent's proposals were not included there. Farrell told Levesque that the Respondent was not bargaining in good faith and that the Union "had filed charges with the labor board." The Union then submitted its "Union Proposal" to the Respondent. In its proposal, the Union agreed to the Company's language on "A" and "B" and offered a modification to the Company's language in "C"; reduced its proposal on wage increases; accepted the Company's agreement as to no change in the number of holidays; proposed employee contributions regarding health insurance, and offered a package of health benefits for laid off employees. The Union also dropped its proposal on sick days and bonus days and sought a 2-year term for the new collective-bargaining agreement. Levesque told the Union that it would take her "a few minutes to decide on that proposal and review it." Livengood asked her why she couldn't make the decision then and there and, as instructed by Marsh to do so, Levesque responded that she had "to check to see what financial impact it would have on the company." Levesque then left the room and FAX'd a copy of the Union's proposal to Marsh. After a wait of half an hour, Marsh called Levesque back and informed her that New York would accept items "A" and "B" (which were the Respondent's proposals); proposed the same language as the Respondent had previously proposed on item "C" and that all other items would remain as the Respondent had previously proposed. The Respondent also rejected all the "local issues" proposed by the Union, rejected a 2-year term for the contract, and agreed to accept any changes in the pension plan as required by law. Marsh instructed Levesque to prepare and type up what they had just discussed as "Company Proposal #3" which she did and she then presented the proposal to the Union at this meeting.

The Union now presented the Respondent with a verbal counterproposal consisting of the following: an extra week of vacation for employees with 20 or more years of service; 3 months' medical insurance coverage for employees with 1 or less years of service who had been on layoff for 1 month, and 9 months medical insurance coverage for employees on layoff with more than 1 year's experience; a \$30 employee contribution for insurance coverage for a family and \$15 contribution for an individual, per month; \$3500 life insurance coverage for all new retirees; time and one-half for holidays worked if the holiday was not mandatory; and a 3-year term for the new contract. The Union also said it would

continue to be flexible on wage scales. Levesque prepared a written notation of the Union's verbal proposal and FAX'd it to Marsh after leaving the meeting room. Marsh called her on receiving the FAX notation and reviewed the proposal with Levesque. Marsh instructed Levesque to indicate on the Respondent's "Proposal #3" that the parties have agreed to a 3-year term for the contract, agreement as to "A" and "B" there, and that all its other proposals would remain the same, and to inform the Union of this decision.

Moreover, prior to Levesque leaving the meeting to advise Marsh of the Union's verbal counterproposals, Farrell informed Levesque that he was "very upset" about the way the negotiations were progressing, that "in no way" had the parties reached impasse in the negotiations, that the Union had filed charges against the Respondent, and that the Union was still willing to negotiate as often as possible to reach an agreement including weekends. Farrell then left the meeting leaving Livengood and Sarette to continue the negotiations on behalf of the Union.

After Levesque returned to the meeting and informed the Union as to what the Respondent had decided regarding the Union's verbal counterproposal, the Union verbally offered to amend its counterproposals. The Union offered to reduce its vacation proposal to provide for a maximum of 4 weeks' vacation for long-term employees and a scale of lesser amounts of vacation for less senior employees; an increase of \$10 over its prior proposal for employee contributions to each type of medical insurance; and a possible elimination of severance benefits if it could be accomplished over a period of time. Livengood and Sarette reiterated the Union's willingness to meet with the Respondent as often as possible including weekends in order to reach agreement on a new bargaining contract.

Again Levesque FAX'd her notes of the Union's proposal to Marsh who called her back with the Respondent's response. Marsh told Levesque that the Respondent's proposals remained the same as set forth in its "Company Proposal #3" and that the Respondent would not meet on Saturday or Sunday because no one would be available in Chicago or New York to make decisions regarding the negotiations. Marsh then instructed Levesque to give the Union the previously typed letter dated November 10, 1989, telling employees that they could return to work on November 13, 1989, but under the terms of the Respondent's "Company Proposal #3. Amended." Levesque gave the letter and the Respondent's last proposal (Company proposal 3, amended) to the Union. Livengood and Sarette refused to sign the letter acknowledging receipt of the two documents until Levesque, with permission from Marsh, had typed thereon the words, "This signature does not indicate acceptance of this proposal but indicates receipt of this letter." Levesque also told the Union that the Respondent could not meet with the Union on Saturdays or Sunday but would meet "whenever it was convenient." The meeting was then concluded.

On November 14, 1989, Levesque received a hand delivered letter from Farrell, addressed to Marsh, stating that the Union does not agree to the Respondent's proposals and the fact that its members who are not on layoff status, return to work and are compelled to accept such proposals as their terms and conditions of employment, does not mean that the Union has acquiesced thereto. The Union also indicated its continuing willingness to meet with the Respondent and ne-

gotiate a mutually satisfactory bargaining agreement and requested an additional extension of the old contract in order to accomplish this. The Union further acknowledged that "We remain flexible on all issues that have not been resolved between us," and advised the Respondent that should it "impose their concessionary amendments to the contract" on the returning employees, the Union would "pursue all their legal options in these negotiations, including making our members whole for any lost wages and benefits." Levesque FAX'd the letter to Marsh that day.

Marsh now instructed Levesque to type and send a reply to the Union's letter, the language for which was sent to her by Marsh, after approval by Lorch in New York. Marsh's instructions included the direction to send the letter this time under her own signature, which she did. This letter dated November 15, 1989, denied the Union's request for any further extension of the contract which expired on November 10, 1989, did advise the Union that employees who returned to work on or after November 13, 1989, would be employed under the terms and conditions set forth in the Respondent's "latest proposal presented to the Union on Friday November 10, 1989." The Respondent also indicated there its willingness to continue negotiations with the Union on a new contract.

Livengood and Sarette returned to work on November 14, 1989, the only two union member employees to do so. From the time of their return until November 17, 1989, when they were laid off, they received wages corresponding to the Respondent's "Company Proposal #3. Amended." When Livengood retired a few months later, he was given a "special payment" pursuant to provisions of the pension plan in an amount calculated by using an employee's eligible vacation, in Livengood's case the amount corresponding to the length of his vacation time under the Respondent's above "Proposal #3. Amended."

8. The November 22, 1989 meeting

At this meeting Farrell advised Levesque that the audit of the Respondent's financial records did not substantiate the Company's request for wage concessions nor support its other concessionary proposals. However, the Union reiterated that it was flexible on all the remaining items in the Respondent's last proposal. The Union also emphasized its willingness to meet with the Respondent further to negotiate a new collective-bargaining agreement. Levesque told the Union that the Respondent's proposals remained the same as its latest proposal submitted to the Union on November 10, 1989, at which time this meeting ended, having lasted only half an hour.

No further meetings were held as the Respondent closed down the Putnam mill, laid off Levesque on November 30, 1989, sold all the equipment there, and refused to respond to any of Livengood's attempts to confer with Marsh or Lorch. In mid-December 1989, the Respondent's controller, Peterson, informed Livengood that the medical insurance for employees had been canceled retroactive to September 1, 1989, due to the failure of the Respondent to make the required premium payments. On Livengood's request, Peterson sent a letter to all employees informing them of this.

Moreover, the Respondent admitted here that it instituted the changes set forth in its last proposal (Company proposal #3, amended) after November 10, 1989, making the fol-

lowing changes in employment conditions: reducing wages of unit employees; eliminating its severance and SUB plans; altering the vacation time for employees having 5 or more years of experience to a maximum of 3 weeks; and reducing its medical insurance contributions and life insurance payments to retirees.

Furthermore, although Levesque could not recall the actual figures involved, she did acknowledge that the Respondent experienced a "substantial decrease" in sales during its last year in business, 1989, at the Putnam mill.

B. Analysis and Conclusions

1. The successorship issue

The consolidated complaint alleges, in substance, that the Respondent is a successor of AMPCO. The Respondent denies this allegation. The Supreme Court of the United States in *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987), stated:

In [*NLRB v. Burns Security Services*, 406 U.S. 272 (1972)] we approved the approach taken by the Board and accepted by courts with respect to determining whether a new company was indeed the successor to the old. 406 U.S. at 280-281, and n. 4. This approach, which is primarily factual in nature and is based upon the totality of the circumstances of a given situation, requires that the Board focus on whether the new company has "acquired substantial assets of its predecessor and, continued without interruption or substantial change, the predecessor's business operations." *Golden State Bottling Co. v. NLRB*, 414 U.S. [168 (1973)] at 184. Hence, the focus is on whether there is "substantial continuity" between the enterprises. Under this approach, the Board examines a number of factors: whether the businesses of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers. See *Burns*, 406 U.S. at 280, n. 1; *Aircraft Magnesium*, 265 NLRB 1344, 1345 (1982), enf'd, 730 F.2d 767 (C.A. 9 1984); *Premium Foods, Inc.*, 260 NLRB 708, 714 (1982), enf'd 709 F.2d 623 (C.A. 9 1983).

In conducting the analysis, the Board keeps in mind the question whether "those employees who have been retained will understandably view their job situations as essentially unaltered." See *Golden State Bottling Co.*, 414 U.S. at 184; *NLRB v. Jeffries Lithograph Co.*, 752 F.2d 494, 464 (C.A. 9 1985).

The record evidence in the instant case clearly establishes that the Respondent is a successor of AMPCO. It is uncontradicted that the Respondent acquired the assets of its predecessor, conducted the same business as AMPCO, continued without interruption or substantial change the business of AMPCO, continued to produce the same products under the same production process using the same equipment, employing the same employees in the same jobs under the same working conditions and under the same supervisors, and basically retaining the same customers as its predecessor

AMPCO. Moreover, the Respondent expressly agreed in the purchase and sales agreement between itself and AMPCO to assume the collective-bargaining agreement between AMPCO and the Union except for some changes which did not affect such assumption in substance. The Respondent also recognized the Union as the bargaining representative for the employees in the appropriate unit from the time of purchase in April 1987 until the Respondent shut the Putnam mill in late 1989, complying with the terms and conditions of employment under the collective-bargaining agreement until the Respondent's unilateral actions in November 1989. As regards the above, see *NLRB v. Burns Security Service*, supra; *Fall River Dyeing Corp. v. NLRB*, supra; *Petoskey Geriatric Village*, 295 NLRB 800 (1989); *Goldin-Feldman, Inc.*, 295 NLRB 359 (1989).

2. Unilateral changes in terms and conditions of employment

The consolidated complaint alleges that the Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally and without affording the Union an opportunity to negotiate and bargain as the exclusive representative of the Respondent's employees in an appropriate unit and made the following changes in employment conditions: reduced employees wages; eliminated its severance plan and SUB plan; altered the vacation time for employees with 5 or more years of experience to a maximum of 3 weeks; reduced its medical insurance contributions; and reduced its life insurance payments to retirees. Although the Respondent admits making such unilateral changes in wages and other terms and conditions of employment, it denies that such actions violated the Act.

The law is well established that unilateral changes of wages, hours, and other terms and conditions of employment by an employer obligated to bargain with the representative of its employees in an appropriate unit violates Section 8(a)(5) of the Act. *NLRB v. Katz*, 369 U.S. 736 (1962); *Marriot In-Flite Service*, 258 NLRB 755 fn. 2 (1981). As the Supreme Court of the United States held in *NLRB v. Katz*, supra, "[A]n employer's unilateral change in conditions of employment under negotiation" is tantamount to a "refusal to negotiate in fact." Absent a valid, preexisting impasse, or the consent of the union, an employer, during the course of negotiations, is not free to implement proposed changes or those tentatively agreed to by the parties. *Greshen Transfer*, 272 NLRB 484 (1984); *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176 (5th Cir. 1982).

Furthermore, it is well settled that on the expiration of a collective-bargaining agreement the law imposes a continuing duty on both parties to attempt in good faith to reach a new agreement and therefore an employer may not unilaterally alter the terms and conditions of employment set forth there, as relates to mandatory subjects of bargaining, in the absence of an impasse in negotiations. *Taurus Waste Disposal*, 263 NLRB 309 (1982). As stated by the Board in *SAC Construction Co.*, 235 NLRB 1211, 1218 (1978), "Benefits such as payments into health, welfare and pension funds on behalf of employees, constitute an aspect of their wages and a term and condition of employment which, along with wage rates, survive the expiration of a collective bargaining agreement and cannot be altered without bargaining. *Harold W. Hinson*,

d/b/a Hen House Market No. 3, 175 NLRB 596 (1969), enf. 428 F.2d 133 (C.A. 8, 1970)."

In *Taft Broadcasting Co.*, 163 NLRB 475 (1967), enf. sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968), the Board listed the relevant factors to be considered in determining whether or not an impasse existed, stating:

Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is agreement, the contemporaneous understanding of the parties as to the state of the negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

A genuine impasse in negotiation exists only when the parties have exhausted all avenues for reaching agreement and there is "no realistic possibility that continuation of discussion at that time would have been fruitful." *Taft Broadcasting Co.*, supra, 395 F.2d at 628. And in *Patrick & Co.*, 248 NLRB 390 (1980), enf. mem. 644 F.2d 889 (9th Cir. 1981), the Board held that for an impasse to be found, the parties must have reached "that point of time in negotiations when the parties are warranted in assuming that further bargaining would be futile." Additionally, a party's declaration that an impasse has occurred will not be dispositive in determining whether one does indeed exist—all of the circumstances of the case must be analyzed. *Huck Mfg. Co. v. NLRB*, supra; *Teamsters Local 175 v. NLRB*, 788 F.2d 27 (D.C. Cir. 1986).

Applying the above principles to the facts in this case, I find that the parties had not reached impasse in bargaining when the Respondent unilaterally implemented changes in wages and terms and conditions of employment of its employees. The evidence clearly shows that both parties had made some movement on various issues during the seven negotiation sessions engaged in. In this regard, the Respondent had agreed to the Union's holidays proposal, withdrawing its own proposal on this issue, and agreed to abide by any changes in the law regarding pension plans. The Union, on the other hand, agreed to the Respondent's language proposals; offered counterproposals on health insurance contributions, vacations, life insurance, and wages; agreed to a 3-year term for the new bargaining contract; and offered to work out an agreement to eliminate the severance plan if the Respondent would agree to do so over a period of time. Additionally, the Union consistently and continuously advised the Respondent of its willingness to be "flexible," to give on the issues remaining in dispute as well as expressing its desire and availability to meet with the Respondent in an endeavor to reach agreement on a new contract.

Also it is clear that there was no contemporaneous understanding by both parties that they had reached impasse. The Respondent's self-serving view that impasse had been reached is not determinative nor is it supported by the record evidence. The Union informed the Respondent specifically at the November 10, 1989 bargaining session that in no way had an impasse been reached in the negotiations and maintained this position thereafter by continuing to assert its willingness to be "flexible" regarding the remaining unresolved

issues and its availability to meet with the Respondent to continue negotiations to reach agreement on a new contract. Moreover, the Respondent's willingness to continue negotiations as reflected in its letter of November 15, 1989, would mitigate against its contention that it implemented the unilateral changes in working conditions because the parties had reached an impasse, since the changes become effective November 10, 1989. Furthermore, the Union filed unfair labor practice charges against the Respondent concerning the unilateral changes, fairly soon after their implementation. *Harrah's Marina Hotel & Casino*, 296 NLRB 1116 (1989). Accordingly, I do not find that the parties had reached a point in the negotiations at which there was "no realistic possibility that continuation of discussion at that time would have been fruitful." *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. 1968); *Sacramento Union*, 291 NLRB 552 (1988).

Under the circumstances of this case, it also appears that the Respondent's true bargaining objective in the negotiations was to implement its own terms and conditions of employment rather than to reach agreement with the Union. This conclusion is demonstrated by the fact that on November 19, 1989, prior to the commencement of the negotiation meeting scheduled for that day, Marsh instructed Levesque to prepare a letter informing the Union of the implementation of its last proposal to be offered the Union during this meeting regarding terms and conditions of employment for returning employees, this letter and the Respondent's Proposal #3 then being given to the Union later that day; by the fact that subsequently, by letter dated November 15, 1989, the Respondent agreed to continue negotiations for a new contract but refused to withdraw the unilateral changes it had made in employee's working conditions; and by the fact that the Respondent showed a general lack of intent to seriously negotiate with the Union by designating an individual, Levesque, as its bargaining representative who did not have the authority to negotiate or consummate a collective bargaining agreement with the Union, as will be more fully discussed hereinafter.

The right to be consulted concerning unilateral changes in the terms and conditions of employment is a right given by statute and not one obtained by contract and thus in order to establish a waiver of such statutory right, there must be a showing of a clear relinquishment of the right. *Metropolitan Edison v. NLRB*, 460 U.S. 693 (1983); *McDonnell Douglas Corp.*, 224 NLRB 881 (1976). Before a waiver of the duty to bargain will be found, there must be "clear and unmistakable" evidence of the parties' intent to waive this right. *Columbus & Southern Ohio Electric Co.*, 270 NLRB 686 (1984). Relevant to such a finding of waiver are such things as the terms of the collective-bargaining agreement, the evidence of the negotiations which resulted in the agreement, and whether there has been acquiescence by one of the parties. *McDonnell Douglas Corp.*, supra at 895.

I do not find in the circumstances of this case that the Union clearly and unmistakably waived its right to bargain in connection with the unilateral changes made by the Respondent in the terms and conditions of employment of its employees. Moreover, the Respondent failed to offer any evidence in support of a defense of waiver. Although the Union permitted employees Livengood and Sarette to return to work under the unilaterally changed and implemented terms and

conditions of employment, this does not establish that the Union waived its bargaining rights thereon because the Union specifically raised objections to the Respondent's action in this regard in its letter of November 13, 1989, to the Respondent. Additionally, Livengood's refusal to sign the Respondent's letter of November 10, 1989, until Levesque changed the wording to reflect that the Union was merely acknowledging receipt of the letter and its annexed "Company Proposal #3" rather than accepting the terms set forth there, reinforces the conclusion that the Union did not waive its right to bargain.

Finally, the Respondent's assertion of economic justification, even if based on proven objective facts, would not excuse the Respondent from its statutory obligation to bargain with the Union. *Mike O'Connor Chevrolet*, 209 NLRB 701 (1974), enf. denied on other grounds 512 F.2d 684 (8th Cir. 1975); *NLRB v. Allied Products Corp.*, 548 F.2d 644 (6th Cir. 1977). As the Board stated in *Venture Packaging*, 294 NLRB 544 at fn. 2 (1989):

With respect to the Respondent's reliance on the "compelling economic considerations" exception, stated in dictum in *Mike O'Connor Chevrolet* [supra], we find that the Respondent's assertions of economic losses, even if credited, do not constitute "compelling economic considerations" that would excuse the Respondent from failing to offer to bargain with the Union over the various changes in the terms and conditions of employment that were alleged here as unlawful unilateral actions.

From all of the above, I find and conclude that the Respondent, in violation of Section 8(a)(5) and (1) of the Act, engaged in bad-faith bargaining and unilaterally implemented its contract offer without a genuine impasse being reached, and without the Union's waiver of its right to be consulted with and to bargain thereon, and without there being present any other lawful reason permitting the Respondent to implement the changes in wages and other terms and conditions of employment of its employees unilaterally, as it did.

3. Failure to make employee insurance plan premium payments

The consolidated complaint alleges that since on or about September 1, 1989, the Respondent failed to continue in full force and effect the terms and conditions of its collective-bargaining agreement with the Union, by failing to make contractually required premium payments to the employees' insurance plan in violation of Section 8(a)(1) and (5) and Section 8(d) of the Act. The Respondent denies this allegation.

The evidence shows that the Respondent was obligated under the terms of the collective-bargaining agreement to maintain a health insurance plan for its employees. The record also shows that the Respondent was experiencing some difficulty in making premium payments on the health insurance plan from time to time which affected the payment of benefits to employees. The Respondent's failure to make such payments eventually led to the cancellation of the health insurance policy by the carrier as of September 1, 1989. The Respondent failed to inform the Union of its failure to make the premium payments until December 1989, when con-

fronted by the Union with unpaid employee health insurance claims the Respondent sent a letter to employees informing them of the situation. At no point during the negotiations or at any other time did the Respondent attempt to inform or bargain with the Union regarding its failure to make the required health insurance premium, payments.

The Respondent asserts in its brief as a defense a lack of proof to sustain the allegations in the complaint, in the fact that the health insurance plan was canceled after the expiration of the bargaining agreement and any extensions thereof, and that the failure to pay premiums on the health insurance plan was caused by “economic disaster, namely, an inability to pay.”

In *Cauthorne Trucking*, 256 NLRB 721 (1981), the Board held that:

[H]ealth and welfare and pension fund plans which are part of an expired contract constitute an aspect of employee wages and a term and condition of employment which survives the expiration of the contract. Thus, an employer may not unilaterally alter payments into such plans unless: (1) the changes are made subsequent to the parties’ reaching a bargaining impasse, (2) . . . the union did not represent a majority of the unit employees or that the employer has a good faith doubt, based on objective considerations, of the union’s continuing majority status, or (3) the union has waived its right to bargain regarding the changes.

As discussed here before, neither impasse nor union waiver is present, and the Respondent raises no issue regarding the Union’s majority status here. The evidence in the record clearly shows that the Respondent unilaterally and in violation of its contract failed to maintain health insurance benefits payments for its employees. The Respondent argues in its brief that economic necessity caused its action in this regard rather than any intended violation of the Act. However, as the Board stated in *Flood City Brass & Pump Co.*, 296 NLRB No. 28 (Aug. 22, 1989) (not reported in Board volumes):

Neither a claim of economic necessity nor a lack of subjective bad faith intent, even if proven, constitutes an adequate defense to an allegation that an employer has violated Section 8(a)(5) of the Act by failing to abide by provisions of a collective-bargaining agreement. *International Distribution Centers*, 281 NLRB 742, 743 (1988); *Westinghouse Electric Corp.*, 278 NLRB 424, 432 (1986).

I also reject the Respondent’s contention that “This allegation must fall for lack of proof,” in view of the record evidence here.

Based on the above, I find and conclude that the Respondent violated Section 8(a)(1) and (5) and Section 8(d) of the Act by its failure to make the contractually mandated employee health insurance plan payments. *Flood City Brass*, supra; *Parkview Furniture Mfg. Co.*, 284 NLRB 917, 972 (1987).

4. Designation of a bargaining representative

The consolidated complaint alleges that the Respondent has failed and refused to bargain collectively and in good

faith with the Union, engaging in unfair labor practices within the meaning of Section 8(a) (1) and (5) of the Act by designating an individual as its bargaining representative who did not have the authority to negotiate or consummate a collective-bargaining agreement with the Union, and by intentionally misinforming the Union as to such bargaining representatives’ authority. The Respondent denies these allegations.

Section 8(d) of the Act defines the duty to bargain collectively as “the mutual obligation . . . to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement.” Such obligation does not compel either party to agree to a proposal or to make a concession. *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952). The essential element in the bargaining principle is the serious intent of the parties to reach a common ground. *Romo Paper Products Corp.*, 220 NLRB 519 (1975). A determination of whether a respondent has met the good-faith bargaining standard requires consideration of the totality of the respondent’s conduct. *NLRB v. Insurance Agents*, 361 U.S. 477 (1960); *M.R. & R. Trucking Co.*, 178 NLRB 167 (1969), *enfd.* in part 431 F.2d 689 (5th Cir. 1970).

The duty to bargain includes the obligation to appoint a negotiator with real authority to negotiate and carry on meaningful bargaining regarding fundamental issues. *National Amusements*, 155 NLRB 1200 (1965). However, although an employer is not required to be represented by an individual possessing final authority to enter into an agreement, this is subject to a limitation that it does not act to inhibit the progress of negotiations. *Carpenters Local 1780*, 244 NLRB 277 (1979). The degree of authority possessed by the negotiator is a factor which may be considered in determining good-faith bargaining. *Lloyd A. Fry Roofing Co. v. NLRB*, 216 F.2d 273 (9th Cir. 1954).

In the instant case the undisputed evidence here clearly establishes that Levesque had no authority to negotiate in any meaningful way with the Union during contract negotiations. Levesque, with no experience in negotiating collective-bargaining agreements, was instructed not to make any decisions or to offer any contract proposals to the Union unless first cleared through Marsh and “New York.” In this connection Levesque was required to obtain instructions and approval on every contract proposal or issue arising at the negotiation meetings, whether generated by the Respondent or the Union, which at times resulted in the parties having to wait several hours during which no bargaining was engaged in and/or the adjournment of the negotiation session prematurely because no response was received from Marsh and “New York” regarding the Union’s proposals. Before Levesque could take any course of action at the negotiations, it had to be discussed and decided on by Marsh, Shaffer, and Lorch. In fact, the evidence here shows that Levesque took no independent action or made any decision, tentative or otherwise, on her own at the negotiations.

Moreover, the Respondent then further frustrated the bargaining process by instructing Levesque to mislead the Union about her role in the negotiations by misinforming them that she had from the outset full authority to negotiate a new collective-bargaining agreement. Additionally, it should be noted that after Levesque apprised the Union at the initial negotiation session that she had no authority to ap-

prove any contract proposals and that the negotiations would be conducted through Chicago and New York, the Union objected to this arrangement stating at this meeting and on several occasions thereafter that the Respondent should have someone present at the negotiations who could make decisions.

As previously found here, the Respondent violated the Act by unilaterally changing the terms and conditions of employment of its employees thereby frustrating the bargaining process, and in this case disclosing the Respondent's bad faith and "unwillingness to agree with the Union." *NLRB v. Katz*, supra. The Respondent's additional action in assigning an agent to represent it in bargaining who had no power or authority to negotiate but only to carry messages to the Union, when considered with its unlawful unilateral changes in employees terms and conditions of employment evidences the Respondent's refusal to bargain in good faith as alleged.

From all of the above, I find and conclude that the Respondent engaged in dilatory and evasive bargaining tactics by failing and refusing to designate a representative in negotiations with full authority to enter into a final and binding collective-bargaining agreement and by such conduct taken with its action in misleading the Union as to the subsequent authority of such agent, the Respondent violated Section 8(a)(1) and (5) of the Act. *National Amusements*, supra; *Jeffrey Stone Co.*, 173 NLRB 11 (1968); *U.S. Gypsum Co.*, 200 NLRB 1098 (1972); *Carpenters Local 1780*, 244 NLRB 277 (1979); *Maywood Do-Nut Co.*, 248 NLRB 529 (1980); *Bedford Farmers Cooperative*, 259 NLRB 1226 (1982).

5. Due process

Lastly, the Respondent asserts in its brief that:

A full and fair hearing was denied to Respondent by the denial to Respondent of the personal notes of Levesque and other documents in her exclusive possession with regard to the negotiations so that Respondent's due process rights were violated.

I do not agree.

The record evidence here shows that although Levesque was the Respondent's "sole representative for the on-site negotiations with the Union," in fact she had no authority to negotiate for the Respondent. Levesque was specifically instructed to consult with Marsh and Lorch as to any action undertaken at the negotiation meetings, and was required to communicate each and every action occurring at these meetings by FAX and/or telephone to Marsh whether engaged in by the Union or the Respondent. Thus, even though Levesque took "all her notes and other documents regarding the negotiations" from her "personal file" upon termination, at least as regards the documents FAX'd between she and Marsh, and Marsh and New York, it is reasonable to assume that the Respondent had in its possession copies thereof. Moreover, according to the credited testimony of Levesque, any notes she took at the negotiations were the basis for the material FAX'd to Marsh and subsequently Lorch and again such information contained therein could reasonably be presumed to be within the Respondent's possession and knowledge.

Significantly, the Respondent failed to offer any evidence, either by witnesses' testimony or by documentary proof, that

Levesque had failed to testify truthfully or factually regarding what occurred at the negotiation meetings. Moreover, the Respondent's failure to call either Marsh, Shaffer, or Lorch weighs heavily against its position on this issue. In view of the circumstances present in this case, it is clear that the Respondent's request to view Levesque's notes was nothing more than a "fishing expedition."

Furthermore, where the notes of a witness are not used on the stand but are used by the witness to refresh her recollection prior to testifying, as occurred in the instant case, whether the production of such notes are required is within the discretion of the trial judge. *Goldman v. U.S.*, 316 U.S. 129 (1942); Fed.R.Evid. 612(B). Where "the interests of justice so require" the notes should be made available to the adverse party on request. In *Cosden Oil v. Karl O. Helm Aktiengesellschaft*, 736 F.2d 1064, 1076-1077 (5th Cir. 1984), the United States Court of Appeals for the Fifth Circuit held that "the interests of justice" did not require the production of a witnesses notes for purposes of inspection or cross-examination where the witness did not refer to these notes during his testimony. In *Cosden Oil*, a witness used a summary of his deposition and notes to refresh his recollection prior to testifying. The trial court refused to allow the opposing party access to the writings on request. The court of appeals found this not to be an abuse of the trial court's discretion or an erroneous ruling.

From all of the above, I find and conclude that "the interests of justice" did not require the production of Levesque's notes for purposes of inspection or cross-examination because she did not refer to them while testifying. I therefore do not find that such ruling was prejudicial to the Respondent's due-process right to a full and fair hearing.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth in section III, above, found to constitute unfair labor practices occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act by engaging in the unlawful conduct described above, I would normally recommend that the Respondent be ordered to designate an individual as its bargaining representative who had the authority to negotiate and consummate a collective-bargaining agreement, then bargain with the Union on request in good faith regarding terms and conditions of employment of unit employees, and if an understanding is reached, embody such understanding in a signed agreement; rescind the unilateral changes made in the terms and conditions of its unit employees employment; and make whole any unit employees for any loss they may have suffered as a result of the unilateral changes unlawfully made

by the Respondent in their wages and other terms and conditions of employment. However, in this case the record evidence indicates that the Respondent has closed down its Putnam mill, sold the machinery there, and no longer employs any employees at this plant. The closing of the mill nor the failure of the Respondent to bargain about the effects thereof on unit employees has not been alleged to be an unfair labor practice in violation of the Act.⁵

Therefore, I recommend that the Respondent be ordered to rescind the unilateral changes it made in the terms and conditions of employment of its unit employees and make whole any unit employee employed by it at the Putnam mill, from the time that it instituted such unilateral changes on November 13, 1989, to the time of their discontinuance of employment and/or the mill ceased its operations, under the terms of the last collective-bargaining agreement between the Respondent and the Union (effective May 1, 1986, through October 31, 1989).⁶ Any loss of earnings and benefits under the order recommended here shall be computed in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that the Respondent violated Section 8(a)(5) and (1) and Section 8(d) of the Act by failing and refusing to make contractually required premium payments for the employees' insurance plan, I will recommend that the Respondent be ordered to make whole the unit employees by making all premium payments to the employees' insurance plan required by the above last collective-bargaining agreement between the parties, which have not been paid up to the time of the closing of the Putnam mill⁷ and by reimbursing unit employees for any expenses ensuing from the Respondent's failure to make such required payments as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enf. mem. 661 F.2d 940 (9th Cir. 1981). See *W. A. Krueger Co.*, 299 NLRB 914 (1990).

Additionally, because the Respondent has ceased its operations at the Putnam mill, with all employees laid off or terminated, I shall recommend that the Respondent be ordered to mail a copy of the notice (Appendix A) to all unit employees including William Livengood and Roger Sarette. *P. J. Hamill Transfer Co.*, 277 NLRB 462 (1985); *Benchmark Industries*, 269 NLRB 1096 (1984).

Because of the nature of the unfair labor practices found here, and in order to make effective the interdependent guarantees of Section 7 of the Act, I recommend that the Respondent be ordered to refrain from in any like or related manner abridging any of the rights guaranteed employees by Section 7 of the Act.

⁵ Where such acts have been alleged and been found to be unfair labor practices in violation of Sec. 8(a)(1) and (5) of the Act the Board has ordered as part of the remedy there, that if the employer were to resume operations at its closed facility, the employer be required to offer unit employees reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, and to continue to recognize and bargain in good faith with the union as the bargaining representative of its unit employees. *P. J. Hamill Transfer Co.*, 277 NLRB 462 (1985).

⁶ The question of whether the Respondent must pay any additional amounts into the benefit funds in order to satisfy the make-whole remedy is left to the compliance stage of these proceedings. *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

⁷ *Ibid.*

CONCLUSIONS OF LAW

1. The Respondent, Wyckoff Steel, Inc., is now and has been at all times an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, United Steelworkers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees employed by the Respondent at its Putnam, Connecticut mill, excluding supervisors, foremen, office managers, salesmen, watchmen, guards, and executives constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material, the Union has been and is the exclusive bargaining representative of all the employees within the above-described appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By failing and refusing to bargain collectively and in good faith with the Union, by unilaterally implementing changes in the terms and conditions of employment as set forth here without notice and bargaining with the Union, and by designating an individual as its bargaining representative who did not have the authority to negotiate or consummate a collective-bargaining agreement with the Union, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. By failing to make contractually required premium payments to the employees' insurance plan, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) and Section 8(d) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

ORDER

The Respondent, Wyckoff Steel, Inc., Putnam, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively and in good faith, on request, concerning rates of pay, wages, hours, and other terms and conditions of employment with the Union, as the exclusive bargaining representative of its employees in an appropriate unit by unilaterally implementing changes in terms and conditions of employment of its employees without notice to the Union or affording the Union the opportunity to bargain thereon, and by designating an individual as its bargaining representative who does not have the authority to negotiate or consummate a collective-bargaining agreement with the Union.

(b) Failing and refusing to make contractually required premium payments to the employees' insurance plan.

⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(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) On request, rescind the unilateral changes in terms and conditions of employment as set forth here and make its employees whole for any loss of pay they may have suffered as a result of such changes with interest, as provided for in the remedy section of this decision.

(b) Make the contractually required premium payments to the employees' insurance plan and make whole unit employees for any loss they may have suffered as a result of the Respondent's failure to have done so, with interest, all in the manner set forth in the remedy section of this decision.

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

(d) Sign and mail a copy of the attached notice marked, "Appendix."⁹ to the Union and to the last known address of all employees employed in the unit described above. Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be mailed immediately upon receipt by the Respondent as directed above.

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

⁹If 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."

APPENDIX

NOTICE TO EMPLOYEES
MAILED 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 mail and abide by this notice.

WE WILL NOT refuse to bargain collectively and in good faith with the Union by unilaterally implementing changes in terms and conditions of employment without notice to the Union or affording the Union the opportunity to bargain thereon, and by designating as our bargaining representative any individual who does not have the authority to negotiate or consummate a collective-bargaining agreement.

WE WILL NOT fail or refuse to make contractually required premium payments to the employees' insurance plan.

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

WE WILL rescind the unlawful unilateral changes made in the terms and conditions of employment of our unit employees and make them whole for any loss they may have suffered as a result of such unilateral changes, with interest.

WE WILL make whole our unit employees by transmitting the premium payments to the employees' insurance fund, as required by the collective-bargaining agreement, and by reimbursing our employees for any expense ensuing from our failure to make such payments.

WYCKOFF STEEL, INC.