

**ABC Automotive Products Corp. and Local 365,  
International Union, United Automobile, Aero-  
space and Agricultural Implement Workers of  
America (UAW), AFL-CIO. Case 29-CA-  
14335**

April 27, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND OVIATT

On June 21, 1991, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting 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 brief and has decided to affirm the judge's rulings,<sup>1</sup> findings,<sup>2</sup> and conclusions as modified and to adopt the recommended Order as modified.<sup>3</sup>

1. The Respondent excepts, inter alia, to the judge's finding that the Respondent unlawfully terminated its striking employees. The Respondent argues, inter alia, that it lawfully terminated the employees because the employees lost the protections of the Act by striking within the 60-day notice period provided under Section 8(d) of the Act. We find that the employees did not lose the protections of the Act, and thus adopt the judge's finding that the Respondent unlawfully discharged the employees.

<sup>1</sup>No exceptions were filed to the judge's grant of the General Counsel's motion to amend the complaint.

<sup>2</sup>The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

No exceptions were filed to the judge's finding that the Respondent did not unlawfully refuse to bargain with the Union by stating to the Union, at the August 17, 1989 negotiating session, that another meeting was unnecessary.

We note that in fn. 7 of the judge's decision, the judge inadvertently stated that he had *not* found that the Respondent did not violate the Act by its alleged statement on August 17, 1989, that it would refuse to negotiate with the Union. In fact, the judge *did* find that the Respondent did not violate the Act by this conduct.

<sup>3</sup>We shall amend the judge's Conclusions of Law and modify his recommended Order to reflect our finding below that, even assuming that the strike began as an economic strike, the strike converted to an unfair labor practice strike when the Respondent unlawfully discharged the striking employees. We shall also modify the judge's recommended Order to provide for reinstatement for the discharged employees to substantially equivalent positions if their former positions no longer exist.

Any additional amounts due the trust fund shall be determined in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

The complete facts of the case are set forth in the judge's decision. The relevant facts concerning the 8(d) issue are as follows.

The Respondent and the Union were parties to a collective-bargaining agreement, effective August 9, 1986, through August 9, 1989,<sup>4</sup> and to a separate agreement concerning the union welfare fund. On June 13, the Union sent the Respondent a 60-day notice of its desire to modify the collective-bargaining agreement due to expire on August 9. The Respondent did not receive this notice until July 10. On August 3, the parties agreed to extend the contract to August 23. At a negotiating session on August 17, the Respondent, reiterating the position it took at a prior session, told Union Official Peter Fullerton that it would not provide the employees with welfare coverage and that it would not make a wage offer. The Respondent further told Fullerton that the Respondent had heard rumors that the employees would strike. Fullerton denied these rumors and asked the Respondent to make a wage offer. The Respondent said it had no wage offer to make, that Fullerton should go take a strike vote, and if the employees voted to strike, "let them go out."

Fullerton then left the meeting and met with the employees. He told the employees that the Respondent did not want to provide welfare coverage and that the Respondent would not make a wage offer. On hearing this, the employees wanted to go out on strike, but returned to work when Fullerton told them he would go back and talk to the Respondent. Fullerton returned to the bargaining table and told the Respondent that the Respondent should make an offer because if it did not, the employees were not going to work. The Respondent replied that it had nothing to offer and said "let them go out if they want to go out." Fullerton asked the Respondent again to make an offer so that "at least we can make the last day of the extension." The Respondent repeated its refusal to make an offer and stated that they did not need to meet again. Fullerton again left to speak with the employees, who then decided to go out on strike. On August 29, the Respondent discharged the striking employees.

The judge found that the Respondent violated Section 8(a)(3) of the Act by discharging the striking employees. In its exceptions, the Respondent argues, inter alia, that it lawfully discharged the striking employees because the employees struck in violation of Section 8(d) of the Act. Specifically, the Respondent contends that the employees were prohibited from striking for 60 days after July 10, the day the Respondent received the Union's notice. The Respondent argues that the employees lost the protections of the Act because they went on strike during this 60-day period, on August 17.

<sup>4</sup>All dates are in 1989 unless otherwise stated.

We reject the Respondent's 8(d) defense, and adopt the judge's finding that the Respondent unlawfully discharged the striking employees.<sup>5</sup> We find that the Respondent waived its 8(d) defense when the Respondent encouraged the employees to go out on strike at the August 17 negotiating session. Specifically, the Respondent repeatedly stated, in response to the Union's requests for a wage offer, that the employees should go out on strike if they so desired.

The 60-day notice requirement under Section 8(d) of the Act is intended to prevent a union from engaging in a "quickie strike" in order to gain an advantage in negotiations. *United Marine Division Local 333 (General Marine Transportation)*, 228 NLRB 1107, 1108 (1977). In the instant case, however, the Respondent encouraged the type of conduct Section 8(d) is intended to prevent—a strike commencing less than 60 days after the receipt of a notice of termination or modification. Under these circumstances, the Respondent may not subsequently avail itself of the remedies in Section 8(d) to justify its unlawful termination of the striking employees. Therefore, we find that the Respondent's act of encouraging the employees to strike on August 17 constituted a waiver of its 8(d) defense to the allegation that it violated the Act by firing the strikers.<sup>6</sup>

2. The judge found, and we agree, that the Respondent violated Section 8(a)(5) of the Act by failing to make contractually required contributions to the union welfare fund since March 14. The judge also found that the strike was an unfair labor practice strike from its inception because the Respondent's announced refusal to provide welfare coverage at the August 17 negotiating session represented a reaffirmation of its continued refusal to provide welfare coverage, and the employees decided to strike in part to protest the Respondent's stated refusal on August 17 to provide welfare coverage. Additionally, the judge made an alternative finding that even assuming that the strike was

<sup>5</sup> We agree, for the reasons stated by the judge, that the Respondent discharged the employees because of their participation in the strike, and not because of a decision by the Respondent to close part of its business.

<sup>6</sup> In finding that the employees did not strike in violation of Sec. 8(d) of the Act, we do not rely on the judge's discussion of the notice requirements under Sec. 8(d) and his finding that the purpose of the statute was met because the strike occurred more than 60 days after the Union mailed the notice. Additionally, we do not rely on the judge's finding that the Respondent condoned the strike by offering reinstatement to the striking employees on December 15.

The judge found that the employees did not strike in violation of the contractual no-strike clause because the strike was triggered and prolonged by serious unfair labor practices. Although the Respondent argues in its exceptions that the strike was an economic strike, the Respondent does not contend that the strike violated the no-strike clause. We note, however, that assuming the strike was economic at its inception, the Respondent, by encouraging the employees to go out on strike on August 17, also waived any argument that the employees were prohibited from striking by the no-strike clause.

an economic strike at its inception, the discharge of the strikers converted the strike to an unfair labor practice strike.

In its exceptions, the Respondent argues, inter alia, that the strike was an economic strike from its inception because the employees struck in support of their negotiating position. The Respondent contends that its failure to make contributions to the union welfare fund was not a consideration in the employees' decision to go out on strike.

Having found that the Respondent waived its 8(d) defense and that the striking employees were unlawfully discharged, we find, in agreement with the judge, that, as discharged strikers, the employees were entitled to immediate reinstatement on August 29.<sup>7</sup> We also find that the strike, at a minimum, converted to an unfair labor practice strike when the striking employees were discharged.<sup>8</sup> Therefore, because it would not affect the remedy, we find it unnecessary to pass on the judge's finding that the strike was an unfair labor practice strike at its inception, and we adopt the judge's alternative finding that, assuming the strike began as an economic strike, the strike converted to an unfair labor practice strike on August 29 when the Respondent unlawfully discharged the striking employees.<sup>9</sup>

3. The Respondent excepts, inter alia, to the judge's finding that the Respondent violated Section 8(a)(5) of the Act by announcing and implementing the Respondent's decision to institute its own health and welfare plan to replace the Union Welfare Fund. On December 15, the Respondent sent, and the Union received, a letter stating that the employees had until December 19 to unconditionally return to work or permanent replacements would be hired. The letter further stated the Respondent was making its final offer. As part of this offer, the Respondent stated that "All contributions to the Union Health Fund will terminate. The employer will provide its own Health Benefit package." The employees did not return to work by December 19.

The judge found that the Respondent violated Section 8(a)(5) of the Act by announcing the implementation of a unilateral change where no impasse was reached in bargaining. In its exceptions, the Respondent argues, inter alia, that sending the December 15 letter was not unlawful because the purpose of the let-

<sup>7</sup> *Abilities & Goodwill*, 241 NLRB 27 (1979), enf. denied on other grounds 612 F.2d 6 (1st Cir. 1979).

<sup>8</sup> *Gloversville Embossing Corp.*, 297 NLRB 182 (1989).

<sup>9</sup> We also find it unnecessary to pass on the judge's finding that the Respondent prolonged the strike on August 21 by unlawfully conditioning agreement on a successor contract upon the Union's agreement to forgo seeking relief for the Respondent's earlier unlawful modification of the collective-bargaining agreement, i.e., its ceasing payment of the contractually-mandated welfare fund contributions. We agree with the judge, however, that the Respondent violated Sec. 8(a)(5) of the Act by engaging in this conduct.

ter was to communicate a final offer that could be implemented once the parties reached impasse. The Respondent contends that no unilateral change occurred because the employees never returned to work and the final offer was never implemented. We find, however, that such an announcement would cause a reasonable employee to assume that on returning to work on the December 19, a condition of employment would have changed, i.e., the Respondent's implementation of new health and welfare coverage. Thus, as far as the striking employees were concerned, the unilateral change was effectively implemented when it was announced, as the employees could only return to work under this new condition of employment.<sup>10</sup>

We further note that, in arguing that the December 15 announcement was not unlawful because it was never implemented, the Respondent appears to argue that because the Respondent never took any further steps to institute a new plan, no violation occurred. We reject this argument and find the Respondent's conduct unlawful regardless of whether any further steps were taken by the Respondent, or were ever intended to be taken by the Respondent. The damage to the bargaining relationship had been accomplished simply by the message to the employees that the Respondent was taking it on itself to set this important term and condition of employment, thereby "emphasizing to the employees that there is no necessity for a collective bargaining agent." *Famous-Barr Co. v. NLRB*, 326 U.S. 376, 384-386 (1945). See also *NLRB v. Katz*, 369 U.S. 736, 743 fn. 11 (1962).

#### AMENDED CONCLUSIONS OF LAW

1. Substitute the following for the judge's Conclusions of Law 6 and 7.

"6. Assuming the strike which began on August 17, 1989, was an economic strike at its inception, the strike converted to an unfair labor practice strike on August 29, 1989, when the Respondent violated Section 8(a)(3) and (1) of the Act by discharging the following striking employees:

Phillipe Bolisca	Pablo Lopez
Levoyant Brioche	Michael J. Mood
Eddie Dominick	Jerome E. Smith
Pierre Francois	Arthur Richburg
Richard Harrington	Ronald Williams''

2. Substitute the following for the judge's Conclusion of Law 8 and renumber the subsequent paragraph.

"7. The Respondent prolonged the strike by announcing the implementation of its unilateral change

that it would provide its own health and welfare coverage to replace the union welfare fund."

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, ABC Automotive Products Corp., Brooklyn, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Discouraging its employees' activity on behalf of a labor organization by discharging employees because they engaged in a strike, and by refusing to reinstate unfair labor practice strikers."

2. Substitute the following for paragraph 1(e).

"(e) Prolonging strikes by announcing the implementation of a unilateral change of providing its own health and welfare coverage to replace the union welfare fund."

3. Substitute the following for paragraph 2(a).

"(a) Offer the following employees immediate and full reinstatement to their former positions, or if those positions no longer exist, to substantially equivalent positions, discharging, if necessary, anyone hired to replace them since their termination, and make them whole for any loss of earnings and other benefits by reason of the discrimination against them in the manner prescribed in the remedy section of the judge's decision.

Phillipe Bolisca	Pablo Lopez
Levoyant Brioche	Michael J. Mood
Eddie Dominick	Jerome E. Smith
Pierre Francois	Arthur Richburg
Richard Harrington	Ronald Williams''

4. Substitute the attached notice for that of the administrative law judge.

MEMBER OVIATT, concurring.

I agree with my colleagues that the Respondent violated Section 8(a)(5) by failing to make contributions to the union welfare fund, by conditioning agreement on a successor contract upon the Union's agreement to forgo the delinquent welfare fund contributions, and by announcing that it would institute its own health and welfare coverage to replace the union welfare fund. I also agree that the Respondent violated Section 8(a)(3) by discharging employees for striking. Unlike my colleagues, however, I find that the strike was an unfair labor practice strike from its inception because it was prompted by the Respondent's reaffirmation of its continued refusal, since March 14, 1989, to make contractually required welfare fund contributions. As Section 8(d) of the Act is inapplicable to unfair labor practice strikes, I find it unnecessary to pass on the judge's findings that the Union's notice satisfied the require-

<sup>10</sup>See generally *Century Wine & Spirits*, 304 NLRB 338, 347 (1991) (employee stock purchase plan implemented when first announced by employer rather than on later dates when employer took further action to institute the plan).

ments of Section 8(d) or on his finding, adopted by my colleagues, that Respondent waived its 8(d) defense by comments it made before the employees struck.

#### 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 discourage our employees' activity on behalf of a labor organization by discharging employees because they engaged in a strike, and by refusing to reinstate unfair labor practice strikers.

WE WILL NOT fail or refuse to bargain with Local 365, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, as the exclusive bargaining representative of our employees in the following appropriate unit:

All employees employed by us at our Brooklyn plant, excluding office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT fail or refuse to make contributions on behalf of the employees in the unit to the Local 365 UAW welfare trust fund.

WE WILL NOT fail or refuse to bargain in good faith with the Union by:

conditioning agreement on the terms of a successor agreement on the Union's agreement to forgo the delinquent union welfare fund contributions or by

unilaterally implementing a change in our employees' terms and conditions of employment by announcing that we would institute our own health and welfare plan to replace the union welfare fund.

WE WILL NOT prolong strikes by announcing the implementation of a unilateral change of providing our own health and welfare coverage to replace the union welfare fund.

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 offer the following employees immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, discharging, if necessary, anyone hired to replace them since their termination, and we will make them whole with interest for any loss of earnings

and other benefits by reason of our discrimination against them:

Phillipe Bolisca	Pablo Lopez
Levoyant Brioche	Michael J. Mood
Eddie Dominick	Jerome E. Smith
Pierre Francois	Arthur Richburg
Richard Harrington	Ronald Williams

WE WILL remove from our files, delete, and expunge any reference to the unlawful termination of the above employees, notifying them in writing that this has been done and that their discharges will not be used against them in the future.

WE WILL, on request, bargain in good faith with the Union as the exclusive collective-bargaining representative of our employees in the appropriate unit concerning their rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL make our employees and the UAW welfare trust fund whole by paying to the fund, with interest, the amounts provided in the collective-bargaining agreement which expired on August 9, 1989, as extended to August 23, 1989. The obligations shall commence from on or about March 14, 1989, and continue until such time as we negotiated in good faith to a new agreement or to an impasse.

WE WILL make our employees whole, with interest, for any loss they suffered due to our unlawful discontinuance of our payments to the Local 365 UAW welfare trust fund.

#### ABC AUTOMOBILE PRODUCTS CORP.

*Kevin R. Kitchen, Esq.*, for the General Counsel.

*Irving T. Bush, Esq.*, of New York, New York, for the Respondent.

*Stephen E. Appell, Esq. (Sipser, Weinstock, Harper & Dorn)*, of New York, New York, for the Charging Party.

#### DECISION

##### STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Pursuant to a charge filed by Local 365, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO (the Union), on September 14, 1989, a complaint was issued against ABC Automotive Products Corp. (Respondent) on December 1, 1989.

The complaint, as amended at the hearing, alleges that Respondent:

(a) Failed and refused to make contributions to the union welfare fund on behalf of its unit employees.

(b) Failed and refused to bargain in good faith by stating that it would refuse to negotiate with the Union; by conditioning agreement on the terms of a successor agreement on the Union's agreement to forego the delinquent union welfare fund contributions; and by unilaterally implementing a

change in its employees' terms and conditions of employment, by announcing that it would institute its own health and welfare plan to replace the union welfare fund.

(c) Caused and prolonged a strike by its unfair labor practices which consisted of the unilateral change described above.

(d) Discharged 10 striking employees.

Respondent's answer denied the material allegations of the complaint.

On July 23, 25, and 26, 1990, a hearing was held before me in Brooklyn, New York. On the entire case, including my observations of the demeanor of the witnesses and after consideration of the briefs filed by the General Counsel and Respondent, I make the following<sup>1</sup>

## FINDINGS OF FACT

### I. JURISDICTION

Respondent, a New York corporation, having its principal office and place of business at 847 Shepard Avenue, Brooklyn, New York, has been engaged in the business of redistributing, and remanufacturing, or rebuilding automotive parts, and selling those parts. During the past year, Respondent derived gross revenues in excess of \$500,000 from its operations, and purchased and received at its New York plant, brakes, axles, steering components, and other automotive parts valued in excess of \$50,000 directly from other states. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

### II. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. *The Bargaining and the Strike*

Respondent has had collective-bargaining agreements with the Union for more than 23 years.

However, Respondent's two principals, Seymour and David Perlman, have been associated with it only since July 1986.<sup>2</sup> Nevertheless, the Perlman's were signatories to the most current contract, and a separate "Agreement on the Subject of Welfare Fund" which, inter alia, specified the amount of contributions to be paid to the Union's welfare trust fund. Both were executed on August 9, 1986. The contract, which expired on August 9, 1989, contained a clause which provided for its automatic renewal unless 60 days' notice was given.

The collective-bargaining unit set forth in the agreement is as follows:

All its employees . . . except office help and supervisors.<sup>3</sup>

<sup>1</sup> General Counsel's unopposed motion to correct the transcript is granted. The motion has been attached to General Counsel's brief.

<sup>2</sup> For clarity, Seymour Perlman may sometimes be referred to as Seymour, and David Perlman may sometimes be referred to as David.

<sup>3</sup> The unit set forth in the complaint, all employees, excluding office clerical employees, guards and supervisors as defined in the Act, is sufficiently similar to the contractual unit.

The contract also contains a grievance arbitration provision and a no-strike clause.<sup>4</sup>

As long as the Employer is not in default in complying with the decision of the Arbitrator, the Union agrees not to engage in any strike, picketing, boycott, or walkout.

Peter Fullerton, the Union's first vice president, testified that on June 13, 1989, a 60-day notice was sent to the Respondent, advising it that the Union wished to modify their agreement. A return receipt bears a delivery date of July 10, and bears a signature of an individual named Friedman.<sup>5</sup>

On July 5, 1989, the Union also sent a notice to the Federal Mediation and Conciliation Service, and the New York State Mediation Board.

On July 14, the Union sent its proposals for a renewal collective-bargaining agreement to Respondent. The Union's demands included a wage raise of \$1.50 [apparently per hour] for each of the 3 years of the contract and increases in contributions to the welfare fund.

Prior to the first negotiation session, Respondent was delinquent in its payments to the welfare fund, from about February 1988 to July 1989, in the amount of \$27,894.94, according to a union audit. At the time of the first session, Respondent was aware of the amount of its indebtedness.

A negotiation session was held on July 20. Union Official Fullerton testified that he told those present that bargaining must begin with the welfare provisions because the employees must have welfare coverage. David Perlman agreed that the workers have to be covered, and asked for an itemization of the coverage, stating that until he received the breakdown of such coverage and until Respondent presented its proposals, there was no sense in meeting. Fullerton agreed to supply the itemization, and the meeting ended.

Thereafter, Fullerton sent a chart containing monthly costs per employee to be paid to the welfare fund. The amounts were broken down by items of coverage such as Blue Cross, medical/surgical, major medical, life insurance, dental, and disability.

The Union received Respondent's proposals on July 26. They included a provision for a 5-year contract; recognition of the Union for all unit employees except those drivers who travel out of the metropolitan area, and a union-security clause requiring membership in the Union after 60 days of employment. The proposal contained no wage offer.

The parties next met on July 31. At that meeting, the Respondent's proposals were discussed first. The only agreement reached on those proposals was a clause permitting it to call upon the Union for additional workers.

<sup>4</sup> That clause is nearly identical to the provision in *Certified Industries*, 272 NLRB 1138, 1139 (1984).

<sup>5</sup> Respondent denies receiving the 60-day notice. When shown the return receipt, Seymour Perlman could not read the name. While admitting that the prior owner's name is Friedman, he denied that the former owner was working at the plant in July 1989, and did not recall that he was at the premises at that time. David Perlman, however, testified that one Elliot Friedman was employed, in the shipping department, about August 1989, when the strike began. Inasmuch as the return receipt is in proper form, and bears the signature of someone in a position to sign for mail, I find that the 60-day notice was received by Respondent.

The Union's demands were discussed next. Fullerton asked David Perlman if Respondent would provide welfare coverage for the employees. David said he would not cover them at this time. Fullerton said that if Respondent would not do so, there was no sense in negotiating. He asked Perlman to think about it, and David said he would. Fullerton asked for a wage offer, and David Perlman said that he had no offer to make at this time.

Fullerton testified that the Perlman's told him that if he dropped their delinquent contributions, they would provide welfare coverage for the employees. They added that if Respondent had to pay the amounts it owed to the fund, Respondent could not provide welfare coverage. Fullerton refused to agree to drop the delinquent sums owed the fund. On cross-examination, Fullerton described the request as their asking him "if we could work something out" regarding the delinquent payments. Fullerton denied being a party to any arrangement whereby a payment schedule for the payment of the delinquent funds was being drafted.

Respondent's official, Seymour Perlman, testified that Respondent presented its counterproposals at that time, and they were reviewed by the Union, which rejected all of them. Since the Union refused to agree to any of Respondent's proposals, Perlman "just to be contrary" rejected all of the Union's demands. Perlman testified that it did not make a wage proposal at that meeting.

However, Seymour Perlman also testified that before the August 17 strike, Respondent made a 25-cent-per-hour wage offer for each year of a 3-year contract, and that a final offer, also made before the strike, was for 50 cents per hour for each year of a 3-year contract. Perlman later changed his testimony by asserting that before the strike, Respondent did not make the 50-cent-per-hour wage offer.<sup>6</sup>

On August 3, the parties entered into an agreement to extend the collective-bargaining contract 2 weeks, to August 23.

Fullerton testified that no wage offer was made until a meeting in December. He further stated that at the August 17 session, Fullerton asked Perlman if Respondent was going to provide welfare coverage for the employees. David Perlman said it would not. Fullerton asked why, and Seymour Perlman said that the workers do not need such coverage because many of them do not "pull their weight, and 1 hand washes the other." Fullerton asked if Respondent would make a wage offer, and David Perlman said that it would not. David added that he heard rumors that the employees would strike. Fullerton denied such rumors, and again requested that Respondent make an offer. David said that he had no offer to make, and suggested that the employees vote on whether to strike, and if they decided to strike, "let them go out."

Fullerton then told the employees, who were on a break, that Respondent did not want to provide welfare coverage, and would not make a wage offer. The employees wanted to strike. Fullerton told them to return to work, which they did. Fullerton returned to the bargaining table and told the Perl-

man that if Respondent did not make an offer the employees would not work. David Perlman replied that he had nothing to offer, and that if they wanted to strike, they should do so. Fullerton again asked David to make an offer so they could meet on the last day of the extension, August 23. David repeated that he had nothing to offer, and stated that another meeting was unnecessary.

Fullerton then spoke to the employees, who decided to strike. Fullerton testified that the reason for the strike was that no agreement was reached on the terms of a new contract. The complaint alleges that the employees began their strike in support of their collective-bargaining position.

Eddie Dominick, the Union's shop steward, corroborated Fullerton's testimony that Respondent asked him to take care of the welfare fund, and asked him to "drop" the welfare, and if he did not, Respondent had nothing to offer. Respondent also refused to make any offer at that meeting.

A bargaining session was held on August 21, 1989, attended by Union President Sal Mieli. According to Fullerton, Seymour Perlman complained that Respondent was being asked to make further contributions to the welfare fund, when it already was delinquent in payments to that fund. Mieli asked Perlman if he owned the building which housed Respondent's factory. Perlman replied that he leased the premises, and the lease expired in June 1990. Mieli then suggested that Respondent continue to pay the current amount of welfare contributions until June 1990, at which time they would speak again about an increase in the contributions. Seymour Perlman then said that if the Union dropped the past due amounts it owed to the welfare fund, Respondent would agree to a new contract immediately. Mieli refused to agree to that, saying that if he agreed to that demand, he would go to jail.

Seymour Perlman corroborated Fullerton's testimony concerning Mieli's offer that Respondent continue to pay the current amount of contributions until the lease expired. Perlman testified that he could not agree to it then because he had to discuss it, and Respondent was not in a position to pay off the delinquent welfare contributions without there being some discussion of the amounts owed in the form of a proposal, apparently to reduce the indebtedness.

Gerald Dankulich, the financial secretary and treasurer of the Union, and Jeannine Conlon, the Union's business agent, were present at the August 21 meeting. Both testified that they heard Seymour Perlman tell Union President Mieli that if the amount of the moneys owed to the welfare fund were "forgotten" the Union would have a contract.

#### B. *The Discharges and the Offer to Return to Work*

Respondent, at about that time, considered closing its business, selling it, or using its facility as a distribution location. It decided to discontinue production, and use the facility to distribute merchandise.

On August 29, Respondent sent letters to the following employees: Phillipe Bolisca, Levoyant Brioche, Eddie Dominick, Pierre Francois, Richard Harrington, Pablo Lopez, Michael J. Mood, Jerome E. Smith, Arthur Richburg, and Ronald Williams. The letter stated:

Please hereby be advised that we have elected to close production in your department. We no longer need your services. Please make arrangements to re-

<sup>6</sup>In this regard, the testimony of Seymour Perlman is not credible. He first testified that no wage offer was made at the July 31 meeting, but Respondent made one or two wage offers before the August 17 strike. Since only one meeting occurred between July 31 and the strike—that being the meeting of August 17—it is clear that no wage offers were in fact made, as testified by Fullerton.

move all your personal [sic] effects as soon as possible.

Management is sorry for this decision, but business necessitates this move. Letters of recommendation for future employment will be more than rendered upon request.

Thank you for your long and loyal services. We wish you good will in your future.

The next day, August 30, Respondent sent the following letter, in relevant part, to the Union.

Please hereby be advised that management has elected to terminate rebuilding, production. We therefore no longer have need for employees in these areas. Letters of termination to employees hand delivered this day. . . .

Management is sorry for this decision, but business necessitates this move.

On September 11, Fullerton sent a mailgram to Respondent, as follows:

Local 365 and its employees represented at ABC Automotive offers to return to work unconditionally. The employees will return to work on Tuesday, Sept. 12 at 8am.

On September 12, Fullerton and the striking employees went to the shop. Fullerton told Seymour Perlman that the men were returning to work and are present to begin work. Seymour replied that he received the mailgram, but that he did not need the men, adding that he fired them. The group then left.

Seymour Perlman stated that he told the men that no work was available, and that Respondent had ceased its production work.

Seymour Perlman further testified that after he sent the late August letters of termination, Respondent experienced difficulty in purchasing merchandise, for a distribution business. It therefore decided to resume its production business.

#### C. *Continued Bargaining and the Offer to Reinstate*

Seymour Perlman testified that on November 8, a meeting took place outside the shop, at which David Perlman, Fullerton, and Shop Steward Eddie Dominick were present. According to Perlman, he told Fullerton that he was willing to accept the Union's unconditional offer to return to work. Perlman stated that Fullerton said he would have to discuss it with Union President Mieli. Fullerton and Dominick both denied that any meeting, or any such conversation occurred. David Perlman testified, but was not asked any questions about that alleged meeting.

On December 2, the parties met at a diner. Fullerton testified that the main topic of conversation was the welfare payments—both the amount that was past due, and the amounts to be paid under a renewal agreement. Respondent wanted concessions in the amounts to be paid. Union President Mieli refused to make any concessions. No agreement was reached, and Fullerton said he would call for another meeting.

Seymour Perlman's version of that meeting was that he asked Mieli what he could do regarding working out a plan for the repayment of the delinquent welfare fund contribu-

tions owed. According to Perlman, Mieli offered to help in that regard. Perlman also offered a 50-cent-per-hour wage raise in each year of a 3-year contract, and also accepted the Union's offer that Respondent continue making welfare contributions in the same amount as it had in the prior contract. Perlman asked if this offer was acceptable, and Mieli replied that he would make sure that the workers accepted it. According to Perlman, the meeting concluded with an agreement that the Union would contact Perlman, and the employees were supposed to return to work.

Fullerton testified that Respondent's 50-cent-per-hour wage offer was not made at the December 2 meeting. Rather, it occurred at one of the meetings after the diner meeting. Respondent offered a 50-cent-per-hour wage increase in each of the 3 years of a renewal agreement. According to Fullerton, Respondent refused to provide welfare coverage for the employees, and wanted a letter from each of them stating that they would not take further action against it. Fullerton responded that the employees would return for the wage raise offered, but wanted welfare coverage, and would not sign such letters requested by Respondent. Respondent then said that no one could return to work unless he signed the letter.

According to Perlman, when he did not hear from the Union concerning the December 2 offer, he called Fullerton on December 5. Fullerton told him that it was up to Mieli, and not the Union, to accept Respondent's offer. Fullerton denied that conversation took place.

On December 7, Respondent sent its plant manager, J. W. Lane, to the picket line with letters for each employee present. He was instructed to read the letter to the men. He did not read the letter to the employees, but told them it concerned their returning, or not returning to work. The letter stated as follows:

The company accepts your unconditional offer to return to work.

Return December 8, 1989 at 8 am.

If you do not intend to return, please initial below and return.

ABC AUTOMOTIVE PRODUCTS CORP.

I do not intend to return to work.

Lane testified first that he told the employees to sign the letter if they were returning to work. Later, he testified that he told them to sign them if they did not intend to return to work.

The employees refused to accept the letters, or to read them. Lane was told that he should have given the letters to Union Agent Fullerton when he was present at the picket line a short time before. Six employees testified that Lane told them that if they wanted to return to work they must sign the paper. They did not return to work pursuant to that letter.

On December 15, Respondent sent the following letter to the Union:

Following the strike at the employer's plant, you were advised by the employer that it had made a decision to stop production and the services of its employees would no longer be needed. Since the strike started, no employees have been hired to replace the employees on strike. The employer has now changed its prior decision and intends to start production as previously done.

On or about September 11, 1989, the union on behalf of the striking employees made an unconditional offer for the employees to return to work. On November 8, 1989, the company offered to accept the unconditional offer to return to work made by you in behalf of the employees. The company's offer was refused. A similar offer was made and rejected on December 2, 1989. In accordance with the employer's decision to start production, the employer now offers to accept the unconditional offer of the employees to return to work. On December 7, 1989, this offer was made to all employees and refused.

The employer now intends to permanently replace those employees who do not return to work in accordance with their unconditional offer. New hiring will start December 19, 1989.

At this time, the employer also offers the Union the opportunity to resume contract negotiations. These negotiations commenced 5 months ago, and the employer believes that it is time for the negotiations to end.

The employer, therefore, gives for its final offer the following: 50 cent increase in wages yearly over three years, to commence upon signing the agreement.

All other terms of the prior agreement will continue as is, except the starting date and ending date and contribution to the Union Health Fund.

All contributions to the Union Health Fund will terminate. The employer will provide its own Health Benefit package.

At the hearing, Fullerton denied Respondent's assertions in that letter that Respondent accepted, on November 8 or December 2, the unconditional offer to return to work. In addition, Fullerton stated that, before receiving that letter, Respondent never discussed with him the fact that it would institute its own health and welfare plan. However, it should be noted that during their meetings, when Respondent complained that it could not afford the cost of the proposed health and welfare contribution, Fullerton told the Perlman that Respondent did not have to accept the Union's coverage, and that they should "go out and shop around" for other coverage if they wished, with the condition that the coverage they purchased must be comparable to or better than the Union's plan.

Fullerton testified that a few days after receipt of the above letter, he met with Respondent, and in fact, met several times with Respondent thereafter. At the first meeting after receiving the letter, the Union agreed to accept Respondent's wage offer. However, the Perlman insisted on receiving letters signed by all employees, and by the Union, that they would not take legal action against the Respondent. In addition, Respondent refused to provide welfare coverage to the employees. Perlman denied placing such conditions on the return to work of the strikers.

Fullerton stated that in every meeting including, and after the August 21 meeting, Respondent continued to insist that the Union drop Respondent's delinquent welfare fund obligations. Seymour Perlman denied making that comment, and asserted that by the time of the December 2 meeting, Respondent had already worked out with the Union's attorneys a payment schedule for the payment of its welfare fund delinquencies. David Perlman also denied conditioning the

reaching of a contract on the Union's dropping the delinquent fund contributions owed.

Shop Steward Eddie Dominick testified that during the strike he saw replacement workers who, from their appearance, looked like they were doing unit work. He did not say when he saw these workers. Seymour Perlman stated that Respondent resumed production in late December 1989 or early January 1990. This is consistent with its letter of December 15 to the Union in which it stated that it would begin hiring permanent replacements on December 19.

Three employees who were employed as drivers for Respondent before the strike, Pablo Lopez, Michael Mood, and Candido Velez, and engaged in the strike, thereafter became self-employed persons, who apparently leased Respondent's trucks, made deliveries and were paid pursuant to a voucher system for the deliveries they made.

#### ANALYSIS AND CONCLUSIONS

##### I. RESPONDENT'S OBJECTION TO THE AMENDMENT OF THE COMPLAINT

The original complaint alleged violations of Section 8(a)(1), (3), and (5) of the Act in the following respects:

- (a) Respondent failed and refused to make contributions to the union welfare fund, and
- (b) Respondent discharged employees because they engaged in an economic strike.

At the hearing, the General Counsel moved to amend the complaint to include allegations that:

- (a) Respondent failed and refused to bargain in good faith by conditioning agreement on the terms of a successor agreement on the Union's agreement to forego the delinquent union welfare fund contributions,
- (b) Respondent unilaterally implemented a change in the terms and conditions of employment by announcing that it would institute Respondent's own health and welfare plan to replace the union welfare fund, without notice to the union.
- (c) The strike was an unfair labor practice strike.

Respondent objected to the amendment on the grounds that certain of the allegations sought to be included had been part of the charge in this proceeding which had been withdrawn previously, and also objected based upon Section 10(b) grounds.

The relevant parts of the charge which had been withdrawn, are as follows.

Since on or about July 1, 1989, the . . . Employer has negotiated in bad faith with the Union for a new collective bargaining agreement, with no intention of entering into a final and binding agreement; has insisted on unlawful concessions as to benefit-fund delinquencies as a condition of reaching any agreement.

The Union requested withdrawal of that part of the charge, and on October 31, 1989, the Regional Director approved its request for withdrawal. On December 1, 1989, a complaint was issued, as set forth above.

The other allegations of the charge, as to which complaint was issued, alleged that Respondent failed and refused to

make contributions to the union welfare fund, and discharged its employees because they engaged in a strike.

I overruled Respondent's objection to the amendments and granted the General Counsel's motion to amend the complaint.

The fact that certain allegations which were the subject of the instant charge were withdrawn is not determinative of the question here. In *Redd-I, Inc.*, 290 NLRB 1115 (1988), the Board held that allegations in a withdrawn charge could be added to a timely filed charge if such withdrawn allegations were closely related to the pending, timely filed charge.

The following factors are examined in order to determine whether otherwise untimely allegations are "closely related" to a timely filed charge: the allegations must all involve the same legal theory and usually the same section of the Act; whether the allegations arise from the same factual situation or sequence of events as the allegations in the pending timely charge; whether the respondent would raise the same or similar defenses to both allegations.

Here, the allegations of the withdrawn charge occurred within 6 months prior to the filing of the timely charge in this case. The withdrawn allegations of the charge involve the same class of violation as the allegations in the timely charge because they all involved actions of Respondent allegedly taken in violation of its obligation to bargain with the Union, and retaliation against employees for engaging in their Section 7 rights, in violation of Section 8(a)(3) and (5) of the Act.

The allegations in the withdrawn charge all arise from the same factual situation and series of events as the timely charge. Thus, they arose from the course of bargaining and sequence of events which took place as a result of the negotiation of a renewal collective-bargaining agreement. In addition, Respondent would have raised the same or similar defenses to the withdrawn allegations, particularly with regard to the concessions for benefit-fund delinquencies, inasmuch as that issue relates to the allegation in the complaint that Respondent failed and refused to make contributions to the Union's welfare fund.

I accordingly reaffirm the granting of General Counsel's motion to amend the complaint.

## II. THE ALLEGED VIOLATIONS OF SECTION 8(A)(5)

The complaint alleges that Respondent (a) failed and refused to make contributions to the Union's welfare fund and (b) failed and refused to bargain in good faith by stating that it would refuse to negotiate with the Union; by conditioning agreement to the terms of a successor contract on the Union's agreement to forego the delinquent union welfare fund contributions; and by unilaterally implementing a change by announcing that it would institute its own health and welfare plan to replace the Union's welfare fund.

### A. *The Failure to Make Contributions to the Welfare Fund*

Respondent admits that it was delinquent in the payment of welfare fund contributions. However, it moved to dismiss certain allegations of the complaint as alleged the failure and refusal to make welfare contributions, on the ground that the trustees of the Local 365 welfare fund had filed a lawsuit against Respondent for the collection of such contributions

owed it. On December 4, 1989, the welfare fund sued Respondent in U.S. District Court, pursuant to the Employer Retirement Income Security Act (ERISA), seeking the payment of \$31,327.46 in unpaid contributions to the welfare fund. Respondent argues that the same remedy cannot be sought in two forums, and that one of the cases should be deferred to the other. In addition, on brief, it asserts that the district court action has been settled with the agreement of a payment schedule which Respondent is adhering to.

In *Laborers Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988), the Supreme Court stated that the remedies provided by ERISA and the Act are not mutually exclusive. The Court held that:

A company that is a party to a collective-bargaining agreement may have a contractual duty to make contributions to a pension fund during the term of the agreement and, in addition, may have a duty under the National Labor Relations Act to continue making such contributions after the expiration of the contract and while negotiations for a new contract are in progress. [Id. at 541]

The complaint alleges that since on or about March 14, 1989, Respondent has failed and refused to make contributions to the union welfare fund. That date coincides with a date 6 months prior to the filing and service of the charge herein. The evidence establishes that Respondent has not made such contributions. Respondent was required to make such contributions, pursuant to its collective-bargaining agreement, and the supplementary welfare fund agreement during the life of the contract, and after its expiration. *Apex Investigation & Security Co.*, 302 NLRB 815, 820-821 (1991).

I accordingly find and conclude that by failing and refusing to make such contributions, Respondent violated Section 8(a)(5) and (1) of the Act.

The complaint also alleges that Respondent refused to bargain in good faith with the Union on August 17, by stating that it would refuse to negotiate with it, and by conditioning agreement to a successor contract upon the Union's agreement to forego its entitlement to the delinquent welfare fund payments owed by Respondent.

### B. *The Alleged Refusal to Negotiate*

I find that David Perlman made the statement attributed to him at the August 17 meeting, that another meeting was unnecessary. At that time, negotiation sessions had been held on July 20 and 31, and on August 17. Both parties had presented their proposals for a renewal contract. I credit Fullerton's testimony that no wage offer had been made by August 17. He consistently testified that he repeatedly asked the Perlman's to make a wage offer in order to prevent a strike, but that none was forthcoming. Respondent's failure to put a wage offer in its written proposals lend support to Fullerton's testimony that no wage offer was made by the time of the August 17 meeting. In addition, Seymour Perlman's testimony concerning when a wage offer was made was self-contradictory in that he testified variously that Respondent made a 25-cent and a 50-cent wage offer prior to the strike, but then testified that no 50-cent wage offer was made before the strike, and then testified that one or two wage offers were

made before the strike. If, indeed Respondent had made a wage offer, any wage offer, before the strike, it appears likely, in view of Fullerton's pleas, that a strike would have been prevented. Rather, it appeared that Respondent welcomed a strike, and in fact David Perlman, in stating that he had no offer to make, suggested that the employees take a strike vote, and if they decided to do so, go out on strike. I accordingly credit Fullerton's testimony in this regard.

It was in this context that when Fullerton suggested that an offer be made so that they could meet on the last day of the contract's extension, David Perlman said that another meeting was unnecessary. The employees then decided to strike, and did so.

Although I find that David Perlman made the statement attributed to him, I cannot find that this statement constitutes a refusal to negotiate with the Union, as alleged in the complaint. David was stating his opinion that another meeting was unnecessary since he refused to make a wage offer, and apparently did not think that another meeting would be fruitful. He was not refusing to negotiate. It is not alleged that Respondent violated the Act by refusing to make a wage offer. Rather it is alleged that by saying that another meeting was unnecessary, it refused to negotiate with the Union. It should be noted that further collective-bargaining sessions were held, including one only 4 days later. In addition, another session was held on December 2. Under these circumstances, I cannot find that David's comment on August 17 that another meeting was unnecessary, amounted to a violation of the Act. I will accordingly recommend that this allegation be dismissed.

#### C. Conditions to Reaching Agreement

The complaint further alleges that on about August 21, Respondent unlawfully conditioned agreement upon a successor contract on the Union's agreement to forego its entitlement to the delinquent welfare fund payments to which it was entitled.

In this regard, I credit the testimony of General Counsel witnesses Fullerton, Dankulich, and Conlon, that at the August 21 bargaining session, Seymour Perlman told those assembled that if Respondent's indebtedness to the welfare fund was "dropped" or "forgotten" the Union would have a contract.

Respondent argues that it was aware of its indebtedness to the Union's welfare fund, and had been having ongoing discussions with the Union's attorneys concerning a payment schedule so that it could pay out its obligations to the fund. Respondent accordingly argues that under these circumstances it would have made no sense to seek a total forgiveness of its liability to the fund. In this regard, the Perlman denied conditioning the reaching of a new agreement on the Union's forgiveness of Respondent's delinquent payments.

As set forth above, I credit the General Counsel's witnesses, and find that Seymour Perlman made the statement attributed to him. It is likely that Seymour would have sought forgiveness of Respondent's indebtedness to the fund. Respondent knew that the Union was anxious to obtain a renewal collective-bargaining agreement, and he seized on this desire as an effective tool to free itself from its indebtedness. Respondent thus exhibited a hard line approach toward the

bargaining, which is illustrated by its refusal to make an offer, and instead, inviting the employees to strike.

The General Counsel argues that Perlman's statement unlawfully conditioned Respondent's agreement to a renewal contract upon the Union's forgiving Respondent's indebtedness to the Union's welfare fund. I agree.

In *Public Service Electric Co.*, 280 NLRB 429, 432 (1986), the Board held that the employer violated Section 8(a)(5) of the Act when it

conditioned its agreement to any new collective-bargaining agreement on the Union's "consent" to the abrogation of an existing and enforceable contractual obligation. [the retroactivity clause in the parties' expired contract.] [I]n so doing, the Company's position was tantamount to making any new collective-bargaining agreement hostage to the Company's insistence on abrogating an existing contractual commitment.

The Board has held that conditioning the release of pension funds to employees on the Union's acceptance of certain terms of a settlement of bargaining negotiations concerning the effects of a plant closing, violates the Act. *Birmingham Plastics*, 221 NLRB 141 (1975).

#### D. The Unilateral Change

With respect to the complaint allegation of a unilateral change, The General Counsel relies upon Respondent's letter of December 15 to establish the violation. That letter, inter alia, set forth the Respondent's "final offer," including the statement that

all contributions to the Union Health Fund will terminate. The employer will provide its own Health Benefit package.

The General Counsel argues that this statement constitutes the announcement of the implementation of a unilateral change. I agree. The health and welfare provisions of a collective-bargaining agreement survive the expiration of such a contract, until such time as a new agreement is made, or until an impasse is reached, or the Union waived its right to bargain about such changes. Here, no impasse was reached in bargaining. In fact, very little bargaining of substance occurred at all.

However, Respondent urges that the Union waived its right to bargain about the change by Fullerton's admitted statements during the bargaining sessions that Respondent was not bound to accept the Union's health and welfare plan but was free to obtain another plan which provided benefits equal to or greater than the Union's plan. This does not constitute a waiver of the Union's right to bargain over the implementation of the new plan.

An employer is permitted to modify a condition of employment provided that it gives timely notice thereof and the union fails to timely request bargaining. Here, the first notice the Union received of the change in health and welfare plans was when it received the Respondent's letter of December 15. The Union was not informed of the change prior to its receipt of its letter, and no attempts to bargain with it concerning the change were made. Accordingly, the unilateral announcement and implementation of the Respondent's health and welfare plan violated Section 8(a)(5) of the Act.

*Imperial House Condominium*, 279 NLRB 1225, 1238 (1986).

### III. THE ALLEGED VIOLATIONS OF SECTION 8(A)(3)

#### A. *The Strike and the Discharges*

The complaint, as amended, alleges that the strike which began on August 17 was caused and prolonged by certain unfair labor practices, including Respondent's (a) failure to make contributions to the Union's welfare fund since March 1989, (b) statement on August 17 that it would refuse to negotiate with the Union, (c) conditioning agreement on August 21 on the terms of a successor agreement on the Union's agreement to forego the delinquent union welfare fund contributions, and (d) unilateral implementation of a change on December 15, by announcing that it would institute its own health and welfare plan.

The complaint also alleges that the discharge of the strikers on August 29 violated the Act.

Respondent alleges that at all times the strike has been an economic strike.

The reason for the strike must be examined in order to determine the nature of the strike. As set forth above, at the bargaining session of August 17, Fullerton reported to the employees that Respondent refused to provide welfare coverage for them, and was refusing to make a wage offer. They then voted to strike. I have already found that Respondent's refusal to make welfare contributions since March 14, 1989, constituted a violation of Section 8(a)(5) of the Act. Respondent's announced refusal to provide welfare coverage for them at the August 17 bargaining session represents a reaffirmation of its continued refusal to provide welfare coverage. The employees then decided to strike, in part to protest Respondent's refusal to provide welfare coverage. Under these circumstances, where Respondent's failure to make welfare contributions violated the Act, its statement to the union negotiator, which was relayed to the employees, that it would not provide welfare coverage, was a reason for the strike.

In *B. N. Beard Co.*, 248 NLRB 198, 206 (1980), the Board found that employees were not engaged in a strike in support of negotiations for a new contract. Rather, it was found that the workers engaged in an unfair labor practice strike by striking "because of Respondent's unfair labor practices in failing to comply with provisions of [the unions'] separate existing contracts with Respondent requiring Respondent to make payments to health and welfare and pension funds." In *New York-Keansburg-Long Branch Bus Co.*, 228 NLRB 1172, 1179 (1977), the Board held that the employees engaged in an unfair labor practice strike in protest of respondent's "unilateral decision to cease making contributions to the fund."

Accordingly, since the employees struck in part in protest of the unfair labor practice. I accordingly find and conclude that the strike was an unfair labor practice strike from its inception.<sup>7</sup>

The complaint alleges that Respondent discharged 10 strikers on August 29, 1989, because they engaged in the strike.

<sup>7</sup>Since I have not found that Respondent did not violate the Act by its alleged statement of August 17 that it would refuse to negotiate with the Union, I do not rely on that alleged statement in making this finding.

The General Counsel relies on the letter sent by Respondent to each of the strikers as proof of the discharge. As set forth above, the letter stated that Respondent has decided to close production in the employees' departments, and that their services were no longer needed. A letter to the Union the following day stated that Respondent discharged its employees because it decided to terminate rebuilding production.

Respondent denies having terminated the strikers. It also argues that this issue should be decided based on *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). I disagree. It is not alleged that Respondent violated its duty to bargain by not bargaining about its decision to close part of its business.

I find that the 10 named strikers were in fact discharged by Respondent by its August 29 letter. The letter informed them that their services were no longer needed, asked them to remove their belongings, stated that letters of recommendation would be furnished, and thanked them for their service to the company. A letter to the Union the next day stated that the letters to the employees were "letters of termination," and advised that Respondent "no longer [has] need for employees in these areas."

The General Counsel asserts that the employees were discharged for striking. Inasmuch as I have found that the strike was an unfair labor practice strike from its inception, the strikers

could not lawfully be discharged . . . other than for misconduct causing them to lose the protection of the Act. [*Chesapeake Plywood*, 294 NLRB 201, 202 (1989).]

In this connection I find that the discharge of the strikers served to prolong the strike.

#### B. *Respondent's Defenses to the Discharges*

Respondent, however, insisting that the strike was an economic strike, and assuming, arguendo, that its conduct constituted discharges of the strikers, asserts several grounds as defenses to such conduct.

Respondent argues that it lawfully discharged the strikers because it decided to close part of its operation, and because the employees struck in violation of (a) the no-strike clause in the collective-bargaining agreement and (b) Section 8(d) of the Act.

##### 1. The decision to close part of its business

Seymour Perlman testified that Respondent was in financial difficulty when the Perlman's became involved in its operation in July 1986, 3 years before the strike, and at the time of the hearing was still in such financial straits. He stated that at the time of the strike, Respondent was faced with the Union's demand for increases in health and welfare contributions, which Respondent could not meet, and it also owed contributions to the Union's fund for past due amounts. Perlman stated that he did not know what his future costs would be, and apparently based on these considerations, Respondent decided to cease the production part of its business, and accordingly released its employees who were striking at that time.

The timing of the discharges is suspect. If Respondent had been experiencing financial difficulties for 3 years it seems

odd that it chose just this time—in the middle of negotiations for a renewal contract and when employees had struck—to make a major change in the direction of its business. It is most doubtful that, if the strike had not occurred, Respondent would have taken the action of ceasing its production activity. In addition, even before the strike, Respondent knew what it owed to the union funds, and was in the process of bargaining concerning new amounts to be paid to the funds. It should also be noted that no documentation of its financial situation was presented at the hearing. *Ricks Construction Co.*, 259 NLRB 295, 297 (1981). It is apparent that Respondent seized on the strike as an opportunity to rid itself of its employees, and in fact, discharged its employees for striking. If, indeed Respondent did decide to close part of its business, it did so voluntarily, in response to the strike. It had no production workers so it decided, at that time, not to engage in production work. *Pace Motor Lines*, 260 NLRB 1395, 1411 (1982). There was no showing that a decision to close its production facility had been considered at any time prior to the strike. Respondent has not shown that it would have closed its production function in the absence of the strike. *Wright Line*, 251 NLRB 1083 (1980). The fact that it later decided to resume production work only 2 months after discharging the employees is further evidence that Respondent's claim that it was ceasing production was not made in good faith. Respondent asserted that it decided to resume production because it had difficulty purchasing merchandise for a business limited to distribution. These facts should have been known to Respondent prior to its decision to cease production.

Even assuming, as Respondent argues, that the strike was an economic strike from its inception, the discharge of the strikers converted the strike to an unfair labor practice strike. *Champ Corp.*, 291 NLRB 803, 804 fn. 4 (1988).

### 2. The no-strike clause

With respect to the no-strike clause in the contract, the strike began on August 17, prior to the contract's termination date of August 23. The Supreme Court in *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956) held that a no-strike clause in a collective-bargaining agreement does not serve to waive a right to strike against an employer for unfair labor practices. The Board limited that rule to apply only in cases of serious unfair labor practices. *Arlan's Department Store*, 133 NLRB 802 (1961); *Goodie Brand Packing Corp.*, 283 NLRB 673, 674 (1987).

Here, as I have found that the strike was an unfair labor practice strike from its inception, the no-strike clause did not constitute a waiver of the Union's right to strike against Respondent's commission of unfair labor practices. The unfair labor practice found here, the failure of Respondent to make welfare contributions which triggered the strike, and the subsequent unfair labor practices such as the conditioning agreement to a new contract on the Union's forgiveness of welfare fund contributions owed, and the discharge of the strikers which prolonged the strike, were serious unfair labor practices. In *Pacemaker Yacht Co.*, 253 NLRB 828, 831 (1980), the Board held that a no-strike clause was insufficient to establish a waiver of the right to strike, where employees struck to protest the failure of a joint employer-union fund to make contributions for employees' health and welfare benefits. The Board stated that the strike was over a matter

which "intimately related to the terms and conditions of employment of the striking employees."

### 3. Section 8(d) of the Act

With respect to Section 8(d) of the Act, that provision is not applicable to unfair labor practice strikes. *B. N. Beard Co.*, supra. I accordingly find that inasmuch as this strike was an unfair labor practice strike from its inception, Section 8(d) of the Act is inapplicable.

Assuming that the strike from its inception was an economic strike, as argued by Respondent, Section 8(d) of the Act requires that notice be served upon employers of a proposed modification in a collective-bargaining agreement 60 days prior to the expiration date of the contract, and that notification to the Federal Mediation and Conciliation Service must be made within 30 days after such notice. The statute further provides that the party desiring to modify the contract must refrain from striking for a period of 60 days after such notice is given. Section 8(d) also states that any employee who engages in a strike within the notice period loses his status as an employee.

Here, I credit Union Agent Fullerton's testimony that he sent a 60-day notice to Respondent on June 13, 1989, by registered mail. A return receipt therefore shows that it was received on July 10. I have found that it was received by Respondent on that date.<sup>8</sup>

Section 102.112 of the Board's Rules and Regulations provides that the date of service of a document is the day when the document served is deposited in the mail. The parties' contract expired on August 9. Inasmuch as Section 8(d) requires the notice to be served within 60 days of the contract's expiration date, Section 8(d) would be satisfied if the notice was mailed on or before June 5. The notice was not mailed on or before June 5, and was therefore untimely.

However, on August 3 the contract was extended to August 23. The strike, which began on August 17, occurred during the term of the extended collective-bargaining agreement. The question presented, therefore, is whether the strikers lost their status as employees under Section 8(d) because of their strike during the extended contract period. Section 8(d) provides that any employee who engages in a strike during the notice period loses his status as an employee. Section 8(d) was designed to eliminate the "quickie strike" by providing a 60-day period during which unions may not strike, and employers may not lockout in support of bargaining demands. *Jet Line Products*, 229 NLRB 322 (1977). Assuming that the strike was an economic strike, it is evident that the amount of time, more than 60 days, between the original service of notice on June 13 and the strike on August 17, met the purpose of the statute to provide time for the parties to negotiate a settlement of the contract dispute.

Respondent argues, as will be discussed, infra, that it offered the strikers reinstatement to their positions at various times. Respondent thereby waived any defense under Section 8(d) of the Act by its action in offering reinstatement, and thus condoning the strike and the Union's failure to observe the Section 8(d) requirements. *Axelson, Inc.*, 285 NLRB 862, 872 fn. 25 (1987). Respondent not only condoned the strike, but also encouraged it. On August 17, according to the credited testimony of Fullerton, David Perlman was the first per-

<sup>8</sup>See fn. 5, supra.

son to mention the possibility of a strike. Perlman stated that he heard a rumor that the employees would strike. Fullerton denied such rumors, and then after Perlman stated that he had no offer to make, suggested that the workers vote on whether they wished to strike, and if so "let them go out." Accordingly, Respondent suggested and invited the workers to strike. It would therefore be inappropriate to find that the Union struck in violation of Section 8(d) under these circumstances.

### C. *The Failure to Reinstate the Strikers*

Inasmuch as I have found that the strikers were discharged by Respondent's letter of August 29, they were entitled to an immediate offer of reinstatement to their positions of employment even without making an offer to return. *Abilities & Goodwill, Inc.*, 241 NLRB 27 (1979). Respondent asserts that it had no jobs available at that time even if it had immediately reinstated the strikers. As set forth above, Respondent's defense that it ceased production lacks merit. I have found that its decision to cease its production function was because of the action of its production employees in striking. The actual cessation of its production work, if in fact it did occur, was because its production employees were on strike and thus not available to work. Under these circumstances, Respondent would be profiting from its own wrongdoing if its discharge of the strikers was found to be justified because it ceased production due to their activities in engaging in the strike.

As the Board stated in *Chesapeake Plywood*, supra at 202:

As unfair labor practice strikers, they could not lawfully be discharged, or threatened with discharge or other disciplinary action, other than for misconduct causing them to lose the protection of the Act.

I therefore find that as discharged strikers they were entitled to immediate reinstatement even without making an offer to return. However, in the interest of completion, a discussion of the offers to return and Respondent's arguments will be made.

On September 11, the Union sent to Respondent a proper unconditional offer to return to work on behalf of the striking employees, which stated that the workers would return to work the following day. On September 12, the strikers appeared at Respondent's shop. Seymour Perlman stated that he did not need them, and that it had ceased its production work.

Seymour Perlman's testimony, which I do not credit, was that at meetings of November 8 and December 2, he offered to accept the return of the strikers. If, indeed Respondent made those offers, I believe that the Union would have followed them up immediately. It had made an unconditional offer to return nearly 2 months earlier and the workers were still on strike. According to Perlman, Fullerton said he would get back to Perlman concerning Respondent's offer to reinstate the workers. It seems unlikely that Fullerton would have delayed an immediate acceptance of Respondent's offer to reinstate the strikers. Fullerton was anxious to have the workers reinstated as demonstrated by his accompanying them to the shop on September 12.

The first "offer" to reinstate the workers was on December 7 when Respondent sent Plant Manager Lane to the pick-

et line to distribute letters which stated that the company accepted their unconditional offer to return to work. The letter asked that they return to work the following morning. Aside from the short notice, which of itself may not constitute a proper offer of reinstatement, the manner in which the letter was presented was so confusing as to render it a nullity. Thus, Lane's testimony was very confused as to what he told the strikers. First he stated that he told them to sign the letter if they were returning to work. Then he testified that he told them to sign the letter if they did not intend to return to work. The letter, in fact, asks the strikers to initial the letter if they did not intend to return to work. Six employees testified that Lane told them to sign if they wished to return to work. No one signed the letter, and none of the 10 employees named in the complaint returned to work.<sup>9</sup> Accordingly, based upon this evidence, I cannot find that the December 7 attempt to offer reinstatement was valid.

On December 15, Respondent, by letter to the Union, accepted the employees' unconditional offer to return to work, and advised that, as to those who did not return to work, permanent replacements would be hired on December 19.

Fullerton testified that after receiving this letter, he met with Respondent, which placed conditions on the workers returning, requiring a letter signed by the employees and the Union that they would not take legal action against it. Perlman denied placing such conditions upon the employees' reinstatement.

There was no evidence, other than Fullerton's testimony, that Respondent asked for waivers of legal action against it. Certainly, Respondent's letter of December 15 contained no such requirement. It seems to me that if such waivers were the only impediment to the workers' return after a 4-month strike, the Union, being anxious to have the employees return to work, would have formally addressed this issue. Thus, the Union could have sent a letter, in reply to Respondent's letter, outlining the alleged unlawful conditions to the employees' reinstatement. On the other hand, it must be noted that the letter was sent 2 weeks after the complaint issued which alleged the unlawful discharge of the 10 strikers. Accordingly, Respondent's letter may be viewed as its attempt to toll its backpay liability, and its alleged conditions may have been its attempt to have the Board litigation withdrawn. But Fullerton testified that Perlman requested that the letter state that the workers and Union would not take legal action against Respondent. The Union had already taken such action against Respondent by filing the charge in this case, and the Board had already issued a complaint against it. For these reasons, I cannot find that Respondent made the statement attributed to it that employees and the Union must waive their right to take legal action against Respondent as a condition to their being reinstated.

However, Respondent's December 15 letter, in addition to offering reinstatement to the strikers, also stated that it was ceasing its contributions to the Union's health fund, and instead implementing its own health plan. I have found that these actions violated Section 8(a)(5) of the Act. The unilateral change, which I have found, is the price that employees

<sup>9</sup>Seymour Perlman testified, however, that after the strike began, Pablo Lopez and Michael Mood, Respondent's drivers, returned to work. Inasmuch as the date of their return is not clear, I will include them in the remedial portions of this decision.

were being asked to pay for reinstatement. Accordingly, the offer of reinstatement with this change “did not embrace that full reinstatement to which the employees were entitled and was, therefore, clearly unlawful, irrespective of what financial problems Respondent may have been suffering at the time.” *Brooks, Inc.*, 228 NLRB 1365, 1368 (1977); *PRC Recording Co.*, 280 NLRB 615 fn. 2 (1986).

#### CONCLUSIONS OF LAW

1. Respondent, ABC Automotive Products Corp., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 365, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees employed by Respondent at its Brooklyn plant, including office clerical employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. By failing and refusing to make contributions on behalf of the employees in the unit to the Local 365 UAW welfare trust fund since on or about March 14, 1989, Respondent violated Section 8(a)(5) and (1) of the Act.

5. By failing and refusing to bargain in good faith with the Union by (a) conditioning agreement on August 21, 1989, on the terms of a successor agreement on the Union’s agreement to forego the delinquent union welfare fund contributions and by (b) unilaterally implementing a change in its employees’ terms and conditions of employment on December 15, 1989, by announcing that it would institute its own health and welfare plan to replace the union welfare fund, Respondent violated Section 8(a)(5) and (1) of the Act.

6. The strike which began on September 11, 1989, was an unfair labor practice strike from its inception and continued as such at all material times thereafter.

7. By discharging the following striking employees on August 29, 1989, Respondent violated Section 8(a)(3) and (1) of the Act.

Phillipe Bolisca	Pablo Lopez
Levoyant Brioché	Michael J. Mood
Eddie Dominick	Jerome E. Smith
Pierre Francois	Arthur Richburg
Richard Harrington	Ronald Williams

8. Respondent caused and prolonged the strike by its failure to make welfare contributions; by conditioning agreement on the terms of a successor agreement on the Union’s agreement to forego the delinquent union welfare fund contributions; by its unilateral change in ceasing to provide welfare coverage and instead announcing that it would provide its own welfare coverage, and by its discharge of the striking employees.

9. The unfair labor practices set forth above are unfair labor practices having an effect upon commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices within the meaning of the Act, it shall

be recommended that it be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

Having concluded that Respondent discriminatorily discharged the following employees for engaging in an unfair labor practice strike, it shall be recommended that they be offered immediate reinstatement to their former positions, or substantially equivalent positions, discharging, if necessary, anyone hired to replace them since their termination, and that they be made whole for any loss of earnings and other benefits by reason of the discrimination against them. Backpay shall be computed on a quarterly basis from the date of discharge to the date of a bona fide offer of reinstatement, less net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), interest computed in accord with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Phillipe Bolisca	Pablo Lopez
Levoyant Brioché	Michael J. Mood
Eddie Dominick	Jerome E. Smith
Pierre Francois	Arthur Richburg
Richard Harrington	Ronald Williams

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>10</sup>

#### ORDER

The Respondent, ABC Automotive Products Corp., Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging its employees’ activity on behalf of a labor organization by discharging and refusing to reinstate unfair labor practice strikers because they engaged in a strike.

(b) Failing and refusing to bargain with Local 365, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All employees employed by Respondent at its Brooklyn plant, excluding office clerical employees, guards and supervisors as defined in the Act.

(c) Failing and refusing to make contributions on behalf of the employees in the unit to the Local 365 UAW welfare trust fund.

(d) Failing and refusing to bargain in good faith with the Union by

Conditioning agreement on the terms of a successor agreement on the Union’s agreement to forego the delinquent union welfare fund contributions or by

Unilaterally implementing a change in its employees’ terms and conditions of employment, by announcing that it would institute its own health and welfare plan to replace the union welfare fund.

<sup>10</sup>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.

(e) Causing and prolonging strikes by conditioning agreement on the terms of a successor agreement on the Union's agreement to forego the delinquent union welfare fund contributions, by making a unilateral change in ceasing to provide welfare coverage and instead announcing that it would provide its own welfare coverage, and by discharging its striking employees.

(f) 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) Offer the following employees immediate reinstatement to their former positions, or substantially equivalent positions, discharging, if necessary, anyone hired to replace them since their termination, and make them whole for any loss of earnings and other benefits by reason of the discrimination against them in the manner prescribed in the remedy section of this decision.

Phillipe Bolisca	Pablo Lopez
Levoyant Brioché	Michael J. Mood
Eddie Dominick	Jerome E. Smith
Pierre Francois	Arthur Richburg
Richard Harrington	Ronald Williams

(b) Remove from their files, delete, and expunge any reference to the unlawful termination of the above employees, notifying them in writing that this has been done and that their discharges will not be used against them in the future.

(c) On request, bargain in good faith with the Union as the exclusive collective-bargaining representative of its employees in the appropriate unit concerning their rates of pay,

wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(d) Make its employees and the Local 365 UAW welfare trust fund whole by paying to the fund, with interest, the amounts as provided in the collective-bargaining agreement which expired on August 9, 1989, as extended to August 23, 1989. The obligations shall commence from on or about March 14, 1989, and continue until such time as Respondent negotiates in good faith to a new agreement or to an impasse. Respondent shall also make its employees whole, with interest, for any loss they suffered due to Respondent's unlawful discontinuance of its payments to the Local 365 UAW welfare trust fund.

(e) Post at its Brooklyn, New York facility, copies of the attached notice marked "Appendix."<sup>11</sup> Copies of the notice, on forms provided by the Regional Director for Region 29, 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.

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

<sup>11</sup> 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."