

American Packaging Corporation and International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO. Case 3-CA-16167

May 28, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On September 8, 1992, Administrative Law Judge Bruce C. Nasdor issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief. Thereafter, the General Counsel filed a reply brief.

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

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

The judge found that the Respondent did not violate Section 8(a)(5), (3), and (1) by withholding the 1990 fiscal year-end bonus from the employees and that it did not violate Section 8(a)(5) and (1) in bargaining with respect to the bonuses. We agree. Contrary to the judge, however, we find that the Respondent acted unlawfully when it unilaterally granted employees the 1991 fiscal year-end bonus. Our reasons for affirming the judge regarding the 1990 bonus are set forth in section 1 below, and our reasons for reversing him concerning the 1991 bonus are set forth in section 2.

1. For many years prior to the April 16, 1990 certification of the Union, the Respondent paid its Rochester facility employees a fiscal year-end bonus based on production.² The fiscal year ended on June 30 of each year, and the bonus was generally paid on September 1, following a review of the facility's costs and profits and a final decision by the chief executive officer/chairman of the board of directors.

¹Counsel for the General Counsel 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), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We disavow the implication in the judge's analysis that only conduct that is alleged to violate the Act may be used to establish union animus. The law is well-settled that conduct that exhibits animus but that is not independently alleged to violate the Act may be used to shed light on the motive for, or the underlying character of, other conduct that is alleged to violate the Act. *Gencorp*, 294 NLRB 717 fn. 1 (1989).

²All dates are in 1990 unless otherwise indicated. The parties also refer to the fiscal year-end bonus interchangeably as the year-end bonus and as the production bonus.

On August 14, during the first phase of negotiations covering the noneconomic terms for the initial contract, the Respondent's chief negotiator, Robert Conte, observed that September 1 was fast approaching and submitted a proposal to the Union that would defer the payment and discussion of a wage increase and the fiscal year-end bonus until January 1, 1991.³ Following a caucus on the proposal during which the Union's negotiating committee telephoned its attorney for advice, Edward Young, the Union's chief negotiator for non-economic items, told the Respondent that the 1990 bonus was already earned and should be paid. Young said that the Respondent should use the formula used in the past and stated that the Union did not expect a bonus to be paid to unit employees if one was not paid to salaried (nonunion) employees. Conte advised Young that there was no set "formula." Young further stated that the Respondent should follow the handbook with respect to payment of the bonus until the parties could reach an agreement.⁴ On August 15, the Respondent again sought the Union's agreement on its deferral proposal. The Union refused to agree to the proposal, restating its position that the 1990 bonus was already earned and should be paid and stating that it would agree to defer discussion of wages and future bonuses until the portion of bargaining covering economic terms. The Respondent then pressed the Union to bargain about the 1990 bonus, but the Union refused.⁵ Thereafter, using the method used in the past, the Respondent reviewed cost and production data and determined that no production bonus was earned for

³The proposal stated:

The Company shall not implement the payment of a wage increase or bonus on September [sic] 1, 1990.

Accordingly, the parties agree to defer discussion on the subject of a wage increase and bonus until January 1, 1991 or such other date that the parties may agree.

⁴The handbook provides in pertinent part:

[T]he Company has instituted a discretionary bonus payment to reward employee efforts. The bonus is determined annually based upon Company/Division performance during the fiscal year. When a bonus is awarded it is generally paid approximately sixty (60) days following the completion of the fiscal year. Although bonuses have been paid in the past, such payments are entirely discretionary on the part of the Company. The bonus, business conditions and profits permitting, are [sic] given as a reward for good performance; it is *not* automatic nor is it a guarantee to which you are entitled. [Emphasis in original.]

⁵Upon the Union's refusal to bargain about the 1990 bonus, Conte "declared impasse." Although the General Counsel asserts that Conte's declaration was part of an exercise to mask its discriminatory intent to withhold the 1990 bonus, none of the parties contends that a genuine impasse occurred at this or any other time, and we find that the parties were not at impasse. Moreover, as explained below, we find that the Union waived its right to bargain about the amount of the 1990 bonus, and that Conte's rash statement, obviously made in anger, does not reflect a predetermination not to pay the bonus. Angry outbursts and inartful comments uttered in the heat of bargaining are realities of negotiations, and when isolated, as this statement was, do not necessarily bespeak a sinister motive. *Leeds Cablevision*, 277 NLRB 103, 112 (1985).

1990. The decision applied both to unit and nonunit employees. It announced this decision to all employees on August 29.

We agree with the judge's finding that the Respondent did not violate the Act in failing to pay a year-end bonus for 1990. The foregoing establishes that the amount of the bonus was discretionary and that in insisting that the bonus be paid according to the "formula" or method used in the past, the Union waived the right to bargain about any other method of determining the amount of the bonus. Further, however suspicious the fact may be that the Respondent arrived at a zero figure in calculating the amount of the bonus when it had never done so prior to the employees' selection of the Union, the credited testimony establishes that the Respondent followed procedures used in the past and legitimately determined that no year-end bonus was earned for 1990. Thus, General Manager Peter Schottland testified how operating standards and budgets are prepared and revised during the fiscal year. His testimony that 1990 was the worst performance year in his 5 years at Rochester was underscored by the fact that the facility lost more than \$1 million in anticipated profits due to waste, \$230,000 in equipment utilization, and another \$123,000 due to spoilage. Although a year-end bonus was paid in 1989 despite its being a poor performance year, losses were smaller than in 1990 and were attributable to newly installed equipment and attendant training. Moreover, in granting a year-end bonus in 1989, the Respondent's board of directors raised concerns about performance and resolved that it must improve in 1990. Performance did not improve.

In this connection, we note that there are inconsistencies in the financial figures that appear in the Respondent's fiscal year-end summaries and its reconciliation reports and income statement analyses for the years 1989, 1990, and 1991. The most dramatic is the discrepancy between the figures for budgeted and actual operating income in the 1990 Year-End Summary (\$3,524,000 budgeted and \$2,745,000 actual) and the budgeted and actual operating income figures in the 1990 Reconciliation Report (\$5,088,000 budgeted and \$2,745,000 actual). Figures in the 1990 Income Statement Analysis are closer to the Reconciliation Report (\$5,088,000 budgeted and \$2,742,000 actual). The 1990 Year-End Summary indicates that the Respondent earned 77.9 percent of its anticipated operating income—an improvement over 1989 when actual operating income was only 67.4 percent of the budgeted or anticipated operating income; whereas, the 1990 Reconciliation Report indicates that actual income was 53.8 percent of the anticipated income. Although the discrepancy was not explained, the documents also establish that waste, spoilage, and equipment utilization were almost 5 times 1989 levels in actual dollars. The

Board is loath to substitute its business judgment for that of the Respondent. Therefore, while one document indicates a greater actualization of projected income or profit in 1990 than in 1989 and others indicate a diminished actualization, the fact remains that significant performance-based factors that reduce projected profit had not substantially improved in 1990.

On the basis of all the foregoing, the Respondent cannot be found to have either unilaterally withheld the 1990 bonus or to have discriminatorily withheld it.

2. The parties began negotiating economic items on October 23. Although the Respondent initially took the position that no bonuses would be included in the contract, it ultimately agreed to the payment of a discretionary Christmas bonus and a seniority bonus. The parties also reached agreement on numerous other economic items, including vacations, funeral leave, hours of work, and overtime, but did not agree on the subjects of wages, sick days, life insurance, contributions to health insurance, and year-end bonuses. Negotiations broke off on April 11, 1991. No party contends that an impasse was reached. Michael Cantiello, who was then serving as the Union's chief negotiator, said he would contact the Respondent later, but did not do so. Four and a half months later, on August 29, 1991, without prior notice to the Union, the Respondent announced the payment of a 9-percent fiscal year-end bonus to all employees for 1991.

As noted above, the Union waived its right to bargain about the amount of the 1990 year-end bonus when it insisted that the bonus was already earned and stated that the Respondent should use the "formula" used in the past in determining the amount of this discretionary bonus.⁶ Clearly, however, it made no such waiver with respect to bonuses generally or with respect to the 1991 fiscal year-end bonus. To begin with, when presented with the Respondent's proposal to defer the discussion of a wage increase and the 1990 year-end bonus at the outset of bargaining in August, the Union took the position that it would negotiate *future* bonuses. Then, during the economics portion of bargaining, the Union presented proposals on future fiscal year-end bonuses thereby manifesting its desire as the employees' collective-bargaining representative to contractually guarantee the year-end bonus and otherwise to have input with respect to its payment. Although the Union altered its bonus proposals in the course of bargaining to permit the Respondent to retain discretion in determining the amount of the bonus, it did not—by proposal or otherwise—relinquish its right to notice and an opportunity for bargaining concerning

⁶Of course, the parties having agreed to defer bargaining on economic items, the Union was not compelled to bargain with the Respondent about the 1990 bonus at the time it was raised by the Respondent. See generally *Central Maine Morning Sentinel*, 295 NLRB 376 (1989).

payment of the bonus. Significantly, the Union's proposal to allow the Respondent to retain discretion in determining the amount of the year-end bonuses and to include the bonuses in a side agreement rather than the main contract was rejected by the Respondent.⁷

Further, the fact that negotiations stalled in April and did not resume did not confer on the Respondent an unrestricted right to act as it had in the years prior to representation and unilaterally grant the bonus. As stated above, no party contends that impasse was reached,⁸ or that the Union either lost its continuing majority status or abandoned the employees. Therefore, although the Respondent was obligated to continue traditional employee benefits, including the discretionary year-end bonus, it was also obligated to notify and confer with the employees' bargaining representative before paying the bonus. *NLRB v. Katz*, 369 U.S. 736 (1962); *Oneita Knitting Mills*, 205 NLRB 500 (1973). The Respondent complied with this legal obligation in 1990 when it apprised the Union of its practice of paying the bonus on September 1 and solicited deferral or bargaining on the subject. It should have notified the Union and afforded it an opportunity to bargain about the bonus again before unilaterally granting it in 1991. In failing to do so, the Respondent violated Section 8(a)(5) and (1).

REMEDY

Because the Respondent's unilateral grant of the 1991 fiscal year-end bonus is not a pecuniary detriment to the employees, no make-whole order is required. However, we shall require that the Respondent rescind the unlawful unilateral bonus if the Union so requests. *St. John's Hospital*, 281 NLRB 1163 (1986).

ORDER

The National Labor Relations Board orders that the Respondent, American Packaging Corporation, Rochester, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with the Union by unilaterally granting a fiscal year-end bonus without notifying and bargaining with the Union.

⁷We are mindful that Conte's credited testimony establishes that Young said that the handbook should be followed until an agreement was reached. (Young's testimony neither confirms nor denies that he made such a statement.) However, this remark was made in the context of discussions about whether employees had already earned and should be paid the 1990 year-end bonus, and it was followed by Young's stating that the Union would bargain about future bonuses. Given the context and the apparent sequence of the comments, and more particularly, the parties' course of conduct throughout negotiations, we find that no long-term waiver of notice and bargaining over year-end bonuses was intended or perceived.

⁸*Outboard Marine Corp.*, 307 NLRB 1333 (1992).

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

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

(a) Bargain, on request, with the Union concerning the 1991 fiscal year-end bonus and future bonuses and, if an understanding is reached, embody the understanding in a signed agreement.

(b) On request of the Union, rescind the unilaterally granted 1991 fiscal year-end bonus. If no such request is made, nothing herein requires the Respondent to rescind or vary that bonus as it was unilaterally given.

(c) Post on its bulletin boards or designated places copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

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

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

WE WILL NOT refuse to bargain with the Union by unilaterally granting employees a fiscal year-end bonus.

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

WE WILL, on request, bargain with the Union as the exclusive representative of all unit employees concerning the 1991 fiscal year-end bonus and future bonuses and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL, on request of the Union, rescind the unilaterally granted 1991 fiscal year-end bonus. If no such

request is made, nothing above requires us to rescind or vary that bonus as it was unilaterally given.

AMERICAN PACKAGING CORPORATION

Linda Harris Crovella, Esq., for the General Counsel.
Richard N. Chapman, Esq. and *Andrea Bacille Terillion, Esq.*, for the Respondent.

DECISION

STATEMENT OF THE CASE

BRUCE C. NASDOR, Administrative Law Judge. This case was tried at Rochester, New York, on February 11, 12, and 13, 1992. The original charge in Case 3-CA-16167 was filed on February 27, 1991, and the first amended charge was filed on March 15, 1991. The charge in Case 3-CA-16670 was filed on October 28, 1991. An amended consolidated complaint issued on December 31, 1991. The amended consolidated complaint alleges that Respondent violated Section 8(a)(1) and (3) of the Act by, on August 29, 1990,¹ denying all its Rochester Division employees their customary year-end bonuses. The complaint further alleges that Respondent violated Section 8(a)(1) and (5) of the Act by taking the position that the subject of year-end bonuses would not be part of a collective-bargaining contract, and that Respondent alone would determine when, and whether, to grant or deny year-end bonuses. Lastly, the complaint alleges violations of Section 8(a)(1) and (5) of the Act by the unilateral granting and paying to unit employees an annual year-end bonus on or about August 29, 1991. There are no independent 8(a)(1) allegations.

On the entire record,² including my observation of the demeanor of the witnesses, and after due consideration of the briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material herein, Respondent, a Pennsylvania corporation, with a manufacturing facility in Rochester, New York, has been engaged in the manufacture of flexible packaging.

Annually, Respondent, in conducting its business operations, purchases and receives at its Rochester facility products, goods, and material valued in excess of \$50,000 directly from points outside the State of New York.

At all times material, Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

At all times material, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

¹ All dates are in 1990 unless otherwise specified.

² Counsel for the General Counsel's motion to correct the transcript is granted.

III. THE APPROPRIATE UNIT

The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All regular full-time and part-time production and maintenance employees, including warehouse employees, employed at Respondent's Rochester, New York, location; excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act and all other employees.

IV. THE FACTS

Respondent is engaged in the manufacture of flexible packaging. Its Extrusion Laminating and Coating Division (EL&C) located at Rochester, New York, is the facility involved in these proceedings. Respondent has four other divisions: The Carton Division in Middletown, Ohio; the Coating Division in Philadelphia, Pennsylvania; and Columbus, Wisconsin; the Bag Division in Story City, Iowa, additional bag operations located in Philadelphia, Pennsylvania, and Wisconsin; and the Rotogravure Division in Columbus, Wisconsin.

The production and maintenance employees, at its EL&C and Carton divisions and the Coating Division and Bag operations in Philadelphia, are represented by labor organizations. It is uncontroverted that there is a longstanding history of stable labor relations at the unionized facilities.

Stanley Schottland is Respondent's chairman of the board and chief executive officer, Steven Schottland is president. Each of Respondent's divisions is under the direction and control of a general manager, and Peter Schottland is the general manager of the EL&C division in Rochester, New York. The board of directors includes Stanley Schottland, Steven Schottland, Peter Schottland, and C. B. Schottland. Robert F. Conti, Esq., has served as secretary and general counsel of the Respondent during the time relevant to these proceedings.

The Union was certified as the collective-bargaining representative of the unit on April 16, 1990. Prior to the election, Respondent held several meetings at which it discussed its opposition to the Union. Peter Schottland and his father, Stanley Schottland, each spoke at one or more of these meetings which were held in February or March 1990. Stanley Schottland met with all the employees in April 1990.

Two employees, Steve Barone and Michael Vess³ testified about the meeting at which Stanley Schottland spoke. Barone said in his testimony that Stanley Schottland had a chart reflecting bonuses paid by Respondent over 5 years ranging from 3 percent to 13 percent, and Schottland referred to his notes. Barone also testified that much of Schottland's discussion was about his experiences with the Company and how the Company had been in the past, and what it hoped to be in the future. Barone claimed, in his testimony, that Schottland was trying to get the point across that it wouldn't be good for the employees or their families if there was a union. He admitted that Schottland never used these words during his presentation, and he did not remember Schottland's exact words. Barone testified that this was the

³ Transcript misspelling "Bess" is corrected by motion to "Vess."

“gist” Stanley Schottland was trying to communicate to the employees. Vess testified that he was present for Stanley Schottland’s meeting and saw graphs or charts Schottland used during his speech. He recalled that the graphs reflected the bonuses received by Respondent’s union and nonunion divisions. According to Vess, the graph showed nonunion divisions receiving 3-1/2- to 10-percent bonuses, and with the exception of Philadelphia, no other union division of Respondent received a bonus. Vess also testified that at another meeting Peter Schottland fielded the question about bonuses and replied that no other union division of American packaging receives one, except for the Philadelphia division which was a negotiated fixed bonus and, according to Vess, Peter Schottland stated that they would not renegotiate any bonus like that because it didn’t work.

Barone testified that Stanley Schottland had a chart which depicted bonuses paid by Respondent over 5 years ranging from 3- to 13-percent.

Vess testified further that Schottland never verbally made a threat or a statement during his speech that employees would not receive a bonus if the Union was voted in, but Vess concluded that the charts showed that the union divisions did not get a bonus.

Stanley Schottland testified that he communicated his concerns regarding the division’s poor productivity. He testified that he stressed to the employees that they could not be paid the highest wages in the industry without delivering in productivity. He told the employees that they “could not have their cake and their penny.” General counsel of Respondent, Conti, observed Stanley Schottland making an outline of the speech which he would present to the employees. Schottland also rehearsed the speech with Conti, and Conti was present during the employees’ meeting when Schottland told employees they could not have their “cake and their penny.” Conti testified that the phrase was used to stress to the employees that they could not expect a bonus if they did not produce and that would be the case whether or not the plant was unionized.

Vess was called as a rebuttal witness and testified that Schottland made a statement during his speech to employees about the “cake and penny” while pointing to a chart which showed the unionized and nonunionized divisions of Respondent and the bonuses which were received, if any, at these plants. Interestingly, although Vess testified in counsel for the General Counsel’s case in chief, he did not refer to Schottland’s “cake and penny” during his direct or cross-examination, although he testified about Schottland’s speech, chart and Schottland’s entire presentation including references to his chart.

Barone testified that in July or August 1990, prior to any announcement by Respondent with respect to the September 1990 bonus, Michael Collichio, the manager of Respondent’s slitting and finishing department, told Barone that the employees would not receive a bonus “come hell or high water,” and that he heard it from Peter Schottland. Schottland denied making such a comment to Collichio or any other manager. Barone testified that Collichio also told him on two other occasions “that, well, you wanted a union, now you can kiss your bonus goodbye and on another occasion, he told me you got your union, all you wanted were union, how’d you do?”

Barone conceded that Collichio did not determine whether a bonus was to be paid. Respondent, in its answer denied that Collichio was an agent within the meaning of the Act, and Collichio did not testify at the hearing.

Scott Hamilton, former manager of the extrusion department, and now shipping and receiving manager, was not alleged as a supervisor. Vess’ testimony that Hamilton could send employees home for termination, is the sole criteria adduced, reflecting whether or not Hamilton is a supervisor within the meaning of the Act. Vess acknowledged that the decision was reviewed by Peter Schottland and the plant manager.

Vess testified that at some point he asked Hamilton what was wrong because he looked “like he lost his best friend.” According to Vess, Hamilton stated that they did not get as big a bonus because of “you guys” and although the Company had bad years before they had always given the employees something. Hamilton did not testify.

Vess also testified that the first week following September 1, 1990, he overheard Collichio telling three or four employees that they had been told that if they voted in the Union they would not receive a bonus and he asked them, “how’d you do?”

The first three preliminary negotiating sessions occurred in May 1990 at the Union’s office and the first negotiating session between Respondent and the Union was held on June 25, 1990.

Edward Young was the chief negotiator for the Union only until the noneconomic portions of negotiations concluded which was from June 25, 1990, to January 1991. Thereafter, his attendance at the economic session was sporadic and Matthew Cantiello, international representative, became chief negotiator for the Union. Cantiello was also present during the period when Young was chief negotiator for the Union. The Respondent’s negotiating committee was comprised of Robert F. Conti, Esq., vice president and general counsel of Respondent and Louis P. Heller, tech service engineer. It was also agreed that three unit employees would be present to represent the Union and they would also act as stewards at the plant.

At the first formal meeting on June 25, 1990, the parties agreed to bargain over noneconomic issues first, and then to take up the economic items. At this time, the Union gave its noneconomic proposals to the Respondent.

The next sessions were held on August 14 and 15. At the beginning of negotiations on August 14, Conti submitted a proposal to the Union which provided that Respondent would not implement the payment of wage increases or bonuses on September 1, 1990, provided further that the parties would agree to defer discussion on the subject of wage increases and bonuses until January 1, 1991, or any other date acceptable to the parties.

After receiving Respondent’s noneconomic proposals, the Union caucused for a long time to consider them, and to decide what to do with the proposal not to implement wage increases or bonuses on September 1 and to defer discussion until January 1, 1991. Young called a union attorney to seek advice on the latter issue and was advised that the 1990 fiscal year-end bonus was already earned and due to employees but future bonuses should be negotiated. Young worked up a counterproposal with the Union’s attorney and the rest of the caucus was spent working out the Company’s non-eco-

conomic proposals to use as counterproposals. In its counterproposal the Union agreed to defer the wage increase and the subject of wage increases and future bonuses until economics was discussed. However, the Union refused to agree to the deferral of any determination regarding the payment of the 1990 year-end divisional performance bonus. The Union maintained that the bonus was already earned because "that's how it was paid in the past on a Fiscal year that ended on June 30." Although the Union claimed the 1990 year-end divisional performance bonus had already been earned, Young, in his testimony, admitted that at this time, August 14 and 15, he did not know if the bonus had in fact been earned. Conti responded to the Union's counterproposal by offering to change the January 1, and the Respondent's original proposal to November 1, 1990. The Union would not negotiate regarding the deferral of the bonus determination in 1990, and Young rejected Conti's counterproposal. Conti then offered to bargain with the Union over payment of the 1990 bonus.

The parties do not dispute that the Respondent proposed to defer the implementation of the year-end divisional performance bonus decision and negotiations on the 1990 bonus, until the parties discussed economics. There is also no dispute that Respondent did not ever state, on August 14 or 15, that it was not going to pay a 1990 divisional performance bonus.

While discussing the deferral of the decision on the 1990 bonus, Young advised Conti that the Respondent should pay the bonus "using the same formula that you did in the past, if a bonus was earned, it should be paid. If it wasn't earned it shouldn't have to be paid." Young explained his counterproposal to Conti by stating that the Union wanted the hourly employees treated the same as the salaried employees. Young stated to Conti that "using the same formula you used, if no body in the salaried unit has earned a bonus, I don't expect our people to get one either because the same formula was used for the salaried and non-production."

Young testified that he remembered at the meeting on August 15 Conti stating that the board of directors determined the bonus and "even that he doesn't know" what the determination will be.

The employee handbook, in evidence as Respondent's Exhibit 1, states in pertinent part:

Your dedication to the company's well being combined with your performance on the job have a measurable effect on the division's performance. The extra effort to prevent operation down time or to maintain product quality is important to the company. In order to preserve this standard, the company has instituted a discretionary bonus payment to reward employee efforts. The bonus is determined annually based upon Company/Division performance during the fiscal year. When a bonus is awarded it is generally paid approximately sixty (60) days following the completion of the fiscal year.

Although bonuses have been paid in the past, such payments are entirely discretionary on the part of the company. The bonus, business conditions and profits permitting, are given as a reward for good performance; it is not automatic nor is it a guarantee to which you

are entitled. We must all work together for the common objective of maximum profits.

The date of the employee handbook is November 1988. Young was familiar with the handbook prior to the commencement of negotiations. He informed Conti, according to the testimony of Conti, that Respondent was bound to follow the handbook until the parties reached an agreement. Furthermore, Young considered the amount of the bonus to be discretionary.

The parties were unable to reach agreement regarding deferral of the 1990 bonus on August 15, therefore they began to negotiate noneconomic items on that date.

On September 10, the performance bonus was again discussed. The Union claimed that the salaried employees had received a production bonus in 1990. Conti informed the Union that no year-end divisional performance bonus had been paid to either hourly or salaried employees because of the division's poor production performance. Bonuses were not further discussed during negotiations of noneconomic items. The parties reached agreement on noneconomic items and there were none open when the parties last met for negotiating sessions.

Negotiations regarding economic issues began on October 23, 1990. The Union submitted a proposal which addressed the issue of bonuses. Respondent's initial position was that there would be no bonuses. Throughout the negotiation of economic issues, Respondent made proposals and counterproposals and the parties' positions regarding bonuses changed. Respondent initially took the position that no bonuses would be included in the contract, although it subsequently agreed to provide seniority and Christmas bonuses for the employees of the EL&C division. By April 11, 1991, the parties had agreed to several economic issues including funeral leave, vacations, and hours of work and only five economic issues were unresolved. The outstanding economic issues were bonuses, wages, sick days, life insurance, and the amount of contribution that would be made for health care insurance.

The last negotiating session between the parties was on April 11, 1991. Both Conti and Cantiello testified that the parties went back and forth a great deal at the meeting and that there were five outstanding economic issues to be addressed in the parties' proposals as a package. Cantiello's testimony and his version is that Conti gave the Union a package proposal on the outstanding items that was their "final offer" and was the best they could do. Cantiello stated that Conti and Heller were the ones who said there was no sense in going any further because they were so far apart. Cantiello said that the committee wouldn't accept the Company's final proposal on those five issues so he would not take it to the unit for a vote. Conti testified that Respondent returned following a caucus and Cantiello said, "There is no sense in doing this anymore, we're not making any progress." Conti testified that Cantiello told him at that time that he would take the proposal to membership for a vote and that he asked Cantiello to inform him of the results. Cantiello acknowledged that he told Conti that he would get back to him and let him know what the Union was going to do, but that the Union never contacted Respondent after the April 11 meeting. Conti further testified that he did not

declare an impasse, and that Respondent had not implemented its last proposal.

General Manager Peter Schottland was charged with the responsibility of preparing the annual budget for the division. Respondent has two budgetary periods. The first budget is for the first 6 months of the fiscal year, and it is prepared in early March. It is initially determined by projected sales figures provided by Respondent's sales force. Division management then revised estimates of the quantities of goods and dollars which must be produced to set standards of production performance it believes the division can achieve. Budgets then are established for each quarter based on the details of each job that is to be performed. At the Rochester facility there are basically three production operations, printing, finishing or slitting, and extrusion.

When budgeting for efficiencies and standards of expected performance, the general manager averages the best five jobs run at the facility over the previous 12 months. This average becomes a standard of manufacturing and production performance unless, for some extenuating reason, management believes the division should perform above or below that standard. Peter Schottland testified that this method for establishing production standards of performance is applied on a companywide basis at each division. The general manager of each division presents his division budget to the president. After review by the president, any required modifications are made and the budget is submitted to the board of directors for its approval.

In November of the fiscal year, the initial budget, which was prepared in March, is examined and evaluated relative to the division's actual performance 5 months into the fiscal year. The budget is then revised based on actual production and sales figures to reflect the expected results at the end of the fiscal year. A comparison of actual to expected performance is done by quarter. Once the revised budget is approved by the board of directors, the original budget is no longer considered at the corporate level.

Performance standards are measured against actual manufacturing performance in an effort to determine whether a year end divisional performance bonus will be paid. Various documents are assembled by each division during the fiscal year which reflect manufacturing efficiencies. The pertinent documents were introduced and received into evidence. Availability and utilization reports are prepared monthly for each piece of equipment used in the manufacturing process. These reports bear upon the availability and utilization of equipment on a monthly basis.

Respondent employs assorted documents encompassing a decision review, reconciliation of operating income, summaries and income statement analysis documents. The purpose of these various documents is to keep management aware of Respondent's current economic posture, and to some extent, project where it will end up at the conclusion of its fiscal year.

At the end of each fiscal year, the EL&C division and the other divisions forward a reconciliation statement and division review to corporate headquarters. The financial department then consolidates each division's year-end statement into a more simplistic format for James D. Mossholder, treasurer and financial officer and the president and chairman of the board. Respondent has a long history of granting several bonuses to its EL&C division employees. Some of these bo-

nuses are awarded only to salaried employees and other bonuses are awarded to both hourly and salaried employees. With respect to Christmas bonuses, in the past the salaried and hourly employees of Respondent's EL&C division have received a discretionary Christmas bonus paid in December of each year. This bonus is declared by corporate headquarters and amounts to 2-1/2 percent of an employees' annual earnings.

Employees in the division who have been employed for at least 5 years are also eligible for a seniority bonus. This bonus is equal to one-half of 1 percent for each 5 years an employee has been employed up to a maximum of 2 percent.

Salaried employees are also eligible to receive personal performance bonuses. This bonus ranges from 0 percent to a maximum of 8 percent of a salaried employee's salary. These personal performance bonuses are awarded to employees performing specific jobs, rather than team duties. These bonuses are unrelated to a year-end division performance.

In September, employees are eligible on a divisional basis for a discretionary year-end divisional performance bonus. Hourly and salaried employees of the EL&C division are eligible for this bonus. Hourly employees are eligible to receive a divisional performance bonus of between 0 and 10 percent. Any bonus received by salaried employees would be 2 percent less than that received by hourly employees. Any year-end divisional performance bonus received by any division was paid by corporate.

Peter Schottland testified that he makes the initial recommendation with respect to a year-end divisional performance bonus for the EL&C division based on the reconciliation statement prepared by his business manager. He relies on this statement because it focuses in on those areas of productivity which are controlled by manufacturing employees. These areas are waste, spoilage, equipment utilization, chargeable hours, and manufacturing cost figures reflected in the reconciliation statement.

The general managers of each division report to Steven Schottland in August of each year to discuss with him their bonus recommendations. The general manager's recommendation is subject to the president's agreement or modification. Steven Schottland, the president and the general manager, then meets with Stanley Schottland, chairman of the board and chief executive officer, who approves or disapproves the recommendation. Stanley Schottland discusses the bonus recommendation with the president and the general manager and he makes the final decision regarding each division's year-end performance bonus.

Without the Union's agreement to defer implementation of the 1990 year-end divisional performance bonus until discussion of economic issues, Respondent implemented its bonus program in late August 1990.

Peter Schottland testified:

I went down to Philadelphia [corporate]. The difficulty I had with 1990 was that in 1989 I made excuses trying to come up with a good reason to have a bonus, and none of those were there in 1990. I mean, the equipment was in good condition and most of the training had been done and everything had gone to hell in a hand basket. So I recommended to Philadelphia, I don't actually don't even remember recommended the exact, you know, the exact number. I knew it was zero or it

had to be something almost zero because it was just so bad. I left it in Philadelphia's discretion to sort of come up with what it is, but it was nothing short of a disaster for us. So, very, very poor year.

In Schottland's opinion, production had never been that far off standard during his 5 years at division. Stanley Schottland testified that it was the worst year in the history of that Company since he bought it in 1966.

Budget operating income for fiscal year 1990 was approximately \$5.1 million. Therefore, the EL&C division hoped to obtain \$5.1 million in profits during the 1990 fiscal year. In spite of this the actual operating income for the EL&C division for the fiscal year 1990 was only \$2,742,000.

In fiscal year 1990, the division lost over a \$1 million in profits because its standards for waste were exceeded by 2 points. The division lost \$123,000 in profits when spoilage exceeded the established targets. Moreover, equipment utilization fell below targets which resulted in the loss of profits of almost \$250,000. Chargeable hours also fell below the target and resulted in a profit loss of nearly \$750,000. As a result of excess spending, the division incurred \$648,000 more in manufacturing costs than budgeted for. Therefore, the production performance of the division and its manufacturing employees resulted in lost profits of approximately \$2,771,000.

Both Stanley and Peter Schottland testified that the division's standards of performance for fiscal year 1990 were lowered to assure that the division would meet its established goals. The reason standards were lowered is because 1989 had not been a good year for the division although a year-end divisional performance bonus of 6.5 percent was awarded. The board of directors at the end of the 1989 fiscal year did note the divisions poor production performance. Following the division's poor performance in 1989, management recommended to corporate that the production standards for 1990 should be lowered. Corporate agreed to reduce these standards.

Stanley Schottland accordingly made the decision that no year-end divisional performance bonus was to be awarded to hourly or salaried employees of the EL&C division in 1990. Respondent, in late August 1991, evaluated the performance of the EL&C division's production employees. The chargeable hours exceeded the projected standards by 6 percent which resulted in increased profits of \$964,000. The division's reconciliation of operating income statements for the fiscal year 1991 were completed for two 6-month periods. The year-end results are calculated by adding the amounts reflected in General Counsel's Exhibits 14(a) and (b). Manufacturing spending exceeded standards and with this decrease in spending resulted in additional profits of \$288,000. The equipment utilization was somewhat below the target, resulting in a loss of \$3000 in expected profits. Peter Schottland testified that all and all fiscal year 1991 was very good, things had really improved dramatically. The \$3000 loss in expected profits was a great improvement for 1990 when the below-target equipment utilization resulted in lost profits of \$233,000. Waste exceeded the standards established for the division during 1991 but there was an improvement in waste reduction resulting in increased profits of over \$700,000. Accordingly, based on the EL&C division's manufacturing performance, Peter Schottland recommended a year-end divi-

sional performance bonus in the range of 7, 8, or 9 percent. Corporate awarded the employees a year-end performance bonus of 9 percent.

Conclusion and Analysis

Respondent made a good-faith effort to solicit the Union's agreement to a deferral of a decision on the 1990 year-end divisional performance bonus, but the Union refused.

Young, director of organization for the Union, acknowledged that Respondent did not take the position that it would not pay the bonus. Respondent proposed that payment of wage increases and bonuses be deferred until January 1, 1991, or whenever economic issues were discussed.

The Union took the position that the 1990 bonus had already been earned. Respondent offered to move the date up to November 1, 1990, for a discussion of wage and bonus issues. The Union refused.

Respondent continued to maintain existing terms and conditions of employment.

The credible testimony of Peter and Stanley Schottland, reflects that Respondent followed its traditional historical past practice in deciding whether or not to grant a bonus.

The applicable documents were reviewed which reflected the production performance of employees. Based on criteria of production performance, Peter Schottland believed employees deserved a bonus of zero or close to zero.

Thereafter, consistent with past practice, the 1990 reconciliation and the decision review were forwarded to corporate where they were condensed into a less complicated document, the reconciliation of operating income statement. This was then examined by Steven and Stanley Schottland and Respondent's board of directors.

Stanley Schottland made the final decision to not award a bonus because the divisional performance was zero. Employees in the EL&C division were apprised of this decision on August 29, 1990, by a posting at the plant.

Neither hourly or salaried employees received a bonus in fiscal year 1990.

The Union wanted Respondent to adhere to past practice in granting or not granting a bonus. The Union considered the amount of the bonus to be discretionary and requested that Respondent continue to follow the employee handbook. The handbook is precise in that a bonus is "discretionary," "not automatic" and "not a guarantee."

Furthermore, the Respondent was willing to bargain over the bonus, but the Union adamantly insisted that it be paid pursuant to the "formula." The preponderance of the evidence in this case reflects that there was no specific formula.

Although acknowledging that there are no independent 8(a)(1) allegations to establish antiunion animus, counsel for the General Counsel contends that certain conduct, not violative of the Act, still establishes antiunion animus. Counsel for the General Counsel avers that because the employees elected the Union, the 1990 bonus was withheld.

Vess and Barone testified about attending an employee meeting which was conducted by Stanley Schottland. In my view, Schottland's statements were lawful within the meaning of Section 8(c) of the Act, and are not evidence of union animus.

Moreover, Vess and Barone conceded that Stanley Schottland never "threatened" employees that they would not receive a bonus if they elected to go Union.

The alleged statements by Collichio and Hamilton are hearsay and as such are not probative of Respondent's motivation. Moreover, Vess' bald assertion that Hamilton could send employees home for termination is not sufficient evidence to conclude that Hamilton is a supervisor within the meaning of the Act. Furthermore, Vess admitted that the decision to send an employee home was in any case reviewed by Peter Schottland and the plant manager.

The uncontroverted evidence reflects that neither Hamilton or Collichio played any part or gave any input into the decision-making process regarding the divisional performance bonus.

The testimony reflects that employees were engaged in guessing, speculating, and spreading rumors regarding the bonus. The atmosphere was such that even Barone acknowledged that the bonus was "a very hot topic in the industry." Possibly, Hamilton and Collichio were venting their frustrations at not receiving the bonus, although I am not convinced the alleged statements attributed to them were in fact made.

Suffice it to say, neither Vess or Barone were competent to testify or make assessments with respect to Respondent's production performance. During fiscal year 1990, Barone worked one of three shifts as a utility person in the slitting and extrusion departments. In February 1991, he worked as a helper. His responsibility as a utility person was limited.

Vess worked the day shift as a maintenance employee. He acknowledged that the plant engineer is responsible for the department.

Their jobs and limited access to the plant hardly qualified Vess or Barone to judge performance or make profit and loss evaluations.

Prior to any union activity, Respondent evidenced anxiety about the poor performance of the EL&C division. This is reflected in the minutes of the board of directors meetings held on August 23, 24, and 25 and September 1, 1989. See Respondent's Exhibit 8.

Moreover, Stanley Schottland testified that a thermometer in the plant graphically displayed productivity. Thus the employees were on notice of production inefficiencies.

Further evidence of the Respondent's lack of union animus is its relationship with its unionized divisions. For example, Respondent advised the Union in a letter to Young,⁴ dated

⁴R. Exh. 7.

May 24, 1990, that Respondent had every intention of bargaining in good faith. Respondent also pointed out its satisfactory relations with its unionized plants.

Indeed, Respondent attended over 30 negotiating sessions, where the parties agreed to all noneconomic items and all but five economic areas. The Union, in my opinion, broke off negotiations and I credit Conti in this regard. I find and conclude that Respondent legitimately and legally maintained its existing bonus program.

In fiscal year 1991, Respondent again embarked on its annual review of divisional performance. Based on the factors in the division's reconciliation statement, reflecting increased profits of over \$700,000, Peter Schottland recommended to corporate a bonus for the EL&C division at 7, 8, or 9 percent. Corporate granted a 9-percent bonus. This was communicated to the hourly employees on August 29, 1991.

Accordingly, I conclude that Respondent legally continued to maintain its bonus program.

Conti testified that he did not declare an impasse on behalf of Respondent. Cantiello claimed that Conti presented a final offer. However, in either event, the Respondent adhered to its duty to bargain with the Union in fiscals 1990 and 1991.

Thus, Respondent did not unilaterally change terms and conditions of employment in violation of Section 8(a)(1), (3), and (5) of the Act.

Accordingly, I will recommend that the allegations of the amended consolidated complaint⁵ be dismissed in their entirety.

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

3. The allegations of the amended consolidated complaint that Respondent has engaged in conduct violative of Section 8(a)(1), (3), and (5) of the Act have not been supported by substantial evidence.

[Recommended Order omitted from publication.]

⁵A motion to withdraw par. 9(c) of the complaint was granted at the hearing.