

**WWOR-TV, Inc. and National Association of Broadcast Employees and Technicians-CWA, AFL-CIO.** Case 22-CA-21674

April 17, 2000

DECISION AND ORDER

BY MEMBERS LIEBMAN, HURTGEN, AND BRAME

On July 16, 1998, 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<sup>1</sup> and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions and to adopt the recommended Order.

We agree with the judge that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union and by unilaterally changing employee terms and conditions of employment. The facts, which are fully set forth in the judge's decision, can be summarized as follows.

The Respondent and the Union have been parties to several collective-bargaining agreements, the most recent of which ran from 1993 to October 31, 1996.<sup>3</sup> In September through October 17, the Union took the position that the Respondent had failed properly to terminate the 1993-1996 contract, that, therefore, the contract had automatically renewed for a year pursuant to its terms, and that the Union had no obligation to bargain with the Respondent for a new contract.<sup>4</sup>

On October 3, the Respondent announced that it intended to implement new terms and conditions of employment effective November 1. On October 17, the Union replied that, without prejudice to its position that the Respondent had failed to terminate the current contract, the Union was prepared to bargain "unequivocal[ly] and unconditional[ly]" for a new contract. On October 31, the Union filed a grievance claiming that the Respondent had not properly terminated the current contract.

At a meeting on November 6, the Union advised the Respondent that although the Union was not abandoning its position regarding the termination of the contract, it

was "ready, willing, and able" to bargain "unconditionally" for a new contract. The Union repeated during the meeting that it was present to bargain unconditionally.<sup>5</sup> Nevertheless, the Respondent ended the meeting without having engaged in any bargaining with the Union. On November 7, the Respondent cancelled the meeting that had been scheduled for that date.

On December 18, the Respondent implemented the new terms and conditions of employment it had announced earlier. The Respondent did not bargain with the Union regarding a new contract between October 17 and December 18, and the Respondent did not bargain with the Union before making the December 18 changes.

The judge found, and we agree, that although the Union initially refused to bargain with the Respondent, on and after October 17 the Union offered to bargain unconditionally. Accordingly, the judge concluded, and again we agree, that the Respondent violated Section 8(a)(5) of the Act by refusing to bargain with the Union since October 17 and by unilaterally changing employees' terms and conditions of employment in the absence of a bargaining impasse.

Our dissenting colleague accepts the judge's finding that the parties were not at impasse when the Respondent implemented changes in employees' terms and conditions of employment. He, nonetheless, would find no violation on the ground that the Union's continued pursuit of its grievance entitled the Respondent to refuse to bargain and make unilateral changes. We disagree.

The logical conclusion to draw from our dissenting colleague's position is that the Respondent may lawfully refuse to bargain until the Union withdraws the grievance. This, however, is contrary to Board precedent. The Board has repeatedly held that an employer may not condition bargaining on the withdrawal of unfair labor practice charges or other litigation. See, e. g., *Caribe Staple Co.*, 313 NLRB 877, 890 (1994), and *International Metal Specialties*, 312 NLRB 1164 (1993).

Our dissenting colleague argues that the Union's reservation of its right to pursue its grievance "conditioned its willingness to bargain" and constituted a "refus[al] to bargain, albeit with privilege." Again, we disagree.

Under its collective-bargaining agreement, the Union had a right to file a grievance and obtain a ruling from an arbitrator on the question of whether the Respondent had effectively terminated the 1993-1996 contract. Under

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

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

<sup>3</sup> All dates hereafter refer to 1996, unless otherwise noted.

<sup>4</sup> It is now undisputed that the Union's position was legally incorrect.

<sup>5</sup> We find no merit to the Respondent's contention that the judge's decision is defective because he failed to resolve a credibility conflict—whether the Union's attorney on November 6 responded "no" when the Respondent's attorney asked if the Union recognized a duty to bargain. It is clear that such a statement, if made, was an expression of the Union's position on the merits of its underlying grievance. As the judge found, continuing to pursue the grievance was not an unlawful refusal to bargain. Thus, the statement by the Union's attorney, if made, is not in conflict with the judge's finding that the Union repeatedly and clearly announced that it would unconditionally bargain for a successor bargaining agreement.

the National Labor Relations Act, the Union had a right to bargain with the Respondent over its proposed changes in employee terms and conditions of employment. Contrary to our dissenting colleague's position, the Union was not required to waive its statutory right in order to vindicate its contract right.

Under analogous circumstances, the Board has held that a union can bargain in good faith with an employer while taking the legal position in other litigation that it was under no such bargaining obligation. See *International Paper Co.*, 319 NLRB 1253, 1264–1265, 1276 fn. 50 (1995), enf. denied on other grounds 115 F.3d 1045 (D.C. Cir. 1997). In that case, the union filed an unfair labor practice charge alleging that the employer's permanent subcontracting proposal was unlawful. The union's charge ultimately was dismissed. While the charge was pending, the union regularly attended negotiations, explained its adamant opposition to the permanent subcontracting proposal, and listened to the employer's position on the proposal. When the General Counsel alleged that the employer had violated Section 8(a)(5) by unilaterally implementing the permanent subcontracting proposal in the absence of a genuine impasse, the employer defended on the ground that the union had refused to bargain over the proposal, citing the position the union advanced in its nonmeritorious unfair labor practice charge. The Board rejected the employer's defense, concluding that while the pendency of the unfair labor practice charge did not suspend the union's obligation to bargain with respect to the proposal, the union's conduct at the negotiation sessions satisfied the requirements of the Act. Thus, the Board held that a union can bargain in good faith within the meaning of the National Labor Relations Act even while maintaining other litigation which, if successful, would result in a determination that the union was under no duty to bargain.

Similarly, in the instant case, the Union's pursuit of its claim that the 1993–1996 contract had automatically renewed did not disable it from negotiating with the Respondent for a successor agreement. Under the Act, the Union's obligation was to bargain in good faith with the Respondent. The judge found that, on October 17 and thereafter, the Union sought to comply with this obligation. Rather than test the Union's good faith, the Respondent rebuffed the Union's offer to bargain and broke off negotiations.<sup>6</sup> The judge correctly concluded that the

<sup>6</sup> Member Liebman finds it unnecessary to rely on the judge's analogy of the Union's pursuit of its grievance to the situation in which an employer is refusing to bargain with a union in order to obtain court review of the validity of the union's certification. The rule that an employer cannot bargain in good faith at the same time that it is challenging a union's certification is a necessary result of the statutory scheme, under which Board action in representation cases is not subject to direct judicial review, but can only be reviewed if the employer refuses to bargain. See *Terrace Gardens Plaza v. NLRB*, 91 F.3d 222, 225–226 (D.C. Cir. 1996). The instant case is not a test-of-certification and any order the Board issues in this case is subject to judicial review.

Respondent's refusal to bargain and subsequent unilateral changes in employees' terms and conditions of employment violated Section 8(a)(5).<sup>7</sup>

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, WWOR-TV, Inc., Secaucus, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER HURTGEN, dissenting.

I do not agree that the Respondent acted unlawfully when it refused to negotiate on November 6, 1996, and unilaterally implemented certain changes in unit employees' terms and conditions of employment on December 18, 1996.

From September 5 until October 17, the Union had unlawfully refused to bargain with the Respondent. During this period, the Union had intransigently insisted that the Respondent failed timely to terminate the parties' prior collective-bargaining agreement and was therefore still bound by that contract's terms. Even assuming that the Union corrected its conduct on and after October 17, when it relented from an absolute refusal to meet with the Respondent to negotiate a successor agreement, the Union conditioned all bargaining on its pursuit of efforts to hold the Respondent to the prior contract. Under these circumstances, the Respondent was legally entitled to

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Thus, in Member Liebman's view, the unique aspect of the statutory scheme that compels the above-mentioned rule is not involved in this case. Accordingly, because only one Board Member in the majority (Member Brame) relies on the judge's analogy, it is not part of the majority's rationale.

Member Brame finds that the judge's analogy to the situation in which the Board requires an employer to bargain while testing a union's election certification in court is quite apropos here where the Union was willing to bargain in case it lost its grievance claim that the collective-bargaining agreement had automatically renewed for another year. In both instances, lawful bargaining, if required, would occur at the time that the obligation arose and would be most meaningful. This is entirely consistent with *Show Industries*, 326 NLRB 910 (1998), in which Member Hurtgen and Member Brame formed the plurality finding that the employer did not violate the Act when it was willing to bargain about the effects of closing its business while continuing to challenge the validity of the union's election certification. Member Hurtgen's view in this case that the Respondent could lawfully avoid bargaining over a successor agreement unless the Union withdrew its grievance asserting automatic contract renewal is contrary to his position in *Show Industries*, which encourages the pursuit of contemporaneous bargaining.

<sup>7</sup> In the final paragraph of his dissent, our colleague states that he would not require the Respondent "to withhold action for [a] prolonged period" on its proposed changes. Nor would he "hold the Respondent prisoner" to the Union's contract claim. In response, we would note that our position cannot be legitimately criticized on either ground. As the judge recognized, the Respondent would have been justified in unilaterally implementing its proposed changes had it first bargained with the Union to a bona-fide impasse. See, e.g., *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), petition for review denied sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

refuse to negotiate and to make the unilateral changes at issue.

The parties' last collective-bargaining agreement ran from November 1, 1993, to October 31, 1996. It contained an automatic renewal clause. That is, in the event that neither party gave timely notice of intent to modify or terminate within 60 days of the expiration date, the contract would roll over for another year. On July 11, 1996, the Respondent sent notice of a desire to terminate the contract. From September 5 through October 17, however, the Union refused to meet with the Respondent to negotiate a successor agreement. The Union contended that it had no obligation to negotiate because the Respondent allegedly had served its termination notice on the wrong union party.<sup>1</sup>

On October 3, the Respondent sent the Union a letter detailing new terms and conditions of employment that it intended to implement on November 1 in light of the Union's refusal to bargain. On October 17, the Union sent a reply letter reiterating its position that the Respondent had not effectively terminated the current contract and that the Union would pursue "all avenues of redress, including arbitration." The letter continued by stating:

We are, however, and without prejudice to our legal position, prepared to review the document submitted by you to [the Union] and, when our analysis is complete, we will negotiate the terms and conditions of a successor collective bargaining agreement. This offer to negotiate is unequivocal and unconditional.

The Union's letter triggered an exchange of letters in which the Respondent contended that the Union's preservation of its challenge to the effectiveness of the Respondent's contract termination was a disabling condition to the Union's proclaimed "unconditional" willingness to negotiate the terms of a successor agreement. The Respondent sought unequivocal assurances that the Union had abandoned its prior position. It received none.

In fact, on October 31, the last date of the contract's term, the Union filed a grievance claiming that the Respondent had not effectively terminated the contract. When the parties met on November 6 to discuss the prospects for bargaining, the Union's officials made clear their intent to pursue the grievance. The Respondent asked the Union's attorney if the Union recognized a duty to bargain. The attorney replied, "no."<sup>2</sup> In light of the Union's position, the Respondent's representatives declined to negotiate for a successor agreement. By let-

<sup>1</sup> The Respondent had sent its termination notice to the president of NABET Local 209, rather than to NABET, the parent union of Local 209 and actual signatory to the collective-bargaining agreement with the Respondent.

<sup>2</sup> There is a credibility conflict on this point. My colleagues assume *arguendo* that the Union's attorney made that response. In the instant dissenting response to the majority, I shall make the same assumption. However, it is not critical to my dissent.

ter dated November 7, the Union declared that it wished to "bargain a new labor agreement in good faith and without any conditions," but it did not repudiate its grievance. On November 15, the Union notified the Respondent that it would submit the grievance directly to arbitration.

On December 18, the Respondent unilaterally implemented the changes encompassed in its October 3 letter to the Union. The Respondent also filed unfair labor practice charges. Those charges resulted in a complaint that the Union unlawfully refused to bargain with the Respondent from September 5 to October 17. Over the Respondent's objection, the General Counsel executed a settlement agreement with the Union on June 13, 1997, disposing of the charges against it.<sup>3</sup>

The Union also filed unfair labor practice charges, and these resulted in a hearing before the judge on the instant complaint alleging that the Respondent had unlawfully refused to bargain and had unlawfully implemented the December 18 changes. The judge found that the Respondent was obligated to negotiate with the Union after October 17, that the Respondent had failed to do so, and that it unilaterally implemented changes in unit employees' terms and conditions of employment prior to any impasse in good faith negotiations between the parties. He therefore concluded that the Respondent violated Section 8(a)(5) of the Act. My colleagues agree with the judge. I disagree.

There are two key points to the judge's analysis, and he is mistaken on both of them. First, the judge found that on and after October 17, 1996, the Union offered to bargain unconditionally. I disagree. It is obvious that at all relevant times the Union conditioned its willingness to bargain for a successor agreement on preservation of its right to pursue the claim that there was no obligation to bargain at all because the parties still had a contract. In particular, the Union's October 17 letter specifically stated that it would pursue "all avenues of redress, including arbitration" and that its offer to bargain was made "without prejudice to our legal position." In my view, proclamations of an "unconditional" willingness to negotiate a new contract were meaningless in light of the Union's clear intent to pursue its grievance and, if it won, to nullify any agreement reached and to insist on the Respondent's adherence to the terms of the prior contract.

Second, the judge concluded that the Respondent had a legal obligation to bargain with the Union while it pursued its grievance. Again, I disagree. The judge reasoned that the Respondent's bargaining obligation here is analogous to that of an employer required to bargain with the union even while the employer contests a Board order to bargain in a court of appeals. *Benchmark Indus-*

<sup>3</sup> There are no exceptions to the judge's observation that "a finding may be made that the Union refused to bargain with Respondent from September 5 to October 17, 1996."

tries, 269 NLRB 1096, 1098 (1984); *Montgomery Ward & Co.*, 228 NLRB 1330, 1331 (1977).<sup>4</sup> The analogy does not support the General Counsel-Union position in this case. Where an employer refuses to bargain in order to test a certification, it acts at its peril. Thus, for example, any unilateral changes that it makes during the period of the refusal will be unlawful if the employer ultimately loses its "test of certification" case. However, let us assume that the employer offers to bargain, reserving however its challenge to the certification. And, let us assume further that the union refuses to bargain under this condition. Even if the employer's offer is lawful, I think it clear, and I assume that my colleagues would agree, that the union would not violate Section 8(b)(3) by refusing to bargain under this condition.<sup>5</sup>

The situation here is the same, except that the Employer is in the Union's position, and vice-versa. That is, the Union was taking the legal position that it did not have to bargain (because it claimed that the contract rolled over). And, the Union said that it was willing to bargain, while maintaining its legal position that it was not required to do so. The Employer refused to bargain under these conditions. Just as the Union would not commit a Section 8(b)(3) violation in the "test of certification" situation, so the Employer here (Respondent) did not commit an 8(a)(5) violation in the instant situation.

Similarly, my colleagues also argue that a union does not commit an 8(b)(3) violation by pursuing a charge while negotiating. In support of this, they cite *International Paper*, 319 NLRB 1253. I do not disagree. I am not contending that the Union here violated Section 8(b)(3). I am simply saying that the Union's conduct privileged the Respondent's responsive conduct.<sup>6</sup>

My colleagues contend that an employer cannot condition bargaining on the withdrawal of litigation. However, in the instant case, the "other litigation" (i.e., the grievance) went directly to the core issue of whether there was a bargaining obligation. The Union's position in this regard was that there was no such obligation, and the Union was wrong.

With respect to the unilateral change allegation, I recognize that there was no impasse, the event that is the usual defense to an allegation of unlawful unilateral change. However, there was no impasse because both

<sup>4</sup> My colleagues are split on this point. Member Liebman finds it unnecessary to rely on the judge's analogy, while Member Brame would do so. There is therefore no majority to adopt this portion of the judge's rationale.

<sup>5</sup> See *Show Industries*, supra.

Member Brame asserts that I am inconsistent in this regard. The assertion is not correct. In *Show Industries*, I concluded (as part of a majority) that an employer did not violate Sec. 8(a)(5) by testing a certification while bargaining. Similarly, the Union here does not violate Sec. 8(b)(3) by pressing its grievance while offering to bargain. However, the issue here is whether the Respondent's responsive conduct is unlawful.

<sup>6</sup> In other respects, *International Paper* is distinguishable. In that case, the employer's proposal was itself unlawful.

sides were refusing to bargain, albeit with privilege. In these circumstances, where there is no bargaining (because of mutual privileges), I would not require the employer to withhold action for the prolonged period during which the legal issues are being litigated and adjudicated. Where, as here, the changes are otherwise legitimate, i.e., not for the purpose of undermining the Union, I would not condemn those changes. To do so would require Respondent to withhold otherwise lawful changes until the Union's contractual claim is resolved. I would not hold the Respondent prisoner to that claim.<sup>7</sup>

*Bert Dice-Goldberg, Esq.*, for the General Counsel.

*Don Carmody, Esq.*, of Kerhonkson, New York, for the Respondent.

*Stephen Sturm, Esq. (Sturm and Perl, Esqs.)*, of New York, New York, for the Union.

## DECISION

### STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based upon a charge filed on November 7, 1996, by National Association of Broadcast Employees and Technicians-CWA (Local 209), a complaint was issued against WWOR-TV, Inc. (Respondent) on March 18, 1997.<sup>1</sup>

The complaint alleges essentially that Respondent (a) on October 3, 1996 notified the National Association of Broadcast Employees and Technicians-CWA (NABET) of its intent to implement numerous changes to the terms and conditions of its employees without affording NABET an opportunity to bargain with it; (b) on October 17 failed and refused to bargain with NABET upon NABET's offer to bargain with the Respondent concerning the terms of a successor collective-bargaining agreement; and (c) implemented the changes to its employees' terms and conditions of employment on December 18 without affording NABET an opportunity to bargain with it.

Respondent's answer denied the material allegations of the complaint, and on June 17 and 18, 1997, a hearing was held before me in Newark, New Jersey.

Upon the evidence presented in this proceeding, and my observation of the demeanor of the witnesses, and after consideration of the briefs filed by General Counsel and Respondent, I make the following<sup>2</sup>

<sup>7</sup> My colleagues say that the Respondent could have made the change after bargaining to impasse. However, that would have required the Respondent to bargain with a Union that was claiming that there was no duty to bargain.

<sup>1</sup> An order consolidating this case with Cases 22-CB-8401(1) and 22-CB-8401(2) was issued on March 21, 1997. Thereafter, following the approval of informal settlement agreements in those CB cases, on June 13, 1997, the Regional Director issued an order severing the CB cases from this case.

<sup>2</sup> Following the close of the hearing, General Counsel, joined by the Union, moved to strike portions of Respondent's brief on the ground that it made reference to certain alleged facts which were not part of the record. Respondent filed an opposition, and moved to reopen the record in order to respond to certain arguments made in General Counsel's brief, and to supplement the record with additional evidence in support of its affirmative defenses. I have considered the foregoing motions, and they are denied.

## FINDINGS OF FACT

## I. JURISDICTION

Respondent, a corporation, having its office and place of business in Secaucus, New Jersey, has been engaged in the operation of a broadcast television station which advertises goods sold nationally, and subscribes to national wire services. During the 12-month period ending November 30, 1996, Respondent derived gross revenues in excess of \$100,000 from its business operations, and during the same period, purchased products, goods and materials valued in excess of \$5000 directly from points outside New Jersey.

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.

## The Unions

Before 1994, NABET was an independent union, but an affiliate of the AFL-CIO. In January 1994, NABET merged with the Communications Workers of America (CWA). NABET now functions as a semi-autonomous sector of the CWA. NABET has its own officers and bylaws, and conducts its own affairs under the CWA umbrella.

Local 209, NABET-CWA, AFL-CIO (Local 209) is a local union affiliated with NABET. It is a CWA local, and also a NABET local. Local 209 has officers and a president, Brian Wood. "Union" will refer to NABET and Local 209 collectively where appropriate.

Respondent admits the complaint allegation that NABET is a labor organization within the meaning of Section 2(5) of the Act.

## II. THE ALLEGED UNFAIR LABOR PRACTICES

## The Facts

## The Contract and the Bargaining Unit

The Respondent and NABET have been parties to collective-bargaining agreements, the most recent of which ran from November 1, 1993, to October 31, 1996.<sup>3</sup> The collective-bargaining unit set forth in that contract includes "all employees employed by the Employer in the broadcasting of the Employer in the Metropolitan Area of New York City, New York to perform the work as specified in Article II of this Agreement."

## The Notification of Termination of the Agreement and Bargaining Dates

The contract which was due to expire on October 31, provides that if either party desires to modify or terminate the agreement, the party must notify the other "party" at least 60 days prior to October 31. If no such notification is sent, the contract is automatically renewed for 1 year.

Pursuant to that provision, on July 11, Douglas Land, vice president and general counsel of Respondent, wrote to Brian Wood, president of Local 209 at its Secaucus address, advising of Respondent's desire to terminate the 1993-1996 contract. The letter enclosed a copy of a Federal Mediation and Conciliation Service notice which notified that agency that "written notice of proposed termination or modification of the existing collective-bargaining contract was served upon the other party. . . ."

<sup>3</sup> All dates hereafter are in 1996 unless otherwise stated.

Land's letter advised that Respondent sought to bargain with the Union over the terms of a successor agreement, and wished to conclude such negotiations prior to October 31, the expiration of the current contract. He set forth 26 dates, from August 22 to October 31, during which Respondent's representatives were available for bargaining, and urged Local 209 to contact him as soon as possible concerning their availability on those dates or other dates.

Local 209 president Wood stated that at the time he received the July 11 letter, the local had not yet appointed a bargaining committee, and it was thus not possible to agree to any of the proposed dates. It was also deemed necessary to have the participation of John Clark, the president of NABET at the negotiations, and his availability had not yet been determined.

On August 22, Richard Miner, Respondent's executive director of production and engineering and executive producer of sports, wrote to Wood, complaining that he had not committed to any of the suggested dates, and offered additional dates to meet.

In late August, a union meeting was held in order to discuss dates for bargaining. Present were Clark, Wood, Vince Vero, the vice president of Local 209, Carl Gabrili, a member of the bargaining committee, and Stephen Sturm, counsel to the Union. Prior to that meeting, proposals were formulated for presentation to Respondent in the upcoming negotiations.

At the meeting, Clark remarked that the 2 letters sent by Respondent were sent only to Local 209, and not to NABET, the signatory to the agreement. Those present concluded that Respondent's July 11 notification of termination was ineffective since the proper party, NABET, was not notified that Respondent sought to terminate the contract. They agreed not to send a notice of modification or termination of the contract (which would have been timely had they sent it prior to August 31). They instead decided to take the position that inasmuch as no proper notification of termination had been received by NABET, the current contract automatically renewed for one year.

## The September 5 Meeting

On September 5, the parties met. Those present for the Union were the same as at the late August union meeting. Respondent's representatives included Miner, Kenneth McGowan, its chief engineer, and counsel Don Carmody. The Respondent was prepared to bargain.

The Union presented a letter dated September 5 to Respondent. It stated as follows:

The parties to this agreement are NABET-CWA and WWOR-TV, Inc. Since neither NABET-CWA or WWOR-TV, Inc. notified the other in writing more than 60 days prior to the termination, of their desire to modify or terminate, the current labor agreement "continue[s] in effect from year to year thereafter. . . ."

Pursuant thereto, NABET-CWA is under no obligation to negotiate at this time. However, we are available to meet, discuss and evaluate any suggested changes desired by WWOR-TV, Inc. If the NABET-CWA Committee recommends modification of the agreement, it must be submitted for ratification by the membership.

Respondent's attorney, Carmody, asked whether the Union had anything to add to the letter, and was told that it spoke for itself. Carmody replied that Respondent did not agree with the

Union's position regarding the contract automatically renewing, and insisted that Respondent provided the proper notice of termination. Carmody said that he assumed that the Union had no contract proposals to present, and Clark said that it did not. Sturm added that they would listen to Respondent's proposal. The meeting then concluded.

On September 23, the Union again told Respondent that it would not negotiate a successor agreement, and had no obligation to do so.

On October 3, Miner sent a letter to Wood, advising that in light of the Union's refusal to bargain toward a successor agreement, Respondent "intends to undertake the employment of the employees . . . upon new terms and conditions of employment, effective November 1, 1996," and "has defined the terms and conditions of employment to prevail from November 1, 1996 to October 31, 1999. . . ." Miner sent a collective-bargaining agreement "memorializing these terms and conditions of employment" for execution, and stated that if it was not executed by November 1, Respondent would implement those terms on that date.

It is the Respondent's position that, as of October 3, it was not obligated to bargain about the terms and conditions of employment of its employees.

On October 17, Clark, the president of NABET, wrote to Miner advising that he continued to disagree that Respondent had effectively terminated the contract by its letter of July 11, and would pursue "all avenues of redress, including arbitration." Clark also advised Miner that:

[w]e are, however, and without prejudice to our legal position, prepared to review the document submitted by you to Brian Wood and, when our analysis is complete, we will negotiate the terms and conditions of a successor collective bargaining agreement. This offer to negotiate is unequivocal and unconditional. Since you cancelled all meeting dates between us, I will ask Brian to contact you when the negotiating committee has completed its review to arrange mutually satisfactory meeting dates.

On October 22, Miner replied, asserting that the Union's October 17 letter was not a valid offer to negotiate unconditionally, since the Union unlawfully conditioned bargaining by concurrently pursuing efforts to hold Respondent's termination of the contract ineffective.

Nevertheless, Miner stated that he would treat the Union's letter as a "complete abandonment of your earlier position that you are under no obligation to negotiate a successor collective-bargaining agreement" based upon its position that Respondent had not properly terminated the current agreement. Miner asked for confirmation of his understanding of the Union's position.

Miner also noted that the Union's actions forced it to reveal the wage increases it would have been willing to give in exchange for the modifications to the agreement which were included therein. Miner concluded that Respondent would meet with the Union upon its confirmation that it was "indeed ready to negotiate unconditionally."

On October 29, Clark replied to Miner, stating that "we iterate our *conditional* and unambiguous desire to meet and bargain in good faith with WWOR-TV for a successor agreement. The disagreement the Company has with our position regarding Section 1.03 [termination of the contract] in no way conditions our desire, as set forth above." (Emphasis added.) Clark agreed to meet on November 5, 6, and 7.

On October 31, Miner replied, apparently referring to the Union's statement in its October 29 letter that it had a "conditional" desire to bargain, stating that Respondent has carefully noted each word of the Union's letter, and expressly relied upon them, unless advised to the contrary by November 1. Miner also noted that the Union did not confirm that it completely abandoned its position that Respondent's termination of the contract was ineffective.

On October 31, the Union filed a grievance which stated that Respondent violated the contract "when it insisted on bargaining for a successor labor agreement without properly terminating the current labor agreement."

#### The November 6 Meeting

At the opening of the meeting, Carmody asked about the Union's "conditional" bargaining set forth in the Union's October 29 letter. Clark advised Carmody that the word should have been "unconditional" and was a typographical error. Sturm then told Carmody that the Union was "ready, willing and able" to bargain for a new contract.

Carmody asked whether the Union was abandoning its position regarding the termination of the contract, and Sturm replied that it was not abandoning that position, since it filed a grievance concerning it, and would abide by the arbitrator's decision, but nevertheless, they were present to bargain for a new agreement. Carmody asked whether he recognized an obligation to bargain. According to Clark, Sturm answered that the Union recognized that an arbitrator might disagree with the Union's position, but that if the arbitrator agreed, it might make their bargaining moot, adding that the grievance did not make the meeting or its bargaining conditional. Clark added that several times during the meeting, Sturm stated that the Union was present to bargain unconditionally.

Wood testified that Carmody asked for an "unambiguous declaration that you are here ready to bargain unconditionally." The Union replied that it was, and repeated later that it was ready to bargain unconditionally, and that it had a duty to bargain.

Clark stated that Sturm wanted to ask questions concerning Respondent's proposal, but that Respondent did not want to discuss its proposal, and did not discuss it at all. There was a brief discussion about the current, 1993-1996 agreement, which was never executed. Clark produced a copy and signed it, and gave it to Respondent.

Respondent caucused, and returned with Carmody saying that Respondent had received information at the meeting that it did not have before, and suggested a break until the following morning, at which time Respondent's position would be presented. Miner testified that Carmody said that "we now have the answer to the question we had been seeking since September 5." Miner also conceded that Respondent ended the meeting at that time, saying that they could meet again the following day.

Miner stated that at the meeting, Sturm asked Respondent to go over, explain and help the Union understand the new collective-bargaining agreement distributed on October 3. Respondent's representatives replied by asking the Union to clarify its position on their willingness to bargain. Respondent's representatives did not explain the new contract to the Union at any time.

Miner testified that the purpose of the meeting was Respondent's attempt to obtain an unambiguous answer as to the Un-

ion's willingness to bargain for a new contract inasmuch as Respondent was confused regarding its position based upon the filing of the grievance. Miner and McGowan conceded, however, that the Union orally corrected its typographical error, and stated that it was ready, willing and able to negotiate. McGowan added that he believed that Sturm said that the Union would bargain "unconditionally."

Miner, and McGowan stated that when asked whether he agreed that the Union had an obligation to negotiate a new contract, Sturm said, "[N]o," but added that since a grievance was outstanding, an arbitrator's finding may make their deliberations moot. Carmody asked the Union if it had abandoned its grievance, and was told that it had not.

Clark denied that Sturm said that the Union had no bargaining obligation.

#### The Events of November 7

As the Union representatives prepared to attend the meeting on November 7, they received a call from Respondent, stating that it was canceling the meeting, and they should await a letter.

A letter was delivered which advised, that in view of the Union's continuing refusal to recognize its duty to bargain a successor collective-bargaining agreement, Respondent intended to implement the new terms and conditions of employment set forth in its October 3 transmittal. The letter conceded that at the November 6 meeting, the Union "professed an unconditional desire to bargain," but alleged that it stated that it did not recognize a duty to bargain a new contract because an arbitrator might agree with its position concerning the termination of the 1993-1996 agreement.

The letter further noted that based on the Union's course of conduct, it believed that the Union's "professed desire to negotiate a new contract is totally insincere" and solely an attempt to delay the implementation of the new terms and conditions of employment.

The letter concluded that it would implement the new terms and conditions of employment effective December 9.

By letter dated November 7, Wood replied that at the meeting the Union said that it was present to "bargain a new labor agreement in good faith and without any conditions," and noted that it had corrected the typographical error in the October 29 letter. The instant charge was filed that day.

The same day, Respondent notified its employees that at the November 6 meeting, it was told that the Union did not recognize that it had a duty to bargain a new contract, and it was therefore implementing the new terms and conditions of employment effective December 9.

#### Later Events

Thereafter, on November 15, the Union notified Respondent that it would submit its grievance directly to arbitration. On November 18, Respondent advised the Union that it would submit the Union's grievance to arbitration, and ask as a remedy that the grievance be dismissed. On March 7, 1997, the Union advised the American Arbitration Association (AAA) that it was withdrawing its grievance. On March 11, the AAA advised that in view of the withdrawal, it was canceling the hearing scheduled for August 8, 1997.<sup>4</sup>

<sup>4</sup> Another letter sent by the AAA on March 11 advised that a hearing would take place on June 19. That letter referenced a different case number than the other letter. It was not made clear whether the June 19 hearing related to the Respondent's pursuit of the grievance.

Apparently the Board's Regional Office asked Respondent to defer implementation of the terms of the new contract until December 17 in order to permit the office to complete its investigation of the instant charge.

On December 17, Respondent filed charges in Cases 22-CB-8401(1) and 22-CB-8401(2) against the Union alleging that it had failed to bargain with Respondent for a successor collective-bargaining agreement. On March 17, 1997, a complaint was issued against NABET, alleging that from September 5 to October 17, it refused to bargain with the Employer in violation of Section 8(b)(3) of the Act. On March 18, 1997, the instant complaint against Respondent was issued.

As set forth above, NABET entered into a settlement agreement of the complaint, which was approved by the Regional Director on June 13, 1997. The Employer refused to join in the settlement agreement.

#### The Arguments of the Parties

The General Counsel argues that Respondent's conduct on October 3, in notifying the Union of its intent to implement changes in the terms and conditions of employment of its employees, was improper because it did not give the Union an opportunity to bargain with respect to such changes. However, the General Counsel concedes that the Union's refusal to bargain during that period of time, from September 5 to October 17, was improper.

Nevertheless, the General Counsel argues and the complaint alleges, that upon the Union's decision to bargain with Respondent on October 17, Respondent's refusal to bargain about the October 3 announced changes, was unlawful.

The General Counsel further argues that by unilaterally implementing the changes on December 18, Respondent committed further violations of its bargaining obligation.

Respondent first argues that the Union never unconditionally offered to bargain with it since it sought to grieve the issue of the termination of the contract. However, even assuming that it did, Respondent further argues that, because of the Union's refusal to bargain with it from September 5, Respondent was not obligated to bargain about the terms and conditions of employment with the Union thereafter. Respondent also argues that it was justified in notifying the Union on October 3 of its intent to make changes in its employees' terms and conditions of employment, and later implementing those changes.

#### Analysis and Discussion

The Supreme Court in *NLRB v. Katz*, 369 U.S. 736, 742-743 (1962), has stated that the duty to bargain collectively as set forth in Section 8(a)(5) of the Act is defined by Section 8(d) as the duty to "meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment." The Court held that "an employer's unilateral change in conditions of employment under negotiation is . . . a violation of Section 8(a)(5)" of the Act. Accordingly, an employer may not change matters related to wages, hours, or terms and conditions of employment without first affording the employees' bargaining representative a reasonable and meaningful opportunity to discuss the proposed changes.

The Board has held that when parties are engaged in negotiations for a collective-bargaining agreement, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to provide notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bar-

gaining for the agreement as a whole. *L & L Wine & Liquor Corp.*, 323 NLRB 848, 851 (1997); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1995).

Respondent first argues that the Union's refusal to bargain with it from September 5 until October 17 excused it from its obligation to bargain with the Union. First, there is no question that the Union refused to bargain with Respondent during that period of time. The Union clearly refused to bargain based upon its letters of September 5 and 23.

In certain circumstances, a union's refusal to bargain with an employer excuses an employer from bargaining with the union. *Double S Mining*, 309 NLRB 1058 (1992), and permits an employer to institute unilateral changes as "it was the union's own acts which foreclosed effective negotiations." *Louisiana Dock Co.*, 293 NLRB 233, 235 (1989).

A complaint was issued based on the Union's refusal to bargain with the Respondent from September 5 to October 17. Based upon the facts concerning the Union's actions during that period of time, a finding may be made that the Union refused to bargain with Respondent from September 5 to October 17.

Under those circumstances, I cannot find, as alleged in paragraphs 10 through 12 of the complaint, that Respondent unlawfully notified the Union of its intent to implement changes to the terms and conditions of its employees on October 3 without affording the Union an opportunity to bargain with it. At the time of the notification, October 3, the Union was refusing to bargain with the Respondent. Accordingly, Respondent did not violate the Act by announcing its intention to implement the changes. I will accordingly recommend that paragraphs 10 through 12 of the complaint be dismissed.<sup>5</sup>

However, although an 8(b)(3) complaint was issued alleging the Union's refusal to bargain with respect to its conduct from September 5 through October 17, that fact is not relevant to Respondent's obligation to bargain thereafter. That case was settled, and a commitment was given by the Union that it would not refuse to bargain with Respondent, and would upon request, bargain with it. There is no evidence that the Union has violated the terms of that agreement. *Cascade Corp.*, 192 NLRB 533 fn. 2 (1971). I accordingly reject Respondent's affirmative defenses that the Regional Director lacked statutory authority to issue the instant complaint because of the complaint and settlement agreement in Cases 22-CB-8401(1) and 22-CB-8401(2).<sup>6</sup>

On October 17, 2 weeks following Respondent's notification that it intended to implement its proposal, the Union changed its mind, and decided to bargain with Respondent. The Union's letter of October 17 offered to negotiate unconditionally, and at the November 6 meeting, the Union corrected the erroneous wording in its October 29 letter, and again stated its willingness

to unconditionally bargain for a successor agreement. Further, Respondent's November 7 letter confirmed that the Union offered to bargain unconditionally.

Accordingly, it is clear that on October 17 and thereafter the Union agreed to unconditionally bargain with Respondent. Respondent unlawfully refused to bargain with the Union since October 17. Respondent argues that the Union's continued insistence on pursuing its claim that the contract automatically renewed constitutes conditional bargaining. I do not agree. In *Lou's Produce*, 308 NLRB 1194, 1195 (1992), the Board held that a union had not engaged in bad-faith bargaining by stating that the parties' contract had automatically renewed, and its statement did not privilege the employer's unilateral implementation of a health insurance plan.

The Union's pursuit of its grievance may be analogized to the situation in which an employer is required to bargain with a union while it litigates in the court of appeals the Board's order that it bargain with the union. *Benchmark Industries*, 269 NLRB 1096, 1098 (1984); *Montgomery Ward & Co.*, 228 NLRB 1330, 1331 (1977). An employer is thus entitled to seek review of the Board's order, but is at the same time required to bargain with the union. Similarly, here the Union is justified in seeking a determination of the issue concerning the automatic renewal of the contract, but is also required to bargain with Respondent.

Respondent argues that the Union exhibited bad faith in stating that an arbitrator's finding that the contract had automatically terminated would make their bargaining moot. However, where court review of the Board's bargaining order is sought, the court's reversal of the Board's order may likewise result in the parties' bargaining being moot. Nevertheless, a party may seek court review, and at the same time is required to bargain.

The Union's belief that the parties' contract had automatically renewed, and its filing of a grievance in order to obtain a determination of that issue is "not inherently inconsistent with a continued willingness to negotiate, and as long as there is such willingness and no impasse has developed, the employer's obligation continues." *NLRB v. Katz*, supra, 369 U.S. at 741 fn. 7.

I accordingly find that the Union's insistence upon grieving the issue of the alleged automatic renewal of its contract did not constitute an unlawful refusal to bargain, particularly in light of its contemporaneous and clear announcement that it would unconditionally bargain for a successor collective-bargaining agreement. I therefore find that Respondent was not justified in implementing the changes based upon the Union's pursuit of its grievance.

As set forth above, an employer is justified in making unilateral changes to its employees' working conditions only following impasse in negotiations with the union representing such employees.

A genuine impasse in negotiations is synonymous with deadlock. Where there is a genuine impasse the parties have discussed a subject or subjects in good faith, and despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position. The Board does not lightly find an impasse. . . . An impasse is reached after "good-faith negotiations have exhausted the prospects of concluding an agreement" and there is no realistic possibility that continuation of discussion[s] at that time would be fruitful. [*CJC Holdings*, 320 NLRB 1041, 1044 (1996).]

<sup>5</sup> In view of this finding, I need not reach Respondent's argument that the charge did not allege that Respondent's October 3 conduct was unlawful.

<sup>6</sup> I reject Respondent's further affirmative defense that the issuance of the complaint was an abuse of the Regional Director's prosecutorial discretion because of alleged contrary determinations made by the Regional Director for Region 1 in Case 1-CB-8666(1-3). That complaint, which involved different parties, alleged that the union refused to bargain with an employer by, inter alia, submitting a request for arbitration in which it sought a finding that the collective-bargaining agreement had not been effectively terminated. In the absence of a Board finding on this issue, I am not bound by a Regional Director's issuance of a complaint concerning that matter.

Applying the above standard, it is immediately clear that no impasse occurred in these negotiations. In fact, it is obvious that no negotiations occurred at all. Indeed, it is Respondent's position that, as of October 3, it was not obligated to bargain about the terms and conditions of employment of its employees. Accordingly, following the Union's announcement on October 17 that it would unconditionally bargain for a new contract, the Respondent did not engage in bargaining. At the November 6 meeting, the Union's attempt to have Respondent discuss the collective-bargaining agreement it sought to implement was refused. Respondent's admitted purpose in meeting on November 6 was to obtain an answer as to whether the Union sought to bargain unconditionally, and not to bargain with the Union. When the Union announced that it was pursuing the grievance, Respondent cut off discussions, left the meeting, and cancelled the following day's meeting.

It thus cannot be said that impasse has occurred, or even that negotiations took place. I accordingly find that on December 18, when Respondent implemented the changes in its employees' terms and conditions of employment, an impasse did not exist between Respondent and the Union. As of that time, the Union was willing to bargain unconditionally. Having found that the parties were not at impasse in their negotiations, Respondent violated Section 8(a)(5) and (1) by unilaterally implementing its contract proposals on December 18, 1996. *Bottom Line Enterprises*, supra at 375 (1991); *Quik Park Garage Corp.*, 315 NLRB 111, 112 (1994).<sup>7</sup>

#### CONCLUSIONS OF LAW

1. Respondent is an employer 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 appropriate collective-bargaining unit includes all employees employed by the Employer in the broadcasting of WWOR-TV, Inc. in the Metropolitan Area of New York City, New York, to perform the work as specified in article II of the 1993–1996 collective-bargaining agreement.

4. By refusing to bargain with the Union, and by unilaterally changing and implementing changes to terms and conditions of employment of its unit employees without affording the Union an opportunity to bargain with Respondent with respect to such changes, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

5. The above unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

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

Having found that Respondent violated the Act by unilaterally changing and implementing changes to terms and conditions of employment of its unit employees without affording the Union an opportunity to bargain with the Respondent with respect to such changes, I shall order Respondent to restore the status quo by rescinding, on request from the Union, those unilateral changes and make all affected unit employees whole for

<sup>7</sup> In view of my findings herein, Respondent's Motion for Summary Judgment made at the hearing is denied.

losses they incurred by virtue of its unilateral changes, in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>8</sup>

#### ORDER

The Respondent, WWOR-TV, Inc., Secaucus, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally changing and implementing changes to the terms and conditions of employment of its unit employees, without affording the Union an opportunity to bargain with Respondent with respect to such changes.

(b) Refusing to bargain with National Association of Broadcast Employees and Technicians-CWA, AFL-CIO in the following appropriate unit which includes all employees employed by the Employer in the broadcasting of WWOR-TV, Inc. in the Metropolitan Area of New York City, New York, to perform the work as specified in article II of the 1993–1996 collective-bargaining agreement.

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

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

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement: all employees employed by the Employer in the broadcasting of WWOR-TV, Inc. in the Metropolitan Area of New York City, New York, to perform the work as specified in article II of the 1993–1996 collective-bargaining agreement.

(b) On request of the Union, rescind the unilateral changes made on about December 18, 1996, and make whole the affected employees for losses incurred by virtue of the implementation of the unilateral changes, with interest, as prescribed in the remedy section of the decision.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Secaucus, New Jersey, copies of the attached notice marked "Appendix."<sup>9</sup> Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for

<sup>8</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.

<sup>9</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."

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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 17, 1996.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

#### 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 unilaterally change and implement changes to the terms and conditions of employment of our unit employees, without affording the National Association of Broadcast Em-

ployees and Technicians-CWA, AFL-CIO, an opportunity to bargain with us with respect to such changes.

WE WILL NOT refuse to bargain with National Association of Broadcast Employees and Technicians-CWA, AFL-CIO in the appropriate collective-bargaining unit which includes all employees employed by us in the broadcasting of WWOR-TV, Inc., in the Metropolitan Area of New York City, New York, to perform the work as specified in article II of the 1993-1996 collective-bargaining agreement.

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 on request, bargain with the Union as the exclusive representative of the employees in the following appropriate collective-bargaining unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement: all employees employed by us in the broadcasting of WWOR-TV, Inc., in the Metropolitan Area of New York City, New York, to perform the work as specified in article II of the 1993-1996 collective-bargaining agreement.

WE WILL on request of the Union, rescind the unilateral changes made by us on about December 18, 1996, and make whole the affected employees for losses incurred by virtue of the implementation of the unilateral changes, with interest.

WWOR-TV, INC.