

Alwin Manufacturing Company, Inc. and United Steelworkers of America, AFL-CIO. Cases 30–CA–12556, 30–CA–12707, and 30–CA–12772

August 27, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS LIEBMAN
AND BRAME

On September 26, 1996, Administrative Law Judge Robert M. Schwarzbart issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions, and in answer to the Respondent's exceptions, a brief in support of the cross-exceptions. The Charging Party also filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions¹ and briefs and has decided to affirm the judge's rulings, findings,² and conclusions, except as modified below, and to adopt the recommended Order as modified and set forth in full below.³

1. We adopt the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing its final contract proposal on March 1, 1994. In so doing, we rely on the first rationale set forth in the analysis section of the judge's decision, i.e., no valid impasse had been reached in negotiations with the Union because the Respondent had not remedied its prior unfair labor practices.⁴

¹ No exceptions were filed to the judge's findings that the Respondent violated Sec. 8(a)(1) of the Act by taking action to ascertain whether its employees had resigned from the Union and by telling employees that it did not want to recall any more unfair labor practice strikers "than it had to."

² The General Counsel has excepted to the judge's failure to explicitly find that the Respondent violated the Act by insisting to impasse that the Union abandon all grievances it had filed concerning the minimum production standards and alteration of the vacation policy. Because finding such an additional unfair labor practice would not materially affect the Order in this case, we find it unnecessary to pass on the General Counsel's exception.

We adopt the judge's finding that the Respondent violated Sec. 8(a)(5), (3), and (1) by refusing to reinstate unfair labor practice strikers Sheldon Anderson and John Tilly immediately after receiving their unconditional offer to return to work; by not reinstating them to their former positions although those jobs existed; by subjecting them to the employment terms of the Respondent's unlawfully implemented final contract offer; and by variously disciplining them, including laying off Anderson, in enforcement of Respondent's unlawfully implemented production standards. We do not pass on the judge's finding that the Respondent's treatment of Tilly also violated Sec. 8(a)(4) and (1) of the Act, as such a finding does not materially affect the Order.

³ We shall correct certain inadvertent errors in the recommended Order. We amend the judge's remedy to provide that interest on backpay shall be computed as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), rather than *Florida Steel Corp.*, 231 NLRB 651 (1977).

⁴ In *Alwin Mfg. Co.*, 314 NLRB 564 (1994), enfd. 78 F.3d 1159 (7th Cir. 1996) (*Alwin I*), the Board and the court of appeals found that in

The judge further found that the Respondent violated Section 8(a)(5) and (1) by engaging in surface and regressive bargaining, and he reasoned that these findings provided additional grounds for the conclusion that no valid impasse had been reached. We find it unnecessary to pass on this aspect of the judge's decision. His additional unfair labor practice findings are cumulative and do not materially affect the remedy.

2. We adopt the judge's finding that the strike that began on March 1, 1994, was an unfair labor practice strike from its inception. We agree with the judge that the strike was caused, at least in part, by the Respondent's insistence to impasse on its final offer which included the two employment terms found to be unlawfully implemented in *Alwin I*. We also agree with the judge that the strike was prolonged by the Respondent's unlawful conduct.

3. The judge ordered that the Respondent reimburse the Union for the costs and expenses it incurred in the preparation and conduct of the collective-bargaining negotiations, and for the costs and expenses it incurred in connection with the unfair labor practice strike. He found that the Respondent's conduct was egregious, stating that "Respondent's unyielding insistence during prolonged negotiations on its unlawful contract issues . . . calculated to reduce union representation to inconsequentiality, its continued unilateral actions affecting unit employees, its direct dealing with unit members, its threats to discharge and permanently replace the unfair labor practice strikers, and its other conduct found herein, frustrated the bargaining process and depleted the Union's resources." The judge also ordered that the Respondent reimburse the Union and the General Counsel for all litigation costs, including attorneys' fees. He found that "by compelling the General Counsel and Union to prepare and try this matter which, in substantial part, concerns its continued previously determined and willfully unremedied unlawful conduct, the Respondent has necessitated frivolous litigation needlessly burdening the resources both of this Agency and the Union." In so ordering, the judge cited *Frontier Hotel & Casino*, 318 NLRB 857 (1995), enf. denied in part sub nom. *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997).

The Respondent does not except to the judge's reimbursement order. Having failed to do so, the Respondent cannot challenge these remedies in a court of appeals. See Section 10(e) ("No objection that has not been urged before the Board . . . shall be considered by [a reviewing] court [absent] extraordinary circumstances"). Therefore, it is ironic that our dissenting colleague accuses us of "reaching to justify a monetary remedy in a difficult case," when in reality he is the one who is "reaching" to

1992 the Respondent violated Sec. 8(a)(5) and (1) of the Act by unilaterally instituting and enforcing minimum production standards, and by unilaterally making changes in the vacation provisions of the collective-bargaining agreement.

present arguments on behalf of a Respondent that has chosen not to offer any of its own. In any event, as discussed below, we find that the judge's remedies are well tailored to fit the nature and the extent of the violations committed by the Respondent.

Thus, we agree, for the reasons set forth in his decision, with the judge's award of negotiation and unfair labor practice strike costs to the Union.⁵

We agree, for the reasons set forth in his decision, with the judge's award of negotiation and unfair labor practice strike costs to the Union. We also agree with his award of litigation costs to both the General Counsel and the Union. However, in awarding litigation costs, we rely on both Section 10(c) of the Act and our inherent authority to control our own proceedings through an application of the "bad-faith" exception to the American Rule which we

⁵ With respect to the negotiation costs issue, our dissenting colleague attempts to rigidly segment the Respondent's bargaining conduct into two artificial time periods. He concedes in essence that after July 28, 1994, the Respondent engaged in "unusually aggravated misconduct" that infected the bargaining process to such an extent that the effects of the unfair labor practices "cannot be eliminated by the application of traditional remedies." *Frontier Hotel*, supra, 318 NLRB at 859. Therefore, he agrees with us that the Union should be awarded its negotiation costs for the post-July 28, 1994 bargaining session. However, he views the Respondent's pre-July 28, 1994 bargaining conduct differently and would not reimburse the Union for its negotiation costs during the prior 7 months. We disagree completely with his approach. The distinction the dissent draws is based entirely on the issuance of the Board's decision in *Alwin I*, supra, on July 28, 1994. However, it is a well-established legal principle that an employer making unilateral changes acts at its peril. See *Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974), enf. denied on other grounds 512 F.2d 684 (8th Cir. 1975). Accordingly, no controlling legal significance should be accorded the date the Board's decision issued. What is far more important is that the record clearly shows that there was no material difference between the Respondent's conduct in negotiations before July 29, 1994, as opposed to its conduct after July 28, 1994. In fact, as discussed more fully, infra, the Respondent's unlawful conduct actually commenced 2 years earlier in 1992 when it made unilateral changes in minimum production requirements and vacation policy. As the judge correctly recognized, "the record of this proceeding shows that the Respondent concurrently continued to enforce both issues *throughout negotiations*." In addition, the judge found that the Respondent "thereafter continued to implement these terms as part of its effectuated final offer." Therefore, unlike our dissenting colleague, we perceive no basis in fact or law for relieving the Respondent from the consequences of the unlawful course of conduct it first embarked on in 1992 and continued without material change at all relevant times throughout the negotiations.

Equally lacking in merit is the dissent's criticism of the award of unfair labor practice strike costs. As stated in sec. 2, supra, the strike was caused and prolonged by the Respondent's unlawful conduct, and the dissent concedes, as it must, that the conduct was "unusually aggravated." In the absence of such flagrant misconduct, the strike in all likelihood would not have occurred. Thus, there is a direct causal relationship between the Respondent's misconduct and the Charging Party's strike costs. Therefore, an award of unfair labor practice strike costs is warranted for the same reason justifying the award of negotiation costs, "to make the charging party whole for the resources that were wasted because of the unlawful conduct, and to restore the economic strength that is necessary to ensure a return to the status quo at the bargaining table." *Frontier Hotel*, supra, 318 NLRB at 859.

discussed in *Frontier Hotel & Casino*, supra at 864.⁶ As indicated there, the Supreme Court has sanctioned awards of attorneys' fees where a party exhibits bad faith in actions leading to the lawsuit or in the conduct of the litigation.⁷ See also *Lake Holiday Associates*, 325 NLRB 469 (1998). Both aspects of bad faith are present here.

This proceeding had its genesis in *Alwin I*, supra, in which the Board and the Seventh Circuit found that the Respondent acted unlawfully in 1992 when it made unilateral changes in minimum production requirements and vacation policy. The court characterized these topics as "central to the relationship between an employer and its union-represented employees" and stated that the Respondent "should not have been surpris[ed]" that the Union would charge the Respondent with violating the National Labor Relations Act. 78 F.3d at 1160.

The Seventh Circuit noted that, before the Board, the Respondent had not excepted to the judge's finding that it violated Section 8(a)(5) by making unilateral changes to the vacation scheduling policy. The court further noted that, before it, the Respondent did not challenge the Board's finding that it violated Section 8(a)(5) by unilaterally instituting minimum production standards and disciplining employees who failed to meet them. Rather, Respondent argued that enforcement of the Board's order would be a pointless act because there was no reasonable expectation that the wrong would be repeated. Presciently, the Seventh Circuit stated that, considering Alwin's record, the case was one where there was a reasonable expectation "that the wrong will be repeated"⁸ The court also noted that the Respondent had not fully complied with the Board's Order nor had it asserted, before the court, that it had.⁹ Finally, in enforcing the Board's Order, the court characterized the Respondent's attitude as "obstreperous" and its appeal as "frivolous."¹⁰

During the time period covered by the present proceeding, the Respondent still has not complied with the remedial obligations imposed by *Alwin I*. Rather, as the judge correctly observed, "the Respondent, without hiatus, has continued to enforce its unlawfully implemented vacation policy and minimum production standards, has continued to discipline employees for not meeting those

⁶ In its decision in *Unbelievable, Inc. v. NLRB*, 118 F.3d 795, the court (Judge Wald dissenting) found that the Board did not have the authority, under Sec. 10(c) of the Act, to order a respondent to pay litigation costs incurred by the charging party and the General Counsel. The court majority stated, however, that it was not addressing the issue of whether, notwithstanding the lack of statutory authority, the Board might have the inherent power to control its own proceeding through an application of the bad-faith exception to the American Rule against awarding litigation expenses. 118 F.3d at 800 fn.* For the reasons stated by Judge Wald in her partial dissent, we find that we have this inherent authority. 118 F.3d at 810, 812.

⁷ *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980).

⁸ 78 F.3d at 1163.

⁹ *Id.*

¹⁰ *Id.*

standards and has inflexibly insisted on including these terms in the next collective-bargaining agreement.”

Indeed, the judge specifically found that the Respondent’s insistence on maintaining the unlawfully implemented employment terms resulted in friction and disagreement at the bargaining table and ultimately was responsible, in material part, for the breakdown in negotiations. Notwithstanding the absence of a valid impasse, the Respondent unilaterally implemented its final contract proposal embodying and continuing the illegally implemented terms. In addition, during the strike caused and prolonged by its own unlawful conduct, the Respondent continued to undermine the bargaining process by, inter alia, bypassing the Union and dealing directly with unit employees, threatening the unfair labor practice strikers with discharge and permanent replacement, and refusing to reinstate them, on their unconditional offer to return to work. The Respondent’s “obstreperous attitude,” 78 F.3d at 1163, left the Union no alternative but to once again charge the Respondent with violating its statutory obligation to bargain in good faith.

In sum, the Respondent demonstrated bad faith in its actions giving rise to the instant litigation by its failure to remedy the unfair labor practices of *Alwin I* and by its insistence on maintaining the terms it unlawfully instituted. The Respondent has also demonstrated bad faith in the conduct of the instant litigation by forcing the General Counsel and the Union to prepare and try a matter that concerns, in large part, conduct that was adjudicated in *Alwin I*. Accordingly, we conclude that, under the bad-faith exception to the American Rule, the judge was warranted in ordering the Respondent to reimburse the Union and the General Counsel for their litigation costs, including attorneys’ fees.

AMENDED CONCLUSIONS OF LAW

1. Delete Conclusion of Law 4(d) and reletter accordingly the paragraphs that follow.
2. Delete Conclusion of Law 6 and renumber accordingly the paragraphs that follow.

ORDER

The National Labor Relations Board orders that the Respondent, Alwin Manufacturing Company, Inc., Green Bay, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively in good faith with United Steelworkers of America, AFL–CIO, on request, 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 production and maintenance employees of the Respondent at the Respondent’s plant in the greater Green Bay area, Green Bay, Wisconsin; excluding office

clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Unilaterally implementing, maintaining, and enforcing its collective-bargaining proposals, including provisions concerning minimum production standards and changes in vacation policy, without benefit of a valid, preexisting impasse.

(c) Refusing and failing to retroactively rescind the minimum production standards and changed vacation policy as of their respective 1992 dates of implementation in compliance with the previously issued Orders of the Board and the U.S. Court of Appeals in *Alwin Mfg. Co.*, 314 NLRB 564, 569–570 (1994), *enfd.* 78 F.3d 1159 (7th Cir. 1996), herein *Alwin I*, and refusing and failing to comply with the other requirements of those Orders, including the withdrawal of all disciplinary actions taken against employees, during and since 1992, for not having met or maintained those production standards; the proper reinstatement of all employees suspended and/or discharged in connection with the production standards; the requirement that such employees be made whole, with interest; and the removal from its records of any references to such disciplinary actions.

(d) Continuing to discipline employees who do not meet or maintain the above minimum production standards.

(e) Bypassing and undermining the above-named labor organization by bargaining directly with its previously terminated unit employees concerning their reinstatement to work and the applicable terms; by offering such employees lump-sum cash payments in exchange for their waivers of reinstatement and of all legal claims against the Respondent, including Board remedies; and by sending questionnaires directly to its unfair labor practice striker employees after the unconditional offer to return concerning their availability and desire for employment.

(f) Refusing to immediately reinstate its unfair labor practice striker employees to their former prestrike positions after their unconditional offer to return to work and by permanently replacing them.

(g) Refusing to immediately reinstate its returning unfair labor practice striker employees Sheldon Anderson and John Tilly to their former prestrike positions after the unconditional offer to return; assigning them work in jobs other than their prestrike positions subject to the terms and conditions of employment set forth in its unlawfully implemented final contract proposal; and disciplining them for not having met or maintained the aforesaid production standards.

(h) Discriminating against Anderson, Tilly, and its other unfair labor practice striker employees because of their union and other protected, concerted activities.

(i) Soliciting unfair labor practice strikers to return to work and threatening them with permanent replacement if they fail to comply.

(j) In effect, telling its employees, after receiving the unconditional offer to return, that the Company did not want to recall any more of the unfair labor practice strikers than it had to.

(k) Taking action to ascertain whether its employees have resigned from the Union.

(l) In any other 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 in good faith with the above-named Union as the exclusive representative of the employees in the appropriate unit set forth above concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Within 14 days from the date of the Board's Order, retroactively rescind and withdraw the minimum production standards and changed vacation policy as of their respective 1992 implementation dates, as ordered by the Board and U.S. court of appeals in *Alwin I*, and comply with the above requirements of that Order.

(c) Within 14 days from the date of the Board's Order, rescind and invalidate all offers of reinstatement contingent on future compliance with the production standards, or for lump-sum cash payments in exchange for their waivers of reinstatement and of other legal claims against the Respondent, made to previously discharged employees Harold F. Basinski Jr., Robert E. Hudson, Robert Pallock, Peter Filipiak, James L. Plog, Jessie Del Marcelle, and Michael Mahlik, and to any other employees so situated, and reinstate these employees in accordance with the *Alwin I* remedial Orders of the Board and Court of Appeals.

(d) Make the aforementioned employees whole in accordance with the *Alwin I* remedial Orders of the Board and Court of Appeals.

(e) Make previously suspended employees Kevin DeKeyser and Joseph Mir whole in accordance with the *Alwin I* remedial Orders of the Board and court of appeals.

(f) Within 14 days from the date of the Board's Order, rescind retroactive to March 1, 1994, all changes in terms and conditions of employment made on that date, when it unilaterally implemented its bargaining proposals.

(g) Make its employees whole for any losses they may have incurred by reason of such unilateral changes in accordance with the schedule of wages and benefits set forth in the collective-bargaining agreement which expired on February 28, 1994.

(h) Within 14 days from the date of the Board's Order, reinstitute retroactive to March 1, 1994, all terms and conditions of employment of bargaining unit employees that were unlawfully changed following the Respondent's unlawful bargaining impasse until it negotiates in

good faith with the Union to a new contract or to valid impasse.

(i) Within 14 days from the date of the Board's Order, offer all unfair labor practice strikers, including Sheldon Anderson and John Tilly, immediate and full reinstatement to their former prestrike jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(j) Make all unfair labor practice strikers, including Anderson and Tilly, whole for any loss of earnings and other benefits suffered as a result of the Respondent's failure to immediately and fully reinstate them upon the unconditional offer to return to work, with backpay and interest thereon to be computed in the manner set forth in the remedy section of the decision. Such employees are to be made whole in accordance with the schedule of wages and benefits set forth in the collective-bargaining agreement which expired on February 28, 1994.

(k) Within 14 days from the date of the Board's Order, remove from its files any references to the unlawful warnings, suspensions, discharges or other disciplinary actions taken against its employees for not having achieved or maintained the aforesaid production standards and, within 3 days thereafter, notify the employees in writing that this has been done and that these disciplinary actions will not be used against them in any way.

(l) 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.

(m) Pay to the United Steelworkers of America and the General Counsel the costs and expenses incurred by them in the investigation, preparation, presentation and conduct of this proceeding, including reasonable counsel fees, transcript and record costs, printing costs, travel expenses and per diem, and other reasonable costs to be determined at the compliance stage of this proceeding. In addition, pay to the Steelworkers the costs and expenses it incurred in the preparation and conduct of Collective-bargaining negotiations on, and subsequent to November 10, 1993, and its costs and expenses incurred in connection with the unfair labor practice strike which began on March 1, 1994, including any picketing costs, strike benefits and other assistance paid to the Respondent's striking employees during the strike and after the unconditional offer to return to work, until it offers its striking employees full and proper reinstatement.

(n) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix."¹¹

¹¹ 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 Judge-

Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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. 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 and former employees employed by the Respondent at any time since March 1, 1994.

(o) 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 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.

MEMBER BRAME, dissenting in part.

1. Contrary to my colleagues, I would not find that the Respondent violated Section 8(a)(3) by subjecting Anderson and Tilly to the employment terms of its unlawfully implemented final contract offer or by variously disciplining them in enforcement of its unlawful production standards, given the absence of any evidence that the Respondent treated Anderson and Tilly differently from other employees in disciplining them for their failure to meet the minimum production standards and in failing to give them training for their new positions. I agree with my colleagues, however, that the Respondent violated Section 8(a)(5) and (1) by the above conduct toward Anderson and Tilly.

2. Other than the 8(a)(3) finding above, I agree with my colleagues that the Respondent violated the Act in the manner found in the majority decision. I dissent in part, however, concerning the extraordinary remedies granted by my colleagues, as detailed below.¹

ment of the United States court of appeals enforcing an Order of the National Labor Relations Board.”

¹ My colleagues claim that the Respondent does not except to the judge's reimbursement order. The proposition is both questionable and irrelevant. The Respondent does not list the extraordinary remedies as a separate exception, but at p. 1 of its brief, it does state that “[d]espite the weight of record evidence to the contrary and applicable law inconsistent with the ALJ's decision, the Judge incorrectly concluded that Respondent violated Sec. 8(a)(1), (3), (4), and (5) of the Act. As a result, the Judge proposed extraordinary and unduly burdensome remedies against Respondent. It is from these findings and conclusions that Respondent excepts, offering the instant Brief in Support.” [Emphasis added.] The Respondent thus put the Board on notice of its disagreement with the remedy.

Moreover, as the Board stated in *WestPac Electric*, 321 NLRB 1322 (1966), “[i]t is well established that the Board has broad discretion in determining the appropriate remedies to dissipate the effects of unlaw-

Contrary to my colleagues, I would not award negotiation costs to the Union for the negotiation sessions which occurred before the issuance of the Board's decision in *Alwin I* on July 28, 1994,² although I would award negotiation costs for the August 26, 1994 negotiation session. In discussing the standard for awarding negotiation expenses as a remedy, the Board in *Frontier Hotel & Casino* stated that negotiation expenses would be warranted in “cases of unusually aggravated misconduct,” where a respondent's “substantial unfair labor practices have infected the core of the bargaining process . . .” *Frontier Hotel*, 318 NLRB 857, 859 (1995), enfd. in part and enf. denied in part sub nom. *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997). The Board was careful to emphasize, however, that it did not intend to disturb its long-established practice of relying on bargaining orders to remedy “the vast majority” of bad-faith bargaining violations. *Ibid.*

In the instant case, I do not believe that the Respondent's conduct in bargaining prior to the issuance of the Board's decision in *Alwin I* constituted “unusually aggravated misconduct.” All but one of the negotiation sessions at issue occurred between December 16, 1993, and February 28, 1994. Thus, they occurred before the Board issued its decision in *Alwin I* on July 28, 1994 (and even before the administrative law judge's decision in *Alwin I* issued on April 27, 1994). Although, in *Alwin I*, the Board found that the Respondent had acted unlawfully in 1992 by unilaterally implementing its minimum production requirements and unilaterally changing its vacation policy, the Respondent could not have known at the time of the negotiation sessions³ that the Board would make such a finding in *Alwin I* until the Board issued its decision. Thus, the Respondent's continued adherence to those unilateral changes during the negotiation sessions here can hardly be characterized as “unusually aggravated misconduct” when the *Alwin I* case was still pending.⁴

ful conduct,” citing *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533 (1943). This includes the assessment of the appropriateness of remedies for unfair labor practices even when there are no exceptions to the remedies provided. *WestPac Electric*, above at 1322.

² 314 NLRB 564.

³ While the Respondent did not contest the allegation that it had violated the Act regarding the change in its vacation policy before the Board, it did contest that allegation before the judge, whose decision issued after the bargaining sessions that occurred between December 1993 and February 1994.

⁴ By reaching to justify a monetary award in a difficult case, my colleagues' decision regarding negotiation costs effectively risks turning an extraordinary remedy into a standard one, i.e., when a respondent negotiates, while simultaneously contesting an earlier unfair labor practice allegation involving unilateral changes, that respondent now risks being subject to the imposition of negotiating costs for the entire later bargaining should it lose the earlier case. This potential may well dissuade employers from seeking their day in court, to which they are entitled, on those contested unilateral changes for fear they may have to pay later negotiation expenses. I cannot join in a decision which risks loosening the tests for such an onerous remedy.

I would, however, award negotiation costs to the Union for the August 26, 1994 negotiating session. At that point, the Board's *Alwin I* decision had issued, and yet the Respondent failed to materially modify its bargaining position of continued adherence to those unilateral changes which had been found to be unlawfully implemented. Although the Respondent appealed the Board's *Alwin I* decision to the United States court of appeals, it failed to challenge before that court the Board's finding that it had violated Section 8(a)(5) and (1) of the Act by unilaterally instituting minimum production standards and disciplining employees who failed to meet them. *NLRB v. Alwin Mfg. Co.*, 78 F.3d 1159, 1162 (7th Cir. 1996).⁵ Thus, as the issue of the legality of the Respondent's unilateral changes in *Alwin I* had effectively been decided and was no longer a pending matter, I would find that the Respondent's bargaining stance on August 26, 1994, warrants granting negotiation costs to the Union.

Contrary to my colleagues, I also would not award unfair labor practice strike costs to the Union. In awarding such costs, the judge simply cited such an award as "a logical extension of the rationale of *Frontier Hotel*." Given the lack of any supporting rationale for the judge's decision to award such costs and in a situation where I am unaware of any precedent for such an award, I refuse to join my colleagues' award of such costs.

Finally, again contrary to my colleagues, I would not award litigation costs to the General Counsel or the Union in the instant case. In awarding such costs, the majority relies on Section 10(c) of the Act and the Board's inherent authority to control its own proceedings through an application of the "bad-faith" exception to the American Rule, as discussed in *Frontier Hotel*, above at 864. Without passing on whether the Board has the statutory authority under Section 10(c) of the Act to award litigation costs,⁶ I find that the facts of this case would not warrant the imposition of such a remedy here. Further, I do not find that the Respondent's conduct here warrants applying the "bad-faith" exception to the *American Rule*. In discussing the bad-faith exception, the Board in *Frontier Hotel* noted that the bad faith required "may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation." 318 NLRB at 864, citing *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980).

Regarding the Respondent's actions that led to the lawsuit, I do not believe, as discussed above, that the Respondent acted in bad faith by continuing to adhere to its unilaterally implemented changes in the bargaining

sessions that occurred prior to the issuance of the Board's *Alwin I* decision. Regarding the Respondent's conduct of the instant litigation, I note that the Respondent's defenses presented here, although ultimately found to be without merit, are not frivolous and do not warrant ascribing bad faith to its conduct. Thus, I would not apply the bad-faith exception to the *American Rule* here, and I would not award litigation costs.

APPENDIX

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

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

WE WILL NOT refuse to bargain collectively in good faith with United Steelworkers of America, AFL-CIO, on request, 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 production and maintenance employees of the Respondent at the Respondent's plant in the greater Green Bay area, Green Bay, Wisconsin; excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT unilaterally implement, maintain and enforce our Collective-bargaining proposals, including provisions concerning minimum production standards and changes in vacation policy, without benefit of a valid, preexisting impasse.

WE WILL NOT refuse to retroactively rescind the minimum production standards and changed vacation policy as of their respective 1992 dates of implementation in compliance with the previously issued Orders of the Board and the United States Court of Appeals for the Seventh Circuit, and WE WILL NOT refuse to comply with the other requirements of those Orders, including those calling for the retroactive withdrawal of all disciplinary actions taken against employees during and since 1992, for not having met or maintained those production standards; the proper reinstatement of all employees suspended and/or discharged in connection with the production standards; the directive that such employees be made whole, with interest; and that all references to such disciplinary actions be removed from our records.

WE WILL NOT continue to discipline employees who do not meet or maintain the above minimum production standards.

WE WILL NOT bypass and undermine the above-named labor organization by bargaining directly with our unit

⁵ As earlier noted, the Respondent had failed to challenge the Board's finding that it had violated the Act by making unilateral changes to its vacation policy in its exceptions to the Board in *Alwin I*, 314 NLRB 564 fn. 1, and therefore under Sec. 10(c) of the Act it could not challenge that finding before the court.

⁶ See *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997).

employees by directly corresponding with our previously terminated employees concerning their reinstatement to work, and the applicable terms; by offering them lump-sum cash payments in exchange for their waivers of reinstatement and of all legal claims they may have against us, including Board remedies; and by unilaterally sending questionnaires directly to our unfair labor practice striker employees after the unconditional offer to return concerning their availability and desire for employment.

WE WILL NOT refuse to immediately reinstate unfair labor practice strikers to their former prestrike positions after their unconditional offer to return to work and WE WILL NOT permanently replace them.

WE WILL NOT refuse to immediately reinstate unfair labor practice striker employees Sheldon Anderson and John Tilly to their former prestrike positions after the unconditional offer to return; WE WILL NOT assign them to work in other than their former prestrike positions, subject to the terms and conditions set forth in our unlawfully implemented final contract proposal; and WE WILL NOT discipline them for not having met or maintained the production standards.

WE WILL NOT discriminate against Sheldon Anderson, John Tilly, or any of our other employees who had engaged in the unfair labor practice strike that began on March 1, 1994, because of their union and other protected, concerted activities.

WE WILL NOT solicit unfair labor practice strikers to return to work and WE WILL NOT threaten them with permanent replacement if they fail to comply.

WE WILL NOT, in effect, tell our employees, after receiving the unconditional offer to return, that we do not want to recall any more of the unfair labor practice strikers than we have to.

WE WILL NOT take action to ascertain whether our employees have resigned from the Union.

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

WE WILL, on request, bargain in good faith with the Union as the exclusive representative of the employees in the appropriate unit set forth above concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL, within 14 days from the date of the Board's Order, retroactively rescind and withdraw the minimum production standards and changed vacation policy as of their respective 1992 implementation dates, as ordered by the Board and United States Court of Appeals for the Seventh Circuit, and comply with the above-specified requirements of those Orders.

WE WILL, within 14 days from the date of the Board's Order, rescind and invalidate all offers of reinstatement contingent on future compliance with the aforesaid production standards, and offers of lump-sum cash payments

in exchange for waivers of reinstatement and of other legal claims against us, made to previously discharged employees Harold F. Basinski Jr., Robert E. Hudson, Robert Pallock, Peter Filipiak, James L. Plog, Jessie Del Marcelle, and Michael Mahlik, and to any other employees so situated, and WE WILL reinstate these employees in accordance with any other remedies we have previously been directed to afford by Orders of the Board and the United States Court of Appeals for the Seventh Circuit.

WE WILL make the above-named employees whole in accordance with the remedial Orders of the Board and United States Court of Appeals for the Seventh Circuit.

WE WILL make previously suspended employees Kevin Dekeyser and Joseph Mir whole as we were previously ordered to do by the Board and United States Court of Appeals for the Seventh Circuit.

WE WILL, within 14 days from the date of the Board's Order, rescind retroactive to March 1, 1994, all changes in terms and conditions of employment we made on that date, when we unilaterally implemented our bargaining proposals.

WE WILL make whole our employees for any losses they may have incurred by reason of our unilateral changes in accordance with the schedule of wages and benefits set forth in the collective-bargaining agreement which expired on February 28, 1994.

WE WILL, within 14 days from the date of the Board's Order, reinstate retroactive to March 1, 1994, all terms and conditions of employment of bargaining unit employees that we unlawfully changed following our invalid bargaining impasse until we negotiate in good faith with the Union to a new contract or to valid impasse.

WE WILL, within 14 days from the date of the Board's Order, offer all unfair labor practice strikers, including Sheldon Anderson and John Tilly, immediate and full reinstatement to their former prestrike jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make all unfair labor practice strikers, including Sheldon Anderson and John Tilly, whole for any loss of earnings and other benefits suffered as a result of our failure to immediately and fully reinstate them on the unconditional offer to return to work, with backpay and interest thereon to be computed in the manner set forth in the remedy section of the decision.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful warnings, suspensions, discharges, or other disciplinary actions taken against our employees for not having achieved or maintained the production standards and WE WILL, within 3 days thereafter, notify such employees in writing that this has been done and that these disciplinary actions will not be used against them in any way.

WE WILL pay to the United Steelworkers of America, AFL-CIO, and the General Counsel of the National Labor Relations Board the costs and expenses incurred by them in the investigation, preparation, presentation, and conduct of this proceeding, including reasonable counsel fees, transcript and record costs, printing costs, travel expenses, and per diem, and other reasonable costs to be determined at the compliance stage of this proceeding. In addition, WE WILL pay to the above-named Union the costs and expenses it incurred in the preparation and conduct of collective-bargaining negotiations on and subsequent to November 10, 1993, and WE WILL pay to that Union its costs and expenses incurred in connection with the unfair labor practice strike which began on March 1, 1994, including any picketing costs, strike benefits and other assistance paid to our striking employees during the strike and after the unconditional offer to return to work, until we offer our striking employees full and proper reinstatement.

ALWIN MANUFACTURING COMPANY, INC.

Benjamin Mandelman, Esq., for the General Counsel.
Donald F. Woodcock, Esq. (Calfée, Halter & Griswold), of Cleveland, Ohio, and *Ronald T. Pfeifer, Esq. (Godfrey & Kahn)*, of Green Bay, Wisconsin, for the Respondent.
George F. Graf, Esq., of Milwaukee, Wisconsin, *Robert Glaser*, Organizing Director, and *Joel Vattendahl*, District Director, both of Brookfield, Wisconsin, and *Donald Schmitt*, Staff Representative, of Manitowoc, Wisconsin, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT M. SCHWARZBART, Administrative Law Judge. This case was heard in Green Bay, Wisconsin, pursuant to charges filed by the United Steelworkers of America, AFL-CIO (the Union).¹ The consolidated complaints allege that Alwin Manufacturing Company, Inc. (the Respondent or the Company) refused to bargain in violation of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by entering into contract negotiations with a fixed intent not to reach an agreement, presenting and adhering to proposals calculated to frustrate the bargaining process and to cause a strike; by conditioning agreement to a labor contract on an extended series of contract proposals so unreasonably reductive of existing employee pay, benefits and working conditions as to foreseeably have been unacceptable to the Union; by refusing to meet to continue contract negotiations after February 28, 1994; by proceeding, without having reached bonafide impasse, to implement a final

¹ The relevant docket entries are as follows: The charge in Case 30-CA-12556 was filed on May 31, 1994, and the respective complaint, amendment to that complaint and an amended complaint in that matter issued on October 21, 1994, February 24 and April 10, 1995. The charges in Cases 30-CA-12707 and 30-CA-12772 were filed on November 7, 1994, and January 17, 1995, respectively. The complaints in Cases 30-CA-12707 and 30-CA-12772 respectively issued on February 23 and March 7, 1995, and the order consolidating the aforesaid cases is dated April 10, 1995. The complaints were further amended at the hearing held during 14 days between May 1 and July 12, 1995.

offer containing two previously adjudicated, unremedied violations of the Act;² by variously disciplining employees for failure to meet the disputed production standards; by conditioning achievement of a labor contract on the Union's willingness to agree that production standards previously adjudicated as unlawfully implemented remain in effect and not be subject to union timestudies, to the grievance procedure or to rescission pursuant to the Board's prior Order in *Alwin I*; by causing and prolonging an unfair labor practice strike; in bypassing the Union by directly corresponding with all striking employees inquiring as to their immediate availability or unwillingness to return to work for the Respondent; by refusing to reinstate, and by permanently replacing, its striking employees after the Union's unconditional offer to return the employees, as unfair labor practice strikers to work; by failing to reinstate to their former positions, and by variously disciplining and laying off, two recalled unfair labor practice strikers, Sheldon Anderson and John Tilly, for failure to meet the disputed production standards.

The consolidated complaints allege that the Respondent discriminated against its employees in violation of Section 8(a)(1) and (3) of the Act by refusing immediately to reinstate employees engaged in an unfair labor practice strike to their former positions after receipt of an unconditional offer to return to work. The Respondent also is alleged to have violated Section 8(a)(1), (3), and (4) of the Act by failing to reinstate Anderson and Tilly to their former positions, and by variously disciplining and laying them off for failure to meet the disputed production standards. These latter allegations of discrimination were based on these employees' prior union activities, including their participation in the strike; on the Respondent's intention to discourage other striking employees from returning to work; on Tilly's participation in contract negotiations as a member of the Union's bargaining committee; on his testimony in the *Alwin I* hearing; and on intended retribution for the Union's continued pursuit of remedies before the Board.

Finally, the complaints allege that the Respondent independently violated Section 8(a)(1) of the Act by threatening that its striking employees would be discharged and/or replaced if they did not return to work, although they were unfair labor practice strikers; by, in effect, advising an employee, after the unconditional offer to return, that it discriminatorily was not recalling any more of its striking employees than it had to; and by taking certain action to ascertain whether its employees had resigned from the Union. The Respondent, in timely-filed answers, denied the commission of unfair labor practices.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Briefs, filed by the General Counsel,

² Specifically, as will be more fully discussed below, in *Alwin Mfg. Co. (Alwin I)*, 314 NLRB 564 (1994), *enfd.* 78 F.3d 1159 (7th Cir. 1996), the Board and the court of appeals found that the Respondent had violated the Act during the term of the most recent collective-bargaining agreement by unilaterally implementing and enforcing minimum production standards and by unilaterally making changes affecting employees' vacations. Approximately 1 month after rendering its March 4, 1996 decision, the court, at the Board's motion, awarded attorneys' fees and double costs incurred in connection with that appeal. See 152 LRRM 2121 (Apr. 11, 1996). In citing the court of appeals decision enforcing *Alwin I*, which issued after the hearing in this matter closed and the court's subsequent award of attorneys fees and double costs, I grant the General Counsel's posthearing motion that official notice be taken of the court's actions in this case.

the Respondent, and the Charging Party, have been carefully considered. On the entire record of the case, including my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office and place of business in Green Bay, Wisconsin (the Respondent's facility), has been engaged in the manufacture and nonretail sale and distribution of paper towel dispensers and related products. The Respondent, in conducting its operations, annually sells and ships from its Green Bay facility goods valued in excess of \$50,000 directly to points located outside the State of Wisconsin. The 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 and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

1. General

The Respondent, a closely held corporation, has been engaged since 1928 at its Green Bay, Wisconsin plant in the manufacture and nonretail distribution of dispensers for the paper industry—producing dispensers for towels, tissues, and napkins. The Respondent holds about half of the domestic paper dispenser market and has sales in other countries, as well. Its products are sold only to paper companies and it is the names of those customers which appear on the Respondent's dispensers.

The Respondent's largest customer, the purchaser of about 70 to 75 percent of its products, was the Scott Paper Company, headquartered in Philadelphia, Pennsylvania. Among the Respondent's other customers were the James River Corporation, Georgia-Pacific, Kimberley-Clark,³ Wisconsin Tissue Mills, and Sanitor Manufacturing.

The Respondent's president and acting treasurer, Donald Krueger, and its vice president and acting secretary, Thomas Prust, are descendants of the Company's founders. The nine shareholders were members of the Krueger and Prust families, with Donald Krueger owning 51 percent of the Respondent's stock. The board of directors consisted of corporate officers Krueger and Prust, Attorney Joseph Nicks, Certified Public Accountant Roy Bruechert, representing his firm, and Lee Krueger, retired from his position with the Respondent.

During the times relevant to this proceeding, M. Gordon Church was the Respondent's director of human resources; Glenn H. Thiede, director of manufacturing; Kenneth Quigley, director of Sales and customer service; Ken LaCount, director of research and development; Steven Weber, director of manufacturing information systems; and Greg Larson, director of purchasing. Richard Jacobs, controller when bargaining preparations began, was replaced by Joseph Paprocki. Thiede and Weber reported directly to Prust. The rest of the above, including Church, reported to Krueger.

³ Notice is taken that, subsequent to the events of this case, Kimberley-Clark acquired Scott Paper.

Since about 1961, the Union has been the duly recognized exclusive bargaining representative of a unit consisting of approximately 123 employees.⁴ Historically, the Respondent and Union had had a harmonious relationship⁵ and the most recent collective-bargaining agreement between the Respondent and its Local 6039, effective March 1, 1991, until March 1, 1994, from the Union's standpoint, generally was beneficial to the employees, although it provided for employer savings on health insurance costs by providing, for the first time, for employee contributions and copayment.

As described by Company President Krueger, the Respondent's business had thrived in the 1970s, but in the 1980s, the pace began to change. To become more competitive and to provide new thinking, in the early 1990s, Krueger brought in Thiede to take over manufacturing and also hired Church, Quigley and LaCount into their above positions. Against a background of pressure to reduce costs and prices, and even to provide Scott Paper with rebates from the proceeds of its sales to that Company, the Respondent began to tighten its operations.

The Union's district director and organizing director were Joel Vattendahl and Robert Glaser of Brookfield, Wisconsin, respectively, and Donald Schmitt, of Manitowoc, Wisconsin, was the staff representative principally involved in the actual representation of the Respondent's employees. In the course of his duties in this regard, Schmitt was the Union's spokesman in the events considered in the predecessor case, *Alwin I*,⁶ and in the contract negotiations that form much of the substance of the present matter.

2. *Alwin I*

In furtherance of its asserted efforts to achieve greater competitiveness, flexibility, and efficiency, the Respondent, in 1992, during the term of the collective-bargaining agreement then in effect, made two unilateral changes in the terms and conditions of employment of its bargaining unit employees. These changes, implemented over the Union's objections and found by the Board and the U.S. Court of Appeals for the Seventh Circuit, in *I*, supra, to have been in violation of Section 8(a)(1) and (5) of the Act, were a change in the scheduling of vacations from that established in the labor contract and imposition, for the first time, of minimum production standards pursuant to which employees were required to produce specified hourly unit quantities at each of the various manufacturing tasks. Employees who failed to meet these standards were subject to progressive discipline from warning through suspension and discharge. Administrative Law Judge Richard A. Scully, in his Board-approved decision in *Alwin I*, found that, for failure to meet the Respondent's unilaterally imposed production standards, the Respondent had unlawfully discharged six employees after having successively warned and suspended them, that four other employees had received warnings followed by sus-

⁴ The appropriate bargaining unit represented by the Union included: All production and maintenance employees of the Respondent at the Respondent's plant in the greater Green Bay area, Green Bay, Wisconsin; excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

⁵ Prior to the events of the present case, the last strike against the Respondent had occurred in 1962.

⁶ As cited in fn. 2, above.

pensions and that three more employees had been given warnings.⁷

Specifically, the changes in the manner of scheduling vacations, as found in *Alwin I*, had the first time result of limiting the number of employees who could take 1-day's vacations. This arrangement had been permitted under the language of the contract then in effect, conditioned only on the Respondent being so notified within 2 hours of the start of the employee's shift. Also, under that collective-bargaining agreement, employees generally had been entitled to select their vacations in order of seniority, except that the third, fourth, and fifth weeks of vacation, available to the senior most employees, were to be taken at times mutually agreed by management and the employees. Under the Respondent's unilateral actions during the prior contract term,⁸ seniority in the selection of vacations effectively was abrogated since an employee with less seniority who should request a vacation 3 weeks in advance and had met the financial commitment of that policy would be entitled to the vacation rather than a more senior employee who had requested vacation after the vacation schedule had been filled. As noted by Judge Scully, "it also meant that, if a department's vacation schedule was filled, a less senior employee in another department where the schedule had openings could take vacation while a more senior employee in the first department could not."⁹

As also noted by Judge Scully, in unilaterally implementing the production standards and the changed vacation scheduling, the Respondent effectuated employment conditions during the contract term which it had not able to obtain at the bargaining table when that agreement was being negotiated.

The *Alwin I* decisions obligate the Respondent in the instant matter. Although the Board, and more recently the Court of Appeals for the Seventh Circuit, has ordered the Respondent to remedy its violations in *Alwin I*, to restore the status quo ante, inter alia, by rescinding and withdrawing the changes in vacation policy, by rescinding and withdrawing the minimum production standards and all disciplinary actions resulting from the employees' failure to meet or maintain the unlawfully instituted minimum production standards, it is undisputed that, during the time covered by the present proceeding, the Respondent has not complied with these requirements. The Respondent, likewise, has not complied with the further directive in *Alwin I* that all employees discharged and/or suspended for failure to meet the

minimum production standards be offered full reinstatement to their former positions or to substantially equivalent positions, without loss of seniority or other rights and privileges, that the affected employees be made whole, with interest, and that all disciplinary actions taken in connection with the production standards be removed from the Respondent's records. Rather, as will be detailed below, the Respondent, without hiatus, has continued to enforce its unlawfully implemented vacation policy and minimum production standards, has continued to discipline employees for not meeting those standards and has inflexibly insisted on including these terms in the next collective-bargaining agreement.

B. The Facts

1. The negotiating sessions

a. The Respondent's preparation for negotiations

Director of Human Resources Church testified that by May 1, 1993, he had begun to coordinate the Respondent's efforts to prepare for negotiations to replace the then current collective-bargaining agreement, scheduled to expire on February 28, 1994, developing and assigning areas of executive responsibility. Within prescribed timeframes, Company President Krueger, with Vice President Prust, Controller Richard Jacobs, and Church were made responsible for the economic guidelines; Church, with Director of Manufacturing Thiede, and Prust, for developing language proposals; Church, with Thiede, Sales Director Kenneth Quigley and Jacobs, for area/industry wage and benefits surveys; and Thiede, with Church, Prust, Quigley, Research and Development Director Kenneth LaCount, for the strike plan.¹⁰ By July 1, 1993, Church had circulated a detailed strike plan based on information taken from the *Strike Control and Prevention Handbook*, prepared by a Milwaukee, Wisconsin law firm, had designated the above executives as a strike committee and had named six of them as coordinators in the event of a strike,¹¹ assisted by essentially the same executives variously sorted into three-member subcommittees.

In this vein, the Respondent's director of sales, Quigley, on November 1, 1993, wrote to a representative of Wisconsin Tissue, a customer, advising that company that the Respondent soon would be negotiating for a new collective-bargaining agreement, that, while its last contract 3 years before had been negotiated without business interruption, the Respondent never could be certain that a future agreement would be resolved without some slowdown or short term business interruption. Therefore, Quigley urged Wisconsin Tissue to authorize delivery of its March and April 1994 dispenser requirements sometime in January or February. In his letter, Quigley noted the sensitive, confidential nature of that communication.

Krueger testified that, while the last collective-bargaining agreement had provided for pay increases, the Respondent, for reasons to be described, had not been able to achieve a price increase for several years and was undergoing other strictures

⁷ 314 NLRB at 568 and fn. 6. The Union has filed 60-70 grievances, still-unresolved, protesting the disciplinary actions taken against employees for failure to meet the Respondent's minimum production standards.

⁸ As found in *Alwin I*, the unlawfully effectuated, posted vacation policy was as follows:

Each week we will post the number of employees that may be granted time off for vacation on any given day from each department which will not impair plant efficiency.

Vacation requests received more than three weeks before the anticipated vacation, provided a financial commitment has been made to purchase airline tickets or hold a cottage, etc., will be granted on a first come first serve basis according to the current published vacation schedule. Any requests for vacation inside the three week notification period, will be granted as specified in the contract for any remaining openings.

Vacations will be granted until the vacation schedule is filled. Once-filled, no written call-ins or requests for vacations will be accepted.

⁹ 314 NLRB at 565-566.

¹⁰ Church testified that he regularly prepared contingency strike plans before the start of contract negotiations and that his having done so here did not constitute manifested expectation that the Respondent's proposals and bargaining posture would be so unacceptable to the Union as to precipitate a strike.

¹¹ The various coordinators included the strike coordinator (Church), the security coordinator (Prust), striker/fringe benefit coordinator (Jacobs), communications coordinator (Krueger), picket line monitor (Church), and staffing supervisor (Thiede).

in its business. Accordingly, Krueger directed the Respondent's negotiating committee to seek to reduce costs by approximately 20 percent in the bargaining process and, while not specifying how these savings should be achieved, Krueger approved for presentation to the Union an initial company proposal that would reduce the pay of the great majority of the Respondent's production employees by about \$3/hour with no wage increases for top-rated employees during the 5-year term of the proposed contract.

In reaching a determination of this matter, it is not necessary to dwell on the detailed evidence concerning the company executives' internal preparations for the 1993-1994 contract negotiations, some of which never were made known to the Union at the negotiating table, and which included documentation in the form of a series of state government and industry geographically defined wage surveys on which, purportedly, its economic proposals were, at least, partially based. However, it can be noted that some of this material was inefficacious in that certain surveys purporting to contain economic data initially represented as being from 1993, the year new contract negotiations in this matter began, actually dated back to 1992 when the comparison figures were lower. Certain other assertedly relied-on documents were not actually received by the Respondent until late in the negotiating process, after its bargaining positions had been made known. Accordingly, such later acquired data could have played no role in the initial formulation of the Company's bargaining positions.

Church, by letter dated November 10, 1993, to the Union's District 32, gave notice that the collective-bargaining agreement then in effect between the Respondent and Steelworkers Local 6039 would terminate in accordance with its provisions on March 1, 1994, and that, in anticipation of "lengthy and detailed discussions . . . because of the number and breadth of proposals by the Company," the Respondent was offering to meet to commence new contract negotiations during the week of December 13, 1993, so that a new collective-bargaining agreement might be in place when the current one expired. Negotiations, which began on December 16, 1993, were held on the dates shown below.

b. December 16, 1993

All bargaining sessions were held at the same hotel in Green Bay, Wisconsin, with no change in the participating representatives for either party. The Respondent's negotiating committee consisted of Donald F. Woodcock, a Cleveland, Ohio attorney who served as chief spokesperson, Prust, Church, and Thiede.

Schmitt served as the Union's principal spokesperson. The other members of the Union's negotiating team were Charles Peters, president of Steelworkers Local Union 6039, John Tilly, recording secretary,¹² and Mike Martin, all bargaining unit employees of the Respondent.¹³

¹² Tilly's status as an alleged discriminatee is an issue in this proceeding.

¹³ Since the material events occurring during the negotiating sessions are largely documented and are undisputed, and since resolutions of credibility are not required to determine this matter, the description of each bargaining session will synthesize the testimony of the parties' respective witnesses—Schmitt, on behalf of the General Counsel and Union, and Church, Thiede, and Woodcock, for the Respondent. The limited instances where credibility does play a role herein will be indicated.

Krueger, as company president, began the process by meeting with the two committees, his only appearance at the bargaining sessions. He told the respective committee members that the Company was in a situation where, for the last 2 years, circumstances had been out of his control and that changes had to take place. Krueger expressed concern about what had been occurring in the industry and stated that the Company would try to communicate the kinds of changes that had to take place if the Company was to go successfully into the 21st century. Foreign competition was more severe than ever and had increased over the last few years. Although the Respondent had become a worldwide company, there was no guarantee that its international trade and the large amount of business it did with foreign affiliates would last. The Company was experiencing much competition from foreign manufacturers making almost the same product that Alwin was producing and Krueger was not certain what the effects of NAFTA were going to be. The Respondent already had Canadian competition. In addition to the worldwide competition, the Respondent was facing competition in the United States, where plastics were becoming increasingly available and were challenging the basically metal dispensers produced by the Respondent. When Schmitt asked if any thought had been given to getting into plastic manufacturing, Krueger replied that the costs of trying to move into an entirely different form of production were prohibitive. The Company's products were sold directly to the paper industry and that industry was trying to force price reductions.

Krueger related that the paper industry generally was in very severe financial shape; the worst in his 20 years' association. During the past 2 years, the Company had not been able to increase pricing and, in some cases, it was giving rebates on sales to certain customers, like Scott Paper. Krueger stated that several of the Respondent's customers had demanded that it look at its costs so that it could lower its pricing of their products. The Respondent had had to reduce its prices on a number of products for Scott Paper. The goal of Scott Paper was to lessen their dispenser costs by 50 percent and that certainly would bring about reduction of the Respondent's prices.

Krueger declared that the Respondent must continue to invest in equipment in order to meet increasing competition. The Company had purchased a new washer system, several different new presses, and some state of the art computer aided design (CAD) equipment for its research and development efforts. Costs for material and labor had increased across the board and that, to meet the demands of Scott Paper and its other customers, the Respondent was going to have to reduce its costs in those areas.

Krueger told the committees that, while the labor contract they had had for the past 3 years had provided for pay increases, because the Company had not been able to raise its product prices to customers and, as pricing had gone down in that timeframe, the Respondent had nowhere to move. It needed to react because such a trend could not continue.

As Krueger, who left the meeting after completing his remarks, departed, he expressed confidence in the Company's bargaining committee and in the parties' ability to work together to arrive at a contract they could live with.

After Krueger left the room, Company Attorney Woodcock told the union representatives that the Company would be proposing a concessionary contract and that, in the course of negotiations, it expected to negotiate reduced labor costs in order to keep the Company competitive and to meet the challenge of the

future. Accordingly, the Respondent would stay ahead of the curve, have its contract in place for a considerable period of time, during the contract term, and develop a good working relationship with the Union.

Woodcock expressed optimism about reaching agreement. He again noted that the Respondent was not going to become a plastics manufacturer. Therefore, it had to improve its skills, technologies, and abilities to compete against the plastics manufacturers in the industry. Woodcock told the union committee that the Respondent wanted to go forward into the 21st century with a new contract which would meet the anticipated challenges and that, through these negotiations, the Respondent wanted to avoid getting into a future negotiating crisis mode.

The Respondent then gave the Union its new contract proposals in a comprehensive document formatted to permit side-by-side comparisons between the provisions of the then current collective-bargaining agreement and the Respondent's proposals. This was so arranged as to enable the union representatives to more clearly see the Respondent's extensive proposed changes. The parties then commenced an article by article review of the Company's proposed contract without much discussion that day.

Among the Union's stated concerns was the recognition article and an expanded management-rights clause. With respect to the former, the old contract had provided recognition of the Union as the exclusive bargaining representative for all employees at its plant in the greater Green Bay area, Green Bay, Wisconsin. The Company was proposing to change this to recognition only at its plant at a specified street address in Green Bay. The proposed recognition clause also, for the first time, would remove model makers from the unit.

The Union had a variety of problems with the much-enlarged proposed management-rights provision. These included language whereby the Company would retain all management rights, whether or not related to labor costs, which were not restricted by the *specific* provisions of the contract. The Union's stated concern was that the inclusion of the word "specific" in such context would preclude it from grieving over anything that was not expressly covered in the labor agreement and that established past practices and contract interpretations put in place over the years would be wiped away. These concerns were communicated to the Company.

The Respondent, at the December 16 meeting, proposed a 5-year agreement. Woodcock stated that, in the steel industry, a 5-year agreement was becoming a more common occurrence and that, in view of the Company's need to reduce and stabilize its costs, it was desirable to have a fixed time period of some duration during which the Respondent's costs were known to help it to become more competitive. Schmitt replied that, if everything else fell into place, a 5-year agreement would not be a problem.

With respect to the grievances that were pending at the time of the December 16 meeting, Woodcock stated that the Company wanted to address and clear the issues between the parties represented by these grievances through this negotiating process.

At Woodcock's suggestion, the parties adopted a specific negotiating schedule of designated meeting days ultimately including February 28, 1994, when the then current contract was to expire. The parties agreed to meet during in back-to-back days to allow Woodcock to fly in from Cleveland in the morning, participate in an afternoon session, in another session

on the following morning and to leave later that day. The starting and closing times for those meetings were left open.

As matters subsequently developed, all of the scheduled negotiating sessions, including February 28, were utilized.

c. January 5, 1994

Substantive negotiations began at the January 5 afternoon bargaining session. At that meeting, the Company gave the Union another copy of its proposed contract. Although this document contained the same new language as the proposal previously given to the Union, it did not have the side-by-side comparison layout between the old and the proposed contracts. Woodcock pointed out that it was unproductive and too costly to have a lot of grievances and Board actions and that his proposal was geared to alleviate those problems. The Company wanted to forge a better relationship with the Union, but the operation had to be streamlined and productivity improved.

At Schmitt's request, Woodcock went through the Company's proposed changes sequentially, article by article, explaining what the changes were and, generally, the reasons therefore.

As to recognition, Schmitt asked Woodcock why the Company was proposing to change the Union's status as the exclusive representative of all bargaining unit employees in the greater Green Bay area to merely that of exclusive representative of all employees at its plant at the Green Bay plant street address. Woodcock answered that the old contract had been written too broadly and the Company wanted to narrow it down.

Woodcock asserted that, with advancing technologies, the historically—included model makers should be taken from the unit because they more properly belonged to the professional salaried group. Although Union Committeeman Tilly observed that the people in the model making operation would be devastated, the Union did not then discuss model makers.

When Schmitt asked why the management-rights clause had been so changed and lengthened, Woodcock replied that there had been a problem with some arbitrators' interpretations of express and inherent management rights. Woodcock wanted to have the management-rights-clause written so that, when it became necessary or advisable to make changes, the Company wanted to be able to do so. He also referred to the Labor Board's rulings on the difference between express waiver and the inherent rights of management.

In the management-rights clause, the parties discussed the use of the word "specific" in the phrase, "All the rights of management which were not related to labor costs which were not restricted by a "specific provision" of this agreement were to be retained by the Company." Woodcock reiterated that he wanted the management-rights clause designed so that, when it became necessary or advisable to make changes, the Company wanted to be able to make them.

Regarding the part of the management-rights proposal which would give the Respondent the right to determine whether and to what extent the work required in its business would be performed by its own employees, the Company wanted to be able to utilize temporary, part-time, and leased employees. No specific reason for this was given. The Respondent simply wanted to be able to do this.

The management-rights proposal, *inter alia*, also would have enabled the Respondent to introduce new and improved production methods and production standards. In explanation, the Company stated only that it wanted to be able to change

Company stated only that it wanted to be able to change those production standards and methods at any time it chose. Schmitt replied that the Union was willing to enter into an agreement that contained language on production standards, but it would not enter into an agreement that gave the Company the right to change those standards at any time it chose.

Schmitt wondered why production standards had been included in the management-rights clause. He asked if the Union was going to get any details on productivity; was this the only reference that there was going to be in the contract? Woodcock replied that he felt it important that the minimum production standards be in the management-rights clause,¹⁴ the parties could talk about their methodology. When Schmitt then asked about methodology, Woodcock replied that Thiede had done a thorough job of explaining the Company's methodology during his testimony in the earlier *Alwin I* case. That was the method the Company currently was using. Woodcock stated that the production standards currently in effect were fair and, at that point, had been established. Woodcock would be happy to address any concerns but the Respondent wanted to address methodology for setting standards in the future. Schmitt declared it was his practice to have production standards as a part of the agreement. Woodcock replied that the Company felt it was important to have them separate from the agreement. From Woodcock's experience, it would be necessary from time to time during the life of the agreement to modify production standards and keeping them separate from the agreement would help facilitate this. Woodcock viewed a labor contract as a living document, something that should be flexible and changeable. Therefore, while the contract should refer to production standards, the document embodying the standards should be outside of the contract in order to facilitate any needed changes. The Union's stance throughout negotiations was that any agreement that might be reached on production standards must be incorporated into the collective-bargaining contract. Woodcock reiterated the Company's intention to resolve all pending NLRB cases and grievances during the course of negotiations.

The Respondent's proposal concerning hours of work and overtime contained a number of changes from the prior agreement. Where the then current contract had defined regular hours of work at 8 hours per day and 40 hours per week, with the regular starting time at 7 a.m. each day, unless changed by mutual agreement, the Employer's proposal was that the regular work week would consist of 40 hours, Sunday through Saturday, with the regular starting times between 6 and 8 a.m. based on business considerations. On reasonable notice to the Union, management would have the right to adjust the employees' starting times. When Schmitt told the company representatives that there never had been resistance to a change in starting times, Woodcock answered that he wanted to have to have mutual agreement from the Union. The Respondent's reason for its position in this regard was that, from time to time because of customer demands, the Respondent might have to change starting times.

In the hours of work and overtime provision, the Company proposed that time and a half for overtime be paid only after 40 hours, but not after 8 hours in any particular day, as before.

¹⁴ Under the Respondent's proposal, the existence of minimum production standards was to be referenced in the management-rights clause, but the standards, themselves, were to be contained in a separate document.

Woodcock explained that, under the Respondent's proposal, overtime would be distributed as equitably as possible among the employees in the department, in the job classification in which the overtime occurred, as opposed to being apportioned in the department in which the overtime occurred, as in the last contract.

Schmitt pointed out that the prior agreement already had provided for mandatory overtime since, if an insufficient number of employees volunteered for overtime, the Company could force employees to work in the order of inverse departmental seniority. With respect to the company-proposed language that, "[w]hen all employees in the effected department job classification are working overtime and additional employees are needed, management will go to those classifications where individuals can be spared and be assigned the overtime as outlined above," Schmitt asked how the other employees would share equitably in overtime. Woodcock replied that the Company was going to go to those individuals who could be spared. When Schmitt indicated that the Employer had deleted the existing contract's language relating to company maintenance of records of overtime worked and/or refused in order to facilitate equalization of overtime, Woodcock replied that he would look at that again.

Woodcock told the Union that it was preferable to enter into this type of negotiating process while the plant still was operating in Green Bay than to negotiate when the plant was closed. The Company deemed it preferable to stay in Green Bay and work out its differences rather than move to Arkansas where it could get the work done more cheaply. A plant that relocated to the south could hire new employees and would have no buildup of vacation eligibility. Extensive vacations were a problem because the Respondent had a business to run. Too much time was being spent away from work and not enough was being devoted to production. When Schmitt replied that other companies accommodated vacations by using a vacation shutdown period, Woodcock responded that a shutdown period was not in Alwin's best interest. The Company needed the production. The Respondent's primary concern was with the customer.

Under the Respondent's proposal, Sunday work would be compensated at a premium of twice, as opposed to three times, the regular pay rate that had been contained in the then current labor agreement. Since Sunday overtime was rarely scheduled by the Respondent, Schmitt wanted to know why the Company was changing it. The Respondent replied that it only wanted to pay double time. The Respondent also eliminated the existing provision for time and a half overtime for work on Saturdays.

The Company sought greater latitude in establishing second or third shifts, expressing its desire to have the right to determine how many people might be needed to work additional shift hours. The Respondent had not had a third shift for a long time, if ever. However, the then current agreement had provided for 30 cents/hour pay above the regular rate for work on the second shift and an hourly premium of 45 cents/hour for third-shift work. The Company, while continuing to accept a premium of 30 cents for second-shift work, took the position that shift premiums paid for working on the second and third shifts should be the same. Woodcock saw no significant difference between working the two shifts or why there should be greater premium pay for working a third shift. He declared that there would be no problem getting people to work a third shift for the same premium rate as for working the second shift. A higher third-shift premium was an anachronism.

When break periods were discussed, Schmitt asked if the rest periods and lunchbreak would be taken at different times than they were being observed. Woodcock answered that that was possible. With respect to the proposed deletion of the 3-minute cleanup period before the lunchbreak and the 5-minute cleanup time at the end of the day, Woodcock told the Union that he did not feel that such times were necessary and that the periods should be used for production; employees had been abusing the cleanup times. Schmitt replied that the Company should discipline them, then.

The then current contract had provided for a 10-minute rest period in the morning, a 5-minute rest period in the afternoon, and a half-hour lunch period at noon. The Respondent's proposal would have established a 10-minute rest period during the first half of the shift, a 5-minute rest period during the second half of the shift, an *unpaid* half-hour lunch period approximately halfway through the shift, with a company-reserved right to stagger break and lunchtimes within a department or on an employee-by-employee basis. Woodcock told Schmitt that breaks would be at logical and reasonable times. Schmitt responded that the Union would try to dovetail its counterproposals with the Company's proposals. Woodcock replied that the Company would be receptive to any counterproposals from the Union.

At the January 5 meeting, the Union provided the Respondent with its written noneconomic proposals. Woodcock told the union committee that the Company did not deem it necessary to extend the contract or to go beyond February 28, 1994; the parties had appropriate time, hopefully, to reach a mutually satisfactory agreement.

d. January 6, 1998

When bargaining resumed the next day, on January 6, the company representatives continued to go through their proposals, pointing out the changes to the Union.

Union Committee Member Tilly declared that the Company must have had a very bad year. Woodcock replied that the Company wanted to become more competitive through these negotiations. The Respondent was negotiating to save the jobs it currently had. Schmitt asked if the Company was saying that it was not financially profitable. Woodcock answered that the Company was not saying that, but that the price/cost squeeze it was experiencing was causing its margins to shrink. The Respondent needed to address this to be more competitive; the Company needed to reduce its costs.

The parties resumed their discussion of the Respondent's proposed management-rights clause. Schmitt proposed that management rights be subject to the terms of the labor agreement. The Company did not agree to this, counterproposing that the provision read "subject to the express terms of this agreement." Although this change was made in response to a proposal made by the Union, the use of the word "express" did not conform to the Union's proposal.

Also with respect to management rights, the Union continued to object to the Company's proposed right to be able to unilaterally change existing production methods and standards.

The Union also objected to the language in the proposed management-rights clause which would enable the Respondent to determine when and if vacancies in the working force would be filled; to make or change engineering studies or time studies of operations or jobs; to subcontract or procure others to do such work as the Company might from time to time determine

to be advisable or necessary; and to promote, discharge, or discipline employees. The Union proposed that "for cause" should be included in the language enabling discharge or discipline, which change ultimately was accepted by the Respondent.

The Union challenged the Respondent's proposed claim of the right to make and enforce safety rules and rules for the maintenance of discipline. The Company's position was it that had to keep this language in the management-rights clause and that the Union could grieve rules it considered to be unreasonable.

In the article concerning holidays, a principal change was the proposed deletion of a floating holiday. Under the then current agreement, employees could take a floating holiday if they gave 1 day's notice to the Company; the Company having had discretion as to how many workers could be off on the same day. Scheduling conflicts were resolved by seniority. Also, the existing agreement had provided that if a holiday fell while an employee was on vacation, the employee would be entitled to the holiday pay or an extra paid day off. The Company proposed that, if a holiday fell while an employee was off on a full week of vacation, the employee would be entitled only to his pay for that week and for the holiday pay. The employee could no longer take a single day of vacation on a holiday and have the option of an additional day off.

The Company also proposed that, to be eligible for holiday pay, employees had to have completed a there-proposed 60 workday probationary period, as opposed to the then existing labor agreement provision that they had to have been employed by the Company for just 30 days before the holiday. The Company proposed that an employee had to work the full day before and the full day after a holiday to qualify for holiday pay unless on vacation or excused for either day or portion of a day. In that article, the Company proposed deleting the existing provision that, if a layoff occurred within a scheduled workweek which included a holiday, employees would be eligible for holiday pay. Under the Company's proposal, employees who worked on a holiday would be paid just their regular rate of pay in addition to the holiday pay. This would change the then current contract provision of affording such employees holiday pay at double the regular rate of pay. The Respondent also eliminated the prior language which enabled an employee who had been transferred to a more highly paid position, and who had worked at that position for at least 4 weeks prior to the holiday, to receive the higher holiday pay rate associated with that job.

Vacations were discussed at length. Woodcock told the Union that vacations was one of the issues with respect to which the Company, hopefully, intended to come to a mutually satisfactory understanding. This issue had been a problem in the prior *Alwin I* Board proceeding, and the Company wanted to make sure that, through these negotiations, the Respondent would have the flexibility to schedule people on their vacations as opposed to what Woodcock's understanding was as to how vacations had been taken in the past. The Respondent wanted to address the *Alwin I* matter through these negotiations.

The Respondent sought to change the periods of employment for vacation eligibility. Under the then existing contract, employees had had to have been employed for 1 year to receive 1 week's vacation, 3 years for 2 weeks, 9 years for 3 weeks, 15 years for 4 weeks, 20 years for 5 weeks, and 25 years for 6 weeks. The Respondent proposed changing these requirements to 5 years of employment for 2 weeks vacation, 10 years for 3

weeks, and 20 years for 4 weeks. The fifth and sixth vacation weeks would be eliminated. Woodcock told the Union that the Company needed to delete the fifth and sixth weeks of vacation for economic reasons; it needed people to be at work, not away from the job.

The Company proposed that, for employees to qualify for vacations, they had to have worked 1600 hours in the preceding year. The prior agreement had provided formulas for prorated vacations for employees who had worked 50 percent of the qualifying period, based on length of service. Employees who had not been able to work the full 50 percent of the hours in the preceding year because of layoff would receive vacation times on a correspondingly prorated schedule. When Schmitt asked what would happen to employees who worked less than 1600 hours, he was told that they would not be eligible for vacations.

Also on vacations, the old labor agreement provided that employees, at time of layoff, were entitled to receive the vacation pay earned during the preceding year, or a prorated amount if their prior year's service was less than 6 months. The Company's proposal was that employees, when laid off, be paid their unused vacation from the preceding year and a smaller formula for vacation earned during the layoff year.

The Company proposed to completely eliminate the paragraph of the then current labor agreement which had specified that, if an employee was unable to work 50 percent of the hours since his anniversary date, or the preceding year, the employee would receive a prorated vacation.

Also in the Respondent's proposal concerning vacations were paragraphs relating to the outstanding unfair labor practice issues concerning vacation scheduling in *Alwin I*, then pending decision from Judge Scully. The Company, since around mid-1992, had been posting on plant bulletin boards the numbers of employees who could be off work on any given week or day. Under the Employer's proposals, employees' vacation requests would be granted by seniority, provided that the request for vacation was received by March 1. All vacation requests made after March would be granted on a first requested, first granted, basis. As noted, under the then current contract, the first 2 weeks of vacation were to be granted strictly on a basis of seniority, but that the third, fourth, fifth, and sixth weeks were to be taken at mutually agreeable times. There had been no requirement for prior notice or for considerations other than seniority with respect to the first 2 weeks of vacation.

The Employer, on the issue also then pending in *Alwin I*, continued to seek to change the then current agreement which had permitted employees to take vacations by the day after giving the Company 2 hours' notice before the start of the shift. The Respondent's proposal would enable employees to take 5 days of their vacation at one time provided that the Company was notified at least 1 week before the intended vacation, thus eliminating the employees' right to take single days of vacation. At the hearing, Schmitt noted that the Respondent's last two proposals echoed and sought to perpetuate and legitimize its still—unremedied unlawful changes affecting vacation scheduling.

In connection with the discussion concerning the scheduling of vacations of 1 day's duration, Woodcock told the union representatives that the Company needed more flexibility and productivity time. The Company was concerned that too many employees were taking off at any given time, making it difficult to schedule properly. Schmitt answered that it was very impor-

tant to the employees to be able to take vacations 1 day at a time and, to his knowledge, this had not been a significant problem in the past. Woodcock answered that there had been a problem, specifically with respect to the Good Friday holiday in 1992, where the Company had had to shut down part of its operations because unable to schedule vacations in an orderly fashion. So many employees had called off for vacation that the Company was unable to schedule production that day. Later in the course of negotiations, after January 6, the Company did modify its position with respect to the scheduling of vacations 1 day at a time, but not on the other *Alwin I* vacation issue.

The parties then considered seniority. The then existing labor agreement generally had provided that seniority be applied on a plantwide basis except for certain select classifications. Against this, the Company proposed that employees be limited to exercising their seniority based on their classifications and within their own department. Under the then existing agreement, an employee's plantwide seniority could have taken him any place in the plant since employees were not limited to exercising seniority only within their own classifications and departments.

Included among the Employer's proposed changes affecting seniority was its proposal to change the qualifying probationary period from 60 calendar days to 60 working days. The Union did not object to this proposal if probationary employees could continue to receive insurance and holiday benefits after completing 30 days of employment. During negotiations, the Company did modify its position to allow probationary employees to become eligible for union membership, holidays, and jury duty pay after 30 days service, but would not agree that they also then be covered under any benefits or insurance plan as in the prior agreement. This position, never agreed to by the Union was included in the Company's final offer at the end of negotiations.

In response to Schmitt's inquiry as to the reason for the change in the probationary period, Woodcock explained that the Company wanted to have more time period to evaluate employees to make sure that it was hiring the best applicants. The Respondent also had had difficulty in this area because of turnovers during the probationary period. As soon as it had put employees into the insurance program, it had had to take them out.

The Company proposed to delete completely the clause which had provided that seniority would govern in cases of promotion, transfers, temporary transfers and layoff, reductions in force, and recall, provided that the employees were able to demonstrate that they could perform the job within a reasonable period of time. Instead of the prevailing plantwide seniority, the Respondent proposed that, in increasing or decreasing the work force, plantwide seniority within the classification and department be considered.

The Union and Company reached agreement that short-term temporary layoffs could be effectuated on a voluntary basis. The Company presented a series of changes to the ways in which seniority rights might be lost, proposing that an employee who did not return to work within 3 days of recall would lose seniority rights. There had been no such time limit in the then existing agreement. The Company proposed that an employee who had been absent from work for 1 consecutive year due to illness or injury would lose seniority rights. The existing agreement had provided that an employee off for illness or injury would lose seniority rights after 3 years and that those who were off because of injury or illness due to a work-related

cause would lose seniority only after 5 years. Under a proposed change, an employee who had been laid off continuously for 12 months or the equivalent number of days employed, whichever was shorter, would lose seniority. The existing agreement had provided for a minimum of 12 consecutive months and, by virtue of seniority, could have recall rights extended more than 36 months.

In addition to the foregoing, the Company proposed that any employee absent for 3 consecutive workdays without reasonable excuse acceptable to the Company be considered as having quit, another departure from the old agreement.

The Company proposed that temporary transfers be made without regard to seniority. The then-extant labor agreement had provided that temporary transfers would not exceed 4 weeks within a 3-month period and that, where a temporary transfer did continue beyond the 4 weeks, it was to be considered permanent and subject to the seniority provisions of the agreement and posted. Schmitt again asked why the Company needed that type of language which did not give much weight to seniority. Woodcock responded that the proposal was to give the Respondent maximum flexibility to meet its customers' needs. The Company wanted to go where employees were available, as needed, and to rapidly assign them. Seniority would limit the Company's flexibility and ability to quickly address transfer needs. Woodcock also told Schmitt that, typically, instead of moving one person to fill a temporary need, it had been necessary to make several moves to accomplish what could have been done in one move if the Company had not had to consider seniority. The Union's position remained that temporary transfers should be governed by seniority. Woodcock reiterated that the Company had to move people quickly and wanted to take the most expendable person.

Also, under the seniority provision, the Respondent proposed filling job vacancies with employees to be selected on their skill, ability, experience, qualifications, and seniority, enabling the Employer to subject job bidding employees to written and/or practical tests to determine qualifications. The former labor agreement had provided that the employees be selected on the basis of seniority with reasonable trial periods during which the employees so selected could demonstrate their ability to perform the work. The company proposal would make the trial period applicable at the Company's discretion. On this matter, Schmitt asked why the Company had to go beyond seniority, given the trial period; seniority had been followed under the old contract. Woodcock responded that the Company needed to get people with skills and abilities into the jobs.

Part of the Company's proposal was to use testing to identify job bidding qualifications. Schmitt was concerned that some employees might have difficulty with written tests. Woodcock stated that the tests the Company had in mind were like the tests it previously had used under the existing contract. Schmitt asked if the Union could look at the types of tests that the Company had in mind. The Respondent agreed to provide them.

The Company proposed a change from the last agreement in the way in which group leaders were chosen. Under the then existing agreement, group leaders and temporary group leaders were selected through the regular job posting procedure. Under the Company's proposal, group leaders would be picked through a posting in the department in which the leader was needed and that applicants would be evaluated in terms of their potential and their desire to be considered for a leadership posi-

tion. Under the old contract, group leader selection essentially was a function of seniority for eligible bidders.

The Company proposed to change the old agreement whereby an employee and the Union, at the time of any disciplinary activity, including layoff, suspension, and discharge, were given all the reasons therefor; which reasons were confirmed in writing within 24 hours. This was to be replaced by proposed language providing that, in some cases, an employee could be suspended from work pending management's investigation of the facts and circumstances, and that the reasons need be given at time of discipline, with subsequent written confirmation applicable only in cases of layoff or discharge.

On the matter of the parties renegotiating employment conditions and making unilateral changes in midcontract terms, which the Respondent was charged with attempted having done to effectuate in *Alwin I, Woodcock* told the Union that he had made unilateral changes during the contract terms many times. He again referred to the labor contracts as living and breathing documents. Schmitt replied that if the Respondent's representatives violated the contract, they would get grievances and possible unfair labor practice charges. Woodcock expressed disappointment that the Union had not cooperated in renegotiating parts of the contract during the summer of 1992; the contract was too inflexible and the Respondent needed a long-term labor agreement to get over the hump. Schmitt replied that cooperation was a two-way street. Woodcock agreed that there had been some problems in communication in the past and stated that he wanted to try to resolve those issues so that better communications could be established. Issues such as grievances and unfair labor practice charges did not contribute to operational efficiencies.

Schmitt told the Company that at his earlier negotiations with an Eau Claire, Wisconsin company, Phoenix Steel, management had taken the same paycuts as had the bargaining unit employees. Woodcock replied that he did not know what was going to happen with management; the market place set the rates for management personnel. Woodcock also indicated that labor surveys of the rates paid by the Company to its production employees showed that the rates being paid the employees at Alwin for the type of work they were performing were much too high.

In opposing the Respondent's proposal for a 5-year contract term, Schmitt explained to the Employer's representatives that even though long-term labor agreements, of up to 5 years, were becoming more common, there had to be something in those agreements that would prompt employees to vote in their favor. A 5-year term could be made acceptable by a complete change in the Company's position. Schmitt reiterated that the Union would not be opposed to an agreement of more than 3 years if it contained enough improvements to warrant going beyond a 3-year period.

e. January 12, 1994

The parties resumed bargaining on the afternoon of January 12. The discussions began with the representation and grievance procedure article. Woodcock stated that the Company wanted only one grievance committee member to be able to serve a specific plant area and that he wanted them to have their supervisor's permission to leave their work station. When Schmitt asked why, Woodcock explained that the Employer did not want the committee members to spend unnecessary time away from production. The supervisor's permission should be

obtained, because the supervisor should know what was going on; where these people were. When Schmitt ventured that, sometimes, it was necessary to have more than one person involved, Woodcock told him that the Company was not going to have three people pursuing the same grievance. The Company felt that one union representative was enough to represent an area of the plant. Schmitt again asked why these grievance procedure modifications were necessary. Woodcock responded that it was his understanding that more than one committee member had been involved with individual grievances. The Company wanted to address that concern by having the committee designate two plant areas and specify which committee members would act in which area. Schmitt replied that he was unaware that there had been any problem of that nature. Church interjected that the Company did have such a problem. On several different occasions, two and three members of the committee had been off their jobs trying to facilitate one grievance. In view of the Company's need for productivity, it was concerned about having that many people adjudicate a grievance.

There were no union shop stewards, as such, at Alwin; employees had been represented in disputes by the designated grievance committee members. Under the then existing contract, grievance committee members, while pursuing their representative functions, had not been limited as to where in the plant they could go, or in what numbers. They had been required, however, to first notify their supervisors before leaving their work stations. The Employer's proposal, as noted, was to limit a committee person to a specific plant area, to not allow committee members to go into other areas and to permit only one committee member to pursue a grievance at any one time.

The Company proposed to make certain changes in the various steps of the existing grievance procedure. For the first grievance step, the Company proposed that an aggrieved employee must meet with his supervisor within two scheduled workdays. The last agreement had provided that the employee and the grievance committeeman should take up the grievance with the employee's immediate supervisor within 5 calendar days. The Union expressed concern because eliminating the role of the committee member in the first step could prevent the Union from adequately representing employees at that stage. The reduced time limit for the meeting with the supervisor from 5 calendar days to 2 scheduled workdays would further restrict the grievance process. To this change in the first-step time limit, the Company also, for the first time, proposed to add "from the date the employee had knowledge of or reasonably should have knowledge of said grievance."

In the second step, the Respondent proposed that, if the grievance was not resolved within 24 hours after meeting with the employee's supervisor, it must be reduced to writing, signed by the employee and/or his union representative, and filed with the director of labor relations within 2 scheduled workdays after meeting with the employee's supervisor. The matter was to be taken up with the grievance committee and appropriate members of management at their next scheduled meeting. The Company was to respond in writing within 15 calendar days after meeting with the grievance committee. Among the changes the Respondent proposed for the second step was that the time limits for employee/union actions were reduced to 2 scheduled workdays from 5 calendar days and that the Company would respond in writing within 15 calendar days after meeting with the grievance committee. In the last labor agreement that period had been 5 days.

Also, the most recent agreement had required that the grievance committee meet with the Company on the Monday following the regularly scheduled monthly union meeting to discuss grievances or other problems that may have arisen. Under the Respondent's proposal, the parties no longer would meet at regular monthly intervals, but only as needed or mutually agreed. When Schmitt asked for the reason for this modification, Woodcock replied that when there was no specific issue to be discussed, he had found such meetings to be unproductive and that Murphy's Law typically would come into play. Also, the parties had been required to meet when there was no substantive matters to discuss.

As to the third step of the grievance procedure, which provided for a meeting between a representative of the International Union, the grievance committee and the Respondent's director of labor relations, the Company proposed for the first time as a prerequisite to such meeting that the grievance committee must explain in writing within 5 calendar days of receiving the Company's second-step answer why the Company's answer was unacceptable. Schmitt asked whether the Company, if it did not agree with the grievance committee's reasons for not accepting the Company's answer, could use that disagreement to argue that the committee had not complied with the terms of the grievance procedure. Woodcock replied that an arbitrator possibly would have to decide this.

For the fourth step, the Company proposed that any matter not settled on the basis of the Company's third-step answer necessarily be referred to an arbitrator within 15 calendar days from the Union's notification to the Company. As practiced under the then existing contract, the Union had had 30 calendar days from receipt of the Company's third-step answer to notify the Company of its desire to arbitrate. When Schmitt asked why the Company was now imposing stricter time limits on the Union with respect to requesting arbitration, Woodcock answered that the Respondent just wanted to nail down what had been an open-ended timeframe.

The Respondent also proposed to add the following new sentence to step 4: "Any grievance not processed by the Union within the time limit set forth will be considered settled on the basis of the Company's last answer." When Schmitt questioned this proposed language, he was told that the Respondent wanted to facilitate the grievance procedure by getting to these issues as quickly as possible. During discussion of the grievance procedure, Schmitt told the Company that he would not agree to the Company's language because the Union was not going to be bound by a possible cockamamie second-step company answer that might not even be relevant to the issue.

Schmitt also wanted to know why the Company had proposed shortening the existing time periods for the Union to take action during the various grievance steps, while lengthening its own the times to act. Woodcock replied that the Company had shortened the Union's timeframes because it wanted to get grievances through the process as soon as possible. Church responded that the Company was extending its own time limits to make it easier for him, as the only one in his department who answered grievances at the second and third steps, to deal with the numerous grievances. He needed more time to address them.

While the Respondent generally tried to tighten paid and unpaid leaves of absence, including jury duty leave; propounded a completely new clause regarding leaves under the Family and Medical Leave Act; and proposed, with respect to its bulletin

boards, that the Union not post, and ensure that its members not post, inflammatory notices or materials, the only new benefit offered by the Company related to bereavement leave. There, the Respondent offered, for the first time, to add stepchildren to the category of relatives whose loss warranted the granting of leave for 1 scheduled workday. However, in so proposing, the Respondent initially would have redefined the maximum duration of bereavement leave as *up to 3* consecutively scheduled workdays, and eligibility therefor as the completion of the proposed 60 days probationary period. Under the then-extant contract, the bereavement period was *not to exceed 3* consecutively scheduled workdays and eligibility followed 30 days with the Company.

Among the minor proposals, the parties ultimately agreed to the Respondent's proposal to eliminate reference to a long-defunct apprenticeship program and that Respondent would furnish the tools, gloves, and aprons used by its employees. The Respondent also sought to tighten the rules affecting employees injured on the job and proposed that employees absent for 3 or more days furnish physicians' return-to-work slips.

The Company proposed to allow supervisors to perform unit production and maintenance work if for purposes of training, experimental and developmental work, preproduction startup, troubleshooting, inventory, resolving production bottlenecks, assisting when regular employees were absent, and assisting to meet urgent customer demands. Under the prior contract, supervisors had not been permitted to do production or maintenance work. Schmitt responded that such latitude could affect call-ins of production and maintenance employees. Woodcock replied that the Company needed the flexibility; it had to get the work done. However, the Union ultimately agreed to the Company's proposal that supervisors be given the right to perform certain unit work, with negotiated exceptions.

Under the most recent collective-bargaining agreement, the Respondent had undertaken to reimburse employees who had purchased safety shoes and presented receipts therefor to an amount of \$20 a year for every year of the agreement. The Respondent, in its proposal, offered that the \$20 safety shoe reimbursement be paid only to postprobationary employees every other year, instead of to all employees every year.

The Respondent sought to amend the miscellaneous article of the contract to permit it to make virtually unlimited use of part-time, temporary, and leased (agency-obtained) employees in the manufacturing process. The Company's proposal was to permit it to replace retired, terminated, and resigned employees with temporary, leased, and part-time employees during the intended 5 years of the proposed contract. There would be no limitation on the Respondent's ability to use these categories to replace such employees, but there were restraints as to how the Company could use these replacements. The way this translated, the Respondent would be able to use a given temporary employee for 90 days or up to 6 months but, after 90 days, the Respondent could replace that temporary employee with another temporary whom it could utilize for another 90 days. This could be done indefinitely as opposed to hiring and bringing in a regular unit employee. The only limitations on the use of leased employees was that they were not to be used to cause the layoff bargaining unit employees or where bargaining employees on layoff were capable of performing the work. However, if no one was on layoff, the Company could use leased employees without limitation.

Schmitt asked if the Respondent would have unit employees quit or retire to be replaced with temporaries and leased employees whom it would turn over every 90 days. He told the Company that the Union saw this company effort as a way of eroding away the union membership since the part-time, temporary, and leased employees never would come under the collective-bargaining agreement. Schmitt declared that he did not care where the Company got its people from as long as they came under the terms of the labor agreement. Woodcock reminded the Union that, in the fall of 1982, the Respondent's action in having obtained quickly needed employees from an employment agency had had no effect on the unit and he did not think that the Respondent's proposed language would then have any impact on the unit.

The Respondent's proposal concerning wages was not discussed at the January 12 negotiating session. The Company simply proposed to go from weekly to biweekly paydays. Woodcock explained that this would be more efficient and result in a cost savings which the Company planned to use to increase the profit margins it was trying to preserve. When Schmitt asked what the savings in this area would be, the Company did not know.

While the Respondent's proposals directed to the article covering pensions and insurance contained a number of changes, the Union, on January 12, particularly noted the Company's interest in removing from the pension program the there-contained \$9000 life insurance provision. Under this, beneficiaries of an employee who died before taking retirement would either get the \$9000 benefit or a pension benefit, whichever was greater. When Schmitt asked what the savings would be, the Company did not then have an answer.

The Respondent moved to change then existing contract which, in its various departments, had listed more than 30 job classifications, by compressing approximately 90 percent of those positions into a new "production operator" classification.¹⁵ The Company gave the Union copies of job descriptions for the reduction and consolidation of classifications that it was proposing. Under the Employer's proposal, 80 of the approximately 122 unit employees, would become production operators.

The Union was provided with documentation showing how employees affected by the Company's proposal for changing job classifications would be recategorized into the various departments being proposed by the Respondent. Schmitt expressed concern that so many classifications under the old contract were being combined into one classification. He asked if the Company would be willing to train those employees. Woodcock answered affirmatively, that the Company would provide adequate training for employees to cover the combined jobs.

The review of the Respondent's initial entire contract proposal was completed during the January 12 bargaining session.

Also on January 12, the Company provided the Union with production-standard proposals and the parties discussed the standards that already had been put into effect. Woodcock expressed the Company's view that the effectuated standards were fair; most employees had been able to meet them on a regular basis. Schmitt declared that the Company was raping

¹⁵ The parties stipulated at the hearing that about 11 job titles listed in the then existing contract had not been filled and were without incumbent employees.

the entire labor agreement and that the parties ought to get to the gut issues. Woodcock responded that the Company's entire proposal were gut issues.

The Company's stated position was that there was no relationship between the productivity program and other provisions concerning wages and benefits. Woodcock declared that the Company would look at wages separately from the productivity issue. Schmitt responded that productivity and wages went hand in hand. He told Woodcock that the Union was in the process of preparing a proposal dealing with production standards, for which Woodcock was thankful. Schmitt also declared that, in the Union's view, the employees' increased productivity had helped the Company tremendously. Schmitt reiterated that the issues of wages and productivity went together.

Woodcock requested that the Union facilitate negotiations by submitting counterproposals, declaring that, unless the Union did so, he would not be able to make any movement. Schmitt reasserted that the Union was not going to be party to a total rape of the labor agreement; that the parties ought to get to the gut issues.

f. January 13, 1994

At the January 13 negotiating session, after discussion of a variety of minor issues, the Respondent gave the Union a multipage document, entitled *Alwin Studies* which, on the first page, described how *Alwin* measured work activities. This methodology explained the numbers on the succeeding pages, which listed the jobs accompanied by the minimum production standards for positions previously time-studied. As Church testified, some of the production standards already were in effect at *Alwin* at the time of the negotiations, having been established, as part of a continuing process, during 1992-1993 and in early 1994.

When Woodcock handed *Alwin Studies* to the Union, he stated that, in the Company's view, the standards therein had been appropriately implemented, were fair and had been proved by the bargaining unit employees. Woodcock indicated as proof of this fairness that the employees routinely and regularly had met or exceeded the standards established. While Woodcock considered the standards to have been proved, if the Union had any specific concerns about any of them, he would respond to them. Schmitt, in expressing his difficulties with employees meeting the standards, referred to female employees as having greater dexterity than males and asked if the Company had taken that factor into account. Woodcock replied that Schmitt must understand that, by law, the Company could not do this. However, if Schmitt had a relevant proposal within the law, the Company would be happy to entertain it. When Schmitt again expressed concern about the methodology used. Woodcock iterated that he thought that the Respondent had made its methodology clear at the NLRB hearing in *Alwin I*, and this document illustrated the methodology in use. Woodcock told Schmitt that, while this document reflected the methodology the Company then was using, if it later seemed appropriate to make changes, the Company wanted to have the flexibility to do so.

When Schmitt mentioned that former employee Robert Hudson was the last person to be terminated because he couldn't reach the standards, Woodcock replied that Hudson had met the standards and the Company could not understand why he did not continue to do so. Thiede interjected that he believed that

Hudson had not wanted to meet the standards. He did not understand why.

When Schmitt marked difficulties with the way the standards had been set and expressed his desire to challenge errors made in their establishment, Woodcock responded that one way to test whether there had been errors in setting the standards was how employees performed on those jobs. The on-job performances of the actual employees who had worked the positions had been used. Since the bargaining unit people actually had performed the jobs, if there were errors, they would have shown up. Schmitt pointed out that there was more than one way to evaluate fairness; that was one way. Schmitt was concerned that an employee with above-normal abilities could be used as the standard; his experience was that setting the standards on the basis of someone who was too fast would make things very difficult. Thiede said that he found that setting the standards with someone who was too slow was equally difficult. Thiede assured Schmitt that employees were routinely exceeding the standards. In Schmitt's view, it was the Union's function to be the advocate for the employees who could not attain the standards.

The matter of a fair day's work for a fair day's pay was revisited. Schmitt commented that one could not be separated from the other in a discussion of production standards and wages. It was not possible to talk about a fair day's work for a fair day's pay without knowing what constituted a fair day's pay. Woodcock retorted that the Company saw these as two separate issues. He recognized that there was a connection, but in the context of the negotiations, the standards would be one stand—alone item and the wages and job classifications would be another.

On January 13, the Company also gave the Union job descriptions for each of the group leaders. The document set forth proposed job descriptions for group leaders in the paint shop, finish assembly, shipping, receiving, inventory, press, and general assembly. Union Committeeman Tilly, himself, then a group leader, asked if these duties would be more extensive than his own and if the employees incumbent in those positions would be trained to perform the prescribed duties. Woodcock replied yes, they would be; the Employer would give them 6 months training to assimilate their new job duties.

Schmitt asked if Woodcock had anything further to present to the Union. Woodcock replied that, unless the Respondent's proposals were challenged, the Company would assume its own positions stood as presented.

g. January 26, 1994

As scheduled, the parties met again on the afternoon of January 26. There, the Respondent gave the Union a document, entitled *Production Standard Methodology*, and documents showing proposed productivity testing procedures; how standards were set and the methods used. The Company continued to want any language regarding production standards to be outside of the labor agreement. The Union's response was that any agreement on production standards would have to be included within the labor agreement. The Respondent then reviewed its *Production Standard Methodology* proposal with the Union.

The Company's position with respect to the first sentence of its *Production Standard Methodology*, that "once a standard has been attained by an employee, it shall be considered proved and not subject to further establishment processes," was that all the

production standards that were in effect were proven and that the Union could do nothing about them.¹⁶ Schmitt asserted that the Union never would agree that once a standard was attained by any unit employee it would be considered proven and not subject to challenge, including by use of the grievance procedure.

During the parties' lengthy discussion of production standards, the Union expressed concern about employees who were medically unable to perform. Schmitt declared more than once that the Union's concern was not for people who would not apply themselves and were not willing to work, but for those trying their hardest to meet the standards. Schmitt suggested that employees be able to use their plantwide seniority to move to other jobs elsewhere in the plant where they could fulfill the standards without suffering medical impairment. Schmitt assumed that the Company wanted to get at employees whose attitude was they would not perform. Woodcock replied that the Company had thought long and hard about its proposal and, if an employee could not perform, he would be laid off and could return to work when there was a vacancy. Schmitt was worried that, if the standards remained in place, an employee could be terminated before standards were (acceptably) established. The Company responded that it considered its standards to be loose.

The Respondent gave the Union a confidentiality agreement prepared in connection with its proposal on production standards and methodology. This would permit the Union to have outside industrial engineering studies done when there was a disagreement as to reasonableness. In the event such a study was conducted, the Respondent wanted the study analyst to sign the agreement to protect the confidentiality of the Respondent's production processes. Schmitt advised the Company that the Union had no problem with this and the proposed confidentiality agreement was one of the tentative agreements between the parties.

During the negotiations in early 1994, the Union had possession of a list of names of the employees and their assigned departments, but not their job classifications. The Employer, on January 26, furnished job descriptions for each of the new classifications. In the discussion of the proposed new job classifications, Schmitt and Tilly again asked if the employees would be trained in the proposed new classifications. Woodcock again reassured them that the Company would afford whatever training was necessary; the Company intended to cross-train all incumbents, including group leaders, so that every current employee would be fully familiar with his job description.

Schmitt inquired about future new job classifications, specifically mentioning the electrician. He asked how, if the Company added that classification, would it effect the Employer's proposal on job classifications. Woodcock answered that the job classifications were not in concrete, were subject to change and that the Employer would address this if necessary. Production operators who moved from their home job to a new home job would be trained before being compelled to comply with the production standards.

On January 26, the Union was given a company-prepared bumping, or job displacement, chart, illustrating how the Respondent's proposed recall and layoff procedures would work. In sum, the document showed that the application of seniority, predominant under the then current contract, would be qualified

by the requirement that even the senior-most employees, in addition to their seniority, also have the necessary skills and qualifications in order to bump into other job classifications. The chart also showed the positions into which different categories of employees appropriately qualified might bump, displacing other employees. The bumping chart was intended to change the status quo by ending sole reliance on plantwide seniority. Under the then existing system, if an employee, by virtue of his seniority, after bumping into any plant position, thereafter had demonstrated that he was not qualified, he then would be allowed to bump into another job also without first establishing that he had the necessary skills and qualifications.

On job bidding, the Company proposed that there no longer be an automatic trial period, that jobs be posted by department and classification, and that the criteria for filling job bids be skill and ability, with seniority being last. The Union's position was that job bids should continue to be filled by seniority with a trial period, and that employees who did not demonstrate the necessary skills for the bidden position during the trial period should be removed. Bidding employees should not be required to display skills and abilities to get the desired job; they would have to have the qualifications in order to keep it. During negotiations, the Union did not make any counterproposal on this issue and its position, that the job-bidding language in the prior collective-bargaining agreement should be retained, remained constant throughout.

With respect to job bidding, as promised, the Respondent provided the Union with samples of tests that it was proposing to administer to employees who applied for posted positions. These sample tests related to positions in die repair and maintenance and for inventory clerk. These were copies of written tests actually used by the Respondent for those positions during the term of the contract. When he received these test samples, Schmitt asked if tests would be given for any other positions, to which Woodcock responded that, under its proposals, the Respondent would test the maintenance mechanic using the test for technicians. Church added that the Respondent also had used tests for warehousemen.

The parties, on January 13, did not talk about whether the production standards at *Alwin* would be on an incentive pay basis. Woodcock had told Schmitt that there would be no pay differential for meeting production standards, that the Company was not offering incentive pay and asked if Schmitt had anything to offer on incentive pay. Schmitt had had nothing to offer.

The parties also discussed the Union's proposed non-economic changes in the labor agreement which had been provided to the Company at the January 5 session. The parties reached agreement on some additional minor issues. As to the Respondent's proposed 5-year contract term, the Union proposed that that be dependent on the type of improvements on which the parties might be able to agree.

h. January 27, 1994

The parties resumed bargaining on January 27. The meeting began with a presentation made to the Union by Kenneth Quigley, the Company's director of sales and customer service, on the competition that the Company was facing, primarily foreign competition. Quigley detailed the price reductions that had been required by Scott Paper Company, as noted, the Company's biggest customer. Quigley's talk, given with liberal use of graphs, showed the costs of materials and the Company's pric-

¹⁶ The above first sentence reappeared in all of the Company's responses to the Union's proposals on production standards.

ing over the past 4 years. Quigley explained that pricing was going down because of pressures applied by the Company's customers, specifically Scott Paper. While the pricing was going down, the Respondent's labor costs were slightly rising. Quigley displayed a napkin dispenser produced in Taiwan for the Coca Cola Company and informed the committee that that item's retail price had been less than the Respondent's costs to produce the same thing, illustrating the type of foreign competition that the Company was facing. Schmitt replied that the Union could not compete wage-wise against the Taiwanese. Quigley had prefaced his remarks by telling the Union that he could not share the economic information as far as dollars were concerned. Woodcock spoke of the need for increased productivity to enable the Respondent to contend with foreign competition and Quigley pointed out that, since Scott Paper's foreign subsidiaries were able to buy locally abroad, the competition in foreign countries had created intense competitive pressures in the Respondent's efforts to supply Scott's overseas subsidiaries.

Quigley announced that, under a program the Respondent had entered into with the Scott Paper Company to meet that Company's goals, Alwin was going to have to have further price reductions in 1994. Materials costs were continuing to rise and, while the Company had had some success in minimizing such cost increases, it was a never-ending process. Quigley spoke for approximately 30 to 45 minutes.

After Quigley concluded, Woodcock told the Union that Quigley's presentation basically had summed up the Respondent's negotiating rationale and that negotiations such as these occurred when a Company was in bad financial trouble or was closing its doors. The Respondent had entered into these negotiations to try to keep jobs in Green Bay and, hopefully, to grow jobs for the future.

Union Negotiator Tilly responded that the potential effects of the Company's proposals on the employees would be severe. Woodcock answered that the cost of living in the Green Bay area generally was lower and that these negotiations had to take place so that the Company could ensure that the employees could have jobs and continue to have those jobs in the future. Everyone would have to adjust to changes in conditions and these conditions had been brought on by the changes in the business climate at Alwin.

Woodcock reiterated that the Company wanted to end up with a 21st century agreement that would take care of the compression the Company was experiencing with its profit margins. The Respondent needed both reductions in labor costs and increased productivity; the Company had started to really feel the customer pressure for reduced prices only after 1991. Woodcock again stated that times were changing and analogized the negotiations to those in basic steel. Schmitt, in turn, responded that the Company was trying to reach a confrontation rather than a settlement of the issues. Woodcock asked if Schmitt felt that the companies were trying to get rid of the Unions in the basic steel industry negotiations. Schmitt said no. Woodcock told the Union that, in the Company's opinion, the paper industry currently was in the same situation as was the steel industry in the 1980s, when it had needed concessions. Woodcock declared that he wanted to end up with a labor agreement that would ensure that the Company survived, that there would be work for the employees and that he preferred doing it as he was proceeding than to have to come back and negotiate an agreement for the closing of the plant. The Company was in crisis.

One of Woodcock's primary concerns was to limit the costs of insurance. Woodcock informed the committee that health care costs, which had continued to rise over the recent past, was a major cost item to the Company. The employees' contribution currently was "not really in the real world today." Schmitt, alluding to the 1991 negotiations where the Union had agreed to major changes in the group insurance program, including, for the first time, employee contributions, declared that the Union's cooperation in 1991 apparently had not done any good because it now was facing more reductions. The Company replied that health care costs had escalated.

The parties also discussed the scheduling of vacations. Woodcock told the Union that the Company could not afford to have a shutdown for vacations; it had to be open to meet customer demands. Schmitt answered that other companies dealt with vacation time and that Alwin ought to do the same thing; he did not care if the plant had to shut down for vacations. Woodcock retorted that the Company was not a General Motors and could not afford to have the plant shut down; it needed the production. However, increased productivity would not solve all the Company's problems. Customer-wise, the Respondent was experiencing the same problems with James River Mills as with Scott Paper.

Woodcock maintained that newspaper articles regarding the financial situations of Scott Paper and James River and the major layoffs that Scott Paper had been experiencing confirmed what the Respondent had said to the Union about Scott Paper's situation and about the measures that that company had taken to get the Respondent to reduce its prices and costs.

Schmitt stated that he had listened to Quigley and thought Quigley was correct in praising the Alwin work force. The vast majority of the employees were willing to work hard. Schmitt offered to help with productivity standards to assist the Company, but maintained that the Company's proposals were "shafting" the employees. The Union was prepared to work out a productivity program, but Schmitt did not want to be party to the rape of the collective-bargaining agreement. He pointed out that the Respondent was taking vacations and insurance from the employees. The Company responded that those were cost items. Schmitt answered that the Union was willing to work on vacations and productivity, etc., but it was not going to see the bargaining unit eroded as temporary employees who would remain outside the unit replaced employees who quit or retired. In response to Schmitt's stated desire that the parties get down to the basic issues, Woodcock told him that the entire contract was very important to the Company, that the Respondent had to have a reduction in labor costs and that the parties needed to address all the issues.

Also on January 27, the parties went through the Respondent's new complete contract proposal, which incorporated the agreements that so far had been reached and which had been given to the Union on that date, in order to determine each parties' position. Woodcock stated that they were getting very close to the Company's final position and this document represented that.

At the January 27 meeting, all the above articles were discussed and, while a number of minor changes were negotiated, the Union generally acquired no improvement in any term or condition of employment over what previously had existed, when compared to the prior collective-bargaining agreement. The areas of any accord reached essentially were adopted union-proposed relaxations of more stringent original Company

proposals. Schmitt, claiming that he needed more time, promised to provide a proposal on production standards when typed. Woodcock replied that that was fine, the Company would be happy to consider it.

i. February 2, 1994

At the next negotiating session, on February 2, the Union presented its own contract counterproposals, which Schmitt read aloud to the Company, article by article. Schmitt also declared that the Union would not agree to a 5-year labor agreement or to the Company's proposal to reduce wages. The Union did not thereafter change its position in rejecting both of these company proposals.

In the management-rights article, Schmitt, in the provision where the Company was to retain the exclusive right, in effect, to operate its business, again proposed to add the phrase "subject to the provisions of this agreement," and also suggested deleting "specific" before the word "provision" in the sentence wherein the Company would retain all rights of management not restricted by a provision of the agreement.

The Respondent's proposals to allow it to determine the extent to which work required by its business be performed by its own employees and to give it the right to subcontract unit work, remained at issue. The Company continued to propose that it have broad discretion to utilize part-time, temporary, and contract employees.

On overtime pay, the Union consistently opposed the company proposal to change the provision that overtime be paid after 8 hours' work in a day. Woodcock also was concerned that employees who had been absent during the week might be paid at time and a half for working on Saturday, receiving that premium although they had not worked a full 40-hour work-week.

As to holidays, the Union did not agree to the deletion of the floating holiday, but did accept the Company's proposed changed language affecting Memorial Day. To the Company's proposal to eliminate the employee option of having an extra paid day off if a holiday fell during the vacation period, Schmitt replied that, if the holiday fell within an employee's vacation period, the employee ought to have the option of taking an extra day off. Schmitt told the Company that as long as it continued to propose reductions in the number of holidays and deletion of the floating holiday, he would not agree to its holiday proposals. The Union proposed that the language and benefits concerning holidays remain the same as they were in the then current labor agreement.

On vacations, the Union counterproposed that, if the Company would back off from taking away the fifth and sixth weeks, it would be willing to enter into an agreement as to how vacations were scheduled. The Union stated that it would not agree to the company-proposed reduced vacation schedule.¹⁷ The Union, after discussing vacation rights of laid-off employees and proration, continued to adhere to the vacation language of the then-extant collective-bargaining agreement. The Union noted that under the Respondent's proposal, unless employees worked the minimum proposed number of hours, 1600

¹⁷ Schmitt explained that the Union's decisional process was concerned not just with preserving the fifth and sixth weeks of vacation, but also with the Company's entire proposed economic package, including the proposed reductions in wages, holidays, vacations, insurance, and other changes reducing the quality of the employees' working conditions.

hours/year, they would have no vacation. Schmitt reiterated that the Union was not going to be a party to the total rape of the labor agreement, that the parties ought to get to the gut issues and that one of the gut issues was the vacation scheduling. Woodcock repeated that the entire contract was a serious issue for the Company.

The Union opposed the company proposal to delete the 15-cent offset for insurance premiums and persistently proposed that health care premiums, deductibles, and copayments remain as they had been in the then current labor agreement. The Union made no counterproposal concerning health care beyond this.

Schmitt again accused the Respondent of attempting to erode away the bargaining unit in its proposal for almost unlimited freedom to employ part-time, temporary, and leased employees, who would remain outside the unit, to replace unit employees who left the Respondent's employ.

Concerning the Respondent's proposal that earlier starting times be instituted because the Respondent needed the flexibility to meet customer demands, Schmitt reminded the Company that the parties already had a provision for changing the starting times by mutual agreement, that this had worked in the past and that it should be able to work in the future. Schmitt counterproposed only that the contract language remain as it was.

In answering the Company's proposal to eliminate the 3-minute cleanup and the 5-minute cleanup at the end of the day, which assertedly had been put forward to end abuse of those periods and to allot more time to productivity, Schmitt told the Respondent that, if individual employees were abusing those periods, they ought to be dealt with but that the cleanup periods should not be eliminated.

In discussing the time periods to be afforded the respective parties to take action at the various grievance procedure steps, the Union rejected the time limits set forth in the Company's proposal because they would reduce the Union's times to act while, at the same time, increasing the Company's time frames.

Immediately on completing his oral review of the Union's contract counterproposals, Schmitt gave the Company the Union's proposals for minimum production standards; its way of recognizing that production standards were going to be a part of the Employer's policy. However, the Union wanted to ensure that those standards were set so that an average experienced worker could meet them and to address the problem of employees unable to reach the standards by enabling them to move to jobs that they were capable of performing elsewhere in the plant. After Schmitt proposed to substitute a clause which read, "an employee who, through no fault of his own, and after applying his best efforts, is unable to achieve the minimum production standards, will be allowed to exercise his plantwide seniority to move to open jobs that may be available, providing he is qualified to perform the necessary job duties," the Company caucused. Bargaining, which did not resume that day to enable the Respondent's representatives to review the large amount of materials, was scheduled for the following morning.

j. February 3, 1994

Woodcock opened the February 3 bargaining session with another talk about the situation in the steel industry in the 1980s, stating that some of the problems the steel industry had had then were the same as *Alwin Mfg.* was then experiencing and that, therefore, there was need for changes in the labor agreement. Schmitt again charged that the Company clearly

was attempting to erode away the bargaining unit, was looking for a confrontation, was desirous of becoming union-free, and was going to force the people on strike in order to then hire replacements.

The Respondent orally presented a counterproposal revising the written proposal it had given the Union on January 27. In this, the Respondent still proposed to retain its proposed language narrowing the unit description in the recognition article to bargaining unit employees in the Respondent's Green Bay plant, rather than in the greater Green Bay area, as before. The Respondent also carried forward its earlier proposal to remove the model makers from the bargaining unit.

Included under the management-rights article, the Company wanted to insert subject to the "express terms of the agreement" as the only restraint on its exercise of managerial discretion. The Company also sought to retain its earlier proposed language which would enable it to independently determine whether, and to what extent, its work would be performed by the Respondent's own employees, giving it the right to subcontract unit work without limitation on any and all operations. The Company stated that it would propose language on production standards, which it had referenced in that article, and sought to keep its proposed language to enable it to solely determine whether to establish or discontinue jobs or operations and whether to fill vacancies.

The Company gave the Union a counterproposal on production standards. Schmitt repeated his concern about the production standards being set fairly, declaring that simply because a top notch worker happened to meet the Company's standards did not necessarily mean that they had been justly set. Schmitt told the Company that at Mirro Aluminum in Manitowoc, Wisconsin, where Schmitt had worked before becoming a union staff representative, the emphasis had not been on discipline, but on ensuring that the standards were set correctly.

The parties reached general agreement on the union-security article, reserving a minor difference. The Respondent did not basically change its above-described positions with respect to the articles covering hours of work and overtime, holidays, and vacations.

The Respondent again proposed that vacations by the week be granted by seniority if the vacation request was received prior to the Friday of the first full week in December of the year prior to the year of requested vacation. Vacations requested after that time would be treated on a first-come-first-served basis. The Respondent answered the Union's proposal that employees also be permitted to take vacations by the day by requiring at least 1 week's advance notice of same. In its proposal, the Company also modified its position to address an earlier union concern relating to the ability of employees to take vacation time in the event of a sudden onset of illness. This now would be permitted on a limited basis, contingent on preshift notice to the Employer and the availability of openings in the vacation schedule. The Union agreed to accept the Respondent's proposal that an employee shall not be entitled to work during the vacation period and take pay in lieu thereof.

On seniority, the Respondent changed its position that probationary employees not be entitled to any seniority rights until 60 working days after the last date of hire so that, after 30 days employment, an employee could receive contractual paid holidays, funeral leave and, also, participation in the Employees Assistance Program (EAP), as under the then current collective-bargaining agreement. EAP, in continuous effect since its 1982

implementation, was offered to provide confidential employee assistance with respect to mental health, emotional, and family problems, and difficulties with drug and alcohol. The program was administered on a fee basis by an outside service company paid by the Respondent. However, employees still would be required to have completed the proposed 60-working day probationary period to become eligible for health insurance and other job benefits.

The parties also agreed that the Respondent would prepare and post for stated periods lists showing all employees' dates of last hire. The Company continued to insist that, in increasing or decreasing the size of the work force, plantwide seniority within the classification and department would be considered instead of just plantwide seniority; on reducing to 3 days the time in which laid off employees might respond to work recall; and on reducing the application of service seniority during reductions in force by considering employee qualifications to do the work. The parties had agreed that, for short-term temporary layoffs, the Respondent could use voluntary layoffs for up to 8 weeks.

There was no change in the Company's position concerning how seniority might be lost. The Union accepted the Company's proposal that, except in cases of machinery breakdown, materials shortages or matters outside the Respondent's control, the Company would give affected employees and the Union at least 48 hours' notice of a proposed layoff. The Respondent continued to propose allowing temporary transfers without regard to seniority, agreeing only to modify their duration. The Respondent maintained, without change, its position that job vacancies be filled on bases of skill, ability, experience, qualifications, and seniority, instead of the former emphasis on seniority. The Respondent did not understand why the Union objected to the paragraph enabling the Respondent to terminate employees for cause and which provided for other forms of discipline, as well. Schmitt explained that the Union was concerned that the language did not establish "for cause" as prerequisite to employee discipline short of discharge. The Respondent did not answer.

The Respondent did not change its proposals concerning representation and grievance procedure. The article covering strikes and lockouts had been agreed to on February 2.

The Respondent did make some minor concessions affecting the miscellaneous provisions article. The Company deleted proposed language that the Union was to advise its members not to post inflammatory notices on company bulletin boards, leaving only that the Union, itself, would not post such notices. The parties agreed to the paragraph concerning standards and procedures for sanitation and safety in the plant, and the Company accepted the Union's proposal that the company language be changed so that the status of employees who were incapable of performing the work for reasons of health, and who could not qualify for disability or early retirement, be changed from "terminated" to "permanently laid off." In the paragraph prohibiting discrimination for union activity, the Company modified its proposal denying the right of employees to devote time to union activities during working hours without company permission to include "except the five duly elected officers." There were some other small agreements affecting that article.

As to wages, the Respondent still proposed to pay the employees on a biweekly basis and there was no change in the Company's position concerning insurance and pensions and the

Appendices, which covered the job classifications and the wage structure.

The parties returned to the production standards program. Woodcock again declared, as he presented the Union with the Respondent's latest production standards counterproposal on February 3 that, with this, the parties would resolve all outstanding grievances and Labor Board issues and the question of whether or not employees will choose reinstatement. Schmitt replied that he would listen. Schmitt listened but did not make any counterproposals or proposals concerning resolution of the grievances and unfair labor practice charges relating to the production standards. Schmitt did say that he thought the Company's proposal on productivity was an insult, objecting again to the Respondent's proposal that, once any standard was attained by any employee, it was to be considered to be proven. Schmitt continued to insist on the Union's right to challenge the standards.

Woodcock suggested that the Union seek to determine how many of the seven employees discharged in 1992 and 1993 for failure to meet and/or maintain the production standards would be interested in reinstatement. Once the collective-bargaining agreement finally was signed, he would make settlement offers to those employees with or without recalling them to their former positions. Schmitt opined that the response would depend on what the new labor agreement contained, but he never answered Woodcock's query as to how many employees would return to work for the Respondent. Schmitt also did not attempt to communicate with terminated employees in order to be able to calculate what, if any, backpay might be due to them. He merely responded on February 28, the last day of negotiations before the strike, that such discharges ought to be made whole.

The parties also talked about the situation in 1992 which had led to the institution of *Alwin I*, wherein was challenged certain above-described unilateral changes made by the Company during the term of the collective-bargaining agreement. Schmitt declared that, from the Union's perspective, it looked like the Company was going to do whatever it wanted. That was the way the Union saw it, but that's not the way it should be. Woodcock responded that he had opened contracts numerous times and, would say again, that the Company needed to be competitive. Since the Union had not been willing to help make changes, the Company needed to do something. Woodcock declared that he had made midterm modifications at other locations and had had many successful experiences with midterm re-openers. Schmitt responded that he, too, had been involved in changes during the term of a labor agreement but that they had been subject to the approval of the membership.

k. February 9, 1994

At the next bargaining session, on February 9, the Union orally presented its contract counterproposals in response to those submitted by the Company on February 3. On the management-rights clause, Schmitt reiterated that production standards must be contained within the labor agreement. In the discussion of the *Alwin Studies Program*, referenced at the end of the Union's counterproposal, Schmitt told the company representatives that their proposal on production standards was a joke; Thiede knew better. Schmitt again, on previously stated grounds, opposed the Company-proposed language that any standard that had been attained by any regular full-time employee be considered as proven and not subject to the grievance procedure. To Schmitt's rejection of the Company's proposal

that the Union could not challenge any of the established standards, the company representatives repeated that, in their opinion, their standards had been set fairly. Employees were meeting the minimum production standard and they were proven.

In the discussion of the management-rights clause, Schmitt could not understand why the standards program should not be part of the contract. Woodcock again replied that he felt it was better to have production standards outside of the contract to facilitate changes in the event of change of methodology. Schmitt declared that he was never going to agree to anything not specifically spelled out in the contract.

Woodcock told Schmitt that he had a right to challenge the standards. Schmitt replied that if there was bad language in the contract proposal, the right to challenge would not be effective. The Company did have bad language in the proposal and Schmitt knew what the Respondent's objective was. Woodcock answered that the Respondent had proven the standards that were set and that they are what they are.

The Respondent's representatives gave the Union a February 9, 1994 letter to Schmitt from Church in answer to Schmitt's December 16 request, made at the first negotiating session, for cost data on current insurance benefits and those which, under the Respondent's proposals, were to become effective on April 1, 1994. These showed that the anticipated monthly premiums to be paid by employees for the various types of available coverages would be substantially raised. Included were increases in the costs to employees of group medical insurance, weekly sickness, and accident insurance, life insurance and accidental death and dismemberment and increases to the pension multiplier.

On the matter of holidays, Schmitt stated that he could not agree to a reduction in the number of holidays or to eliminating the fifth and sixth weeks from earned vacation periods. Schmitt would not make any counteroffers or alter the Union's proposals concerning vacations as long as the Company maintained its position with respect to their scheduling and duration.

When, at the February 9 meeting, Schmitt told Woodcock that the Company's proposals made it more difficult for the Union to represent the members of the bargaining unit by diminishing the exercise of seniority. Woodcock replied that the Company's proposals had been designed to make the employees more productive and efficient.

l. February 10, 1994

As the Company gave the Union a counterproposal at the start of the February 10 negotiating session, Woodcock announced that the Respondent had heavily revised its proposals since the session of the day before and was very near to its final position. However, it still was open to any suggestions, modifications or proposals that the Union might have. There was no discussion. The company representatives simply went through their contract proposal, giving the Union's printouts of certain articles, indicating that the changes from the Respondent's prior positions had been underlined.

Woodcock, with respect to the contemplated recognition article, reiterated the Respondent's proposal to remove model makers from the bargaining unit and to turn them into salaried professional employees. At the same time, the Respondent was prepared to permit model makers to bump laterally or down into bargaining unit positions. The Company also, for the first time, agreed to afford employees a minimum of 4 hours' pay when, as scheduled, they had reported for work without receiv-

ing at least 4 hours' advance notice that there would be no work, and were prevented from performing their jobs by circumstances outside the Company's control.

Without becoming even more detailed, the Respondent's proposal contained changes to then existing articles covering holidays, seniority, ways in which seniority might be lost, temporary transfers, job posting and bidding, representation and grievance procedure, leaves of absence, and disciplinary procedures. With respect to insurance and pensions, Woodcock declared that those were economic items and open.

For reductions in work force, recall, and layoff, the Respondent persisted in qualifying seniority by insisting that employees who should seek to exercise bumping rights also be qualified and able to do the work. To address Schmitt's expressed concern about employees in the new production operator classification being able to use the Respondent's proposed bumping system, the Company modified its proposal to give production operators the presumption of being qualified when bumping into another department in that classification; the Company would consider everyone qualified to bump into production operator positions. This, however, would apply only to the production operator category, the Company retaining as prerequisite the possession of qualifying skills for employees to bump into any other position. Woodcock explained that, under the Company's proposal, laid-off employees would be recalled to their original job classifications and departments and that, since the great majority of employees would be production operators, they could be recalled by seniority to that position.

Temporary transfers were not to exceed 3 consecutive months, but movement of employees in the same job classification would not be considered a temporary transfer.¹⁸ As to the filling of job vacancies, Woodcock explained to Schmitt that the Company now would consider anyone classified as production operators, or in more highly rated positions, to be qualified as production operators for purposes of job bidding into production operator vacancies, regardless of department.

Proposed changes to the grievance procedure were discussed. Woodcock reiterated the Company's position that the grievance committee members, while so representing employees, should do so in specific plant areas so that the Company would know with whom it would be dealing with respect to grievances arising in each locale. The Respondent again proposed modifying the part of the grievance procedure that had provided for fixed monthly company-union meetings to provide for meetings to be held only at mutually agreed times.

Under the Respondent's revised proposal, the first step of the grievance procedure further reduced the time in which a grievance could be taken up with the employee's immediate supervisor from two scheduled workdays from when the employee had knowledge of the grievable occurrence, as per the Respondent's

prior proposal, to 2 calendar days. The prior collective-bargaining agreement had allowed 5 calendar days for this step. In step two, the time period in which unresolved grievances must be filed with the Respondent's director of labor relations, after the meeting with the immediate supervisor, was reduced from the 5 calendar days in the last contract to 2 scheduled workdays. Woodcock again explained that the Company was seeking to reduce the Union's time to take action because it wanted to expedite the grievance process as much as possible in order to resolve issues.

Before giving the Union its revised proposed production standards, the Company stated that there was no change in its proposed positions with regard to the appendices relating to labor grades, job classifications and wage rates.

The Company agreed to take production standards out of the management-rights clause and place the standards, themselves, within the collective-bargaining agreement as long as it had a satisfactory separate agreement concerning them.

On February 10, the parties discussed the Company's proposed two-tier pay system, which would differentiate the pay for new employees from that of current employees. Schmitt stated that he had experienced two-tier wage systems at other locations. They didn't work and caused much infighting among employees. Woodcock answered that this company proposal was different because the employees would eventually progress to the top of the rate range. In Woodcock's experience, the problem had been that the two systems never were tied together.

The parties also discussed a February 10 letter from union official Robert Glaser to Judge Scully noting that the "issues involved (in *Alwin I*, then pending before Judge Scully) could have a profound effect upon contract negotiations." This letter, *inter alia*, was to put the Company on notice that, in the Union's view, the issues raised in that earlier case continued to pose problems affecting the current negotiations and related pending grievances.

Woodcock announced that the Company intended to give the Union its final proposal on or before February 28, and that no additional bargaining sessions beyond those already agreed would be necessary. Schmitt responded that the parties probably would have to use February 28 because of the volume of materials still to be reviewed.

Schmitt gave the Company the Union's economic proposals. In the item concerning shift premiums, the Union answered the Respondent's proposal to reduce the pay premiums for the second and third shift by countering that the relevant language of the last contract be preserved.

On vacations, the Union proposed to increase leave time by reducing the number of years necessary for eligibility. Trying to keep what it had, the Union did not thereafter deviate from this position. Rejecting the Company's proposal to delete the fifth and sixth vacation weeks, Schmitt declared that the Union would not agree to any reductions in vacation time.

As to holidays, the Union proposed to add a floating holiday while the Company still sought to delete that concept. The Union's communicated position through the end of negotiations was that the holidays remain as they were in the then current agreement.

After discussion, agreement was reached on bereavement leave and safety shoes, the Union acquiescing to the Company's positions in these areas.

¹⁸ Since, under the Respondent's proposal, the great majority of employees would become production operators, the Company's position that movement into the same classification would not constitute a temporary transfer would give the Respondent virtually a free hand in effectuating such transfers. Also, under the Respondent's proposal, employees could be transferred temporarily for up to 3 months, returned briefly to their original assignments, and then returned to their temporary positions for another 3 months, repeating this cycle indefinitely. Also, ambiguously in the Respondent's proposal was the further provision that, while temporary transfers might not exceed 3 months, transfers that did last for more than 3 consecutive months would become permanent and that seniority thereafter would apply.

Concerning wages, the Union proposed an 8-percent pay increase in the first year, a 7-percent increase in the second year, and a 6-percent increase in the third year. Also attempting to keep what it had, Schmitt repeatedly told Woodcock that the Union would not agree to the company-proposed reductions in wages.

On insurance and pensions, the Union proposed permitting participation in a health maintenance organization (HMO) if one should become available in Green Bay. None were available there in February 1994. The Union proposed that the Company contribute 100 percent of the monthly insurance premiums for employees who retired between the ages of 62 and 65 and an increase in life insurance coverage, positions it never abandoned. Similarly, the Union never changed its proposals for an increase in the amount of sickness and accident insurance to be afforded employees and for improvements in the pension plan. These proposals, except for the minor areas indicated, were not accepted.

m. February 23, 1994

The February 23 afternoon bargaining session began about 90 minutes late, adverse weather conditions having delayed Woodcock's flight from Cleveland to Green Bay. Schmitt began by questioning the correctness of company cost figures provided in the economic information it had supplied to the Union with respect to life insurance and accidental death and dismemberment. Church promised that he would get the correct figures. Schmitt also asked whether the Respondent's proposal to eliminate retiree life insurance was intended to apply to past retirees. Church said no.

With respect to vacations that had been earned during the term of the last contract, the Respondent repeated that it needed to reduce the cost of vacations and again proposed to reduce the vacation schedule from a maximum of 6 weeks to a maximum of 4 weeks, to become effective on January 1, 1995. This modified the Respondent's initial position which had been to enforce the new vacation schedule immediately so that employees who had earned vacations as of January 1, 1994, would forfeit that extra vacation period as of that year. Schmitt wanted to know how the Company's proposal to reduce the employees' vacation time by eliminating the fifth and sixth weeks of vacation time and by increasing the work periods necessary to qualify for the weeks of vacation still to be permitted would effect employees for vacation periods earned in 1993. Woodcock replied that the final contract language, whatever it would be, would govern the vacation time to which employees would be entitled under the next labor agreement. Schmitt again objected on the ground that the employees already had earned their vacation time during the preceding year and, in effect, had vested entitlement.¹⁹ Schmitt never had heard of a company taking

away earned vacation. Woodcock responded, "They earn them and take them pursuant to the terms of the contract. It changes how the contract changes." Schmitt stated that the Union could work out language on the scheduling of vacations and on working before and after a holiday, but the Respondent did not answer Schmitt's inquiry as to whether it would consider "grandfathering" those employees who already had earned the greater vacation benefits.

Woodcock asked if Schmitt had anything else, stating that he had told the Union that this was about as far as the Company could go. Schmitt replied that the Union was going to continue to try to reach a labor agreement and would continue to consider proposals from the Company. The Company's proposed wholesale changes in the contract language was making it very difficult for the Union. The Company was proposing to give the employees a huge wage cut; to reduce existing benefits, including a floating holiday; and to reduce the vacation schedule. All these economic items piled on top of all the contract language was "raping the labor agreement." Schmitt declared that it was very difficult for the Union to keep giving and giving and giving and not to get anything in return. The Union, in Schmitt's opinion, was going down the tubes. Woodcock again replied that the Company needed the proposed changes because its profit margins were shrinking; the changes were needed to remain competitive.

Referring to deletion of the floating holiday, Schmitt declared that the parties had better do something on the requirement to work the day before and the day after holidays. On vacations, if the Company did not try to reduce the vacation schedule so drastically, the parties probably could work toward language on how employees scheduled their individual vacations. Schmitt again related that he had been involved in negotiations at other locations where companies had proposed major reductions. However, at those locations management, the salaried people, also shared in the cuts. That was not the case here. Woodcock responded that it was not known what was going to happen to management: whether management was going to have to take any wage or benefits reductions.

Concerning the Company's proposal to eliminate the 15-cent-per-hour offset for employee-paid insurance premiums, Schmitt noted changes that had occurred since 1991 with respect to health care costs. Woodcock responded that, from studies he had seen, although the Union had received a 16-percent wage increase as a result of the 1991 negotiations, the cost of living had gone up approximately 8 percent in the Green Bay area during the 3-year term of that contract. During the same period, the market basket figure for health care costs, as shown in the Consumer Price Index reports, had gone up considerably more, typically in the range of 6 or 8 percent, and that the 15-cent figure that was involved in the 1991 negotiations did not do anything with respect to the Company's greatly escalated health care costs over the term of that contract.

The Company gave the Union a new proposal on leaves of absence to attend to union business. The prior collective-bargaining agreement had had more liberal language providing for leaves to attend to International Union affairs but had not specifically provided leave for purposes of Local Union business. Under the company proposal, one duly designated employee could be granted up to 5 workdays per year to attend to various types of union business at the International or Local Union levels, including attendance at conventions, conferences and seminars, provided at least 30 days' advance notice was

¹⁹ All unit employees would be affected by the Company's concessionary vacation proposal. The Company's proposal to put an end to the fifth and a sixth weeks of vacation would adversely affect employees with, respectively, 20 and 25 years with the Respondent. The provisions of the then current labor agreement under which an employee could be entitled to 2 weeks' vacation after 3 years on the job, 3 weeks after 9 years, and 4 weeks after 15 years would be changed to allow for 2 weeks' vacation after 5 years, 3 weeks after 10 years, and 4 weeks after 20 years. Accordingly, as proposed by the Respondent, employees generally would lose qualifying vacation time they previously had earned under the preceding labor agreement. At the time, approximately 25 then current employees with over 20 years of service would lose their previously earned fifth and sixth vacation week.

given of any such requested absence. Under the then existing collective-bargaining agreement, one employee, elected or appointed to union office, or appointed by the Union to perform union work which would take him away from his employment, could be granted up to 1 year's leave without pay. No advance notice had been required. Schmitt expressed concern over the short leave time to be made available and the length of the mandated advance notice. Woodcock replied that if the Company potentially was going to have numbers of employees leaving on union business, it needed advance time to prepare and also to impose limitations. The Union counterproposed that it would limit leaves of absence for union business to a maximum of five employees, and amended its prior written proposal to reflect this.

The Company then gave the Union a proposal on production standards, entitled *Alwin Studies*, and withdrew its earlier move to take model makers out of the bargaining unit. Woodcock declared that, if the Company should decide in the future to eliminate the model makers and replace them with professional employees, it would do so under the management-rights clause.

The new production standards proposal reflected certain changes in the Respondent's position in this area and, while it referred to a permanent panel of seven arbitrators to determine the fairness of production standards which might be challenged, the arbitral costs were not specifically discussed. Costs of arbitrations arising under the then current collective-bargaining agreement had been shared and there was no discussion about proceeding differently with respect to arbitrations stemming from the production standards.

Under the Respondent's proposal, the Union, for the first time, would have a limited opportunity to challenge new standards. Once a new standard was put into effect, the Union would have the first production run in which to grieve its fairness. If the first production run was for 8 hours or less, the Union still could grieve the standard the next time the job was run. If no grievance should be filed after a first production run consisting of more than a day's production, the standard would be considered proved and no longer subject to the grievance procedure. Schmitt expressed concern about the brief time periods in which production standards could be proved and that the best operators might be used to make the first, proving production runs. The Respondent maintained its stance.

The "Rule of 80" was discussed in connection with production standards. Under this rule, an employee who was unwilling or unable to meet the minimum production standards, but whose combined age and seniority totaled 80 years, would have a one-time opportunity to bump into a lateral or lower job classification elsewhere in the plant. Union Committeeman Peters expressed the Union's belief that the production standards had been designed to get rid of senior employees.

Woodcock then asked the Union to review its position on part-time, temporary and leased employees to see if there was anything the Union would be able to live with. He also asked if the Union had any suggestions on Saturday overtime. Schmitt replied that his union had no contracts containing provisions for the use of temporary, part-time, and leased employees. Woodcock declared that he had to have it; the parties apparently were at impasse on that issue. Schmitt acknowledged that they were at loggerheads. Woodcock stated that, if the Union had nothing further, then it had seen in the Company's last proposal. Schmitt retorted that the Union's position was that that contract language remain as it was in the then current labor agreement.

Woodcock announced that, during the coming week, he was going to send letters offering reinstatement to employees who had been discharged for failure to meet the production standards. Schmitt asked if the Union was going to get copies of them. Woodcock answered that he had not thought about this.

After Woodcock declared that the Company had gone as far as it could on contract language, he went on to say that negotiations would continue, that he would continue to listen and that he would try to reach an agreement. Woodcock asked if the Union had any proposals. Schmitt had none. Woodcock declared that he did not feel that the Union had cooperated at all with the Company in helping to achieve a reduction of labor costs. Woodcock pointed out areas in the contract where there could be improved flexibility, productivity and efficiency without reducing the employees' take home pay. If the employees agreed to be paid every 2 weeks instead of every week, the savings to the Company would not reduce the employees' take-home pay. If the Union would agree that probationary employees not participate in the health insurance program, that, too, would not result in loss to the current employees but would save the Company money. Woodcock again declared that he did not want to negotiate for a cadaver. He wanted to negotiate an agreement that was going to ensure the Company's survival. The Company's profit margins were shrinking. It needed profits in order to survive, to buy equipment and to modernize the facility.

Schmitt replied that he had discussed the Company proposals with the union membership at some length and the membership was not happy. He had told the employees of pitfalls in seniority, wage reductions, reductions in benefit programs, and production standards. Schmitt stated that he would not be surprised if the employees decided to walk. He did not relish having a strike. Woodcock declared that he did not want a strike either and was confident that the employees would accept the Company's final offer.

n. February 24, 1994

When the parties next met, on February 24, Schmitt began by asking Woodcock to extend the labor agreement for a day, through March 1, so as to give the Union more time to review the voluminous materials presented during the negotiations. Woodcock replied that he saw no purpose in so doing since the parties were not making progress.

Schmitt declared that pay rates would have to be agreed upon and would have to be included within the agreement; that the Company would not be able to utilize part-time, temporary, or leased employees to replace unit employees who left the Company; and that the regular employees would have to be guaranteed a 40-hour week. After 30 calendar days, employees would have to be covered under the terms of the labor agreement and the Respondent would not be allowed to work part-time and leased employees, for example, for 29 days, release them, then bring in another bunch of such employees to start a new 30-day period.

In its response concerning overtime, the Union declared that its position concerning Saturday overtime was unchanged; that time and a half overtime premiums should continue to be paid for Saturday work. With respect to the 40-hour overtime prerequisite, Schmitt stated that the Union would prefer to keep the language of the then current agreement. This, the Union's only counterproposal on overtime, did not constitute a change from its prior stance.

The parties next reviewed the Company's proposal on production standards, which had been given to the Union the day before. Schmitt asked the Company to explain some language whereunder the Respondent was reserving the right to make its own independent study of production standards which were to be used as bases for compensation or for employee discipline. Woodcock replied that there were many reasons to restudy a standard. With respect to the provision which would establish motion time studies for the measurement of work activities, the Union balked at the Respondent's proposal that nonproductive essential time be removed from the study. The Company's original *Alwin Studies Program* had provided that the nonproductive elemental time not be removed from the time study. Since the studied production jobs were broken into the different time elements required to perform each operation, i.e., reaching for a piece to work on, assembly, etc., the effect of removing nonproductive essential time, such as the reaching for the part, from the time studies would be to make it more difficult for employees to achieve and to maintain the company-established production standards.

The parties reached agreement on several items in the Respondent's proposal on minimum production standards, but not on others. The Union continued to disagree with the Respondent's position that once a standard has been established, an employee will be given 2 days in which to work toward meeting that standard before becoming subject to progressive discipline. The Union maintained that the Company's first emphasis was on discipline while its position was that, in the first instance, it should be determined whether the standard had been set fairly.

The Union reiterated its disagreement with the Respondent's position that, once a new standard had been put into effect, the first production run would establish its fairness since the initial establishing production runs, unfairly and unrepresentatively, might be "proven" through the best operators. The Respondent's most significant change in its prior policy on production standards on February 24, was its first time willingness to permit the Union to file grievances concerning standards that had not yet been proved. Under earlier company proposals, the Respondent would have had to agree to allow any grievance on production standards to be filed. Before February 24, the Union could not have grieved concerning production standards without such company consent.

After the parties had reviewed the Respondent's minimum production standards and contract proposals, the Company gave the Union an economic proposal, entitled *Alwin Manufacturing Company, Inc., Memorandum of Agreement*, dated February 24, 1994, which it went through and explained. Schmitt disagreed with the proposal's 5-year term for reasons previously stated. The new economic proposal contained no change from the Employer's existing offers with respect to starting rate wages and job classifications. In the final year of the then-extant 3-year collective-bargaining agreement, employees in the various assembly departments, the press department, the paint shop, as probationers, earned between \$10.20 to about \$10.30/hour. New employees received approximately 56-to-60-cent/hour increases after 30 days on the job, followed by another raise after 6 months, finally going to approximately \$12/hour that year. Under the Respondent's original December 16 proposal, submitted at the first bargaining session, the great majority of those employees would become production operators. New production operators were to start at \$8/hour, move to \$8.50

after 6 months and reach the maximum for the proposed 5-year contract term at \$9/hour—about a \$3/hour paycut from the last contract. Under the Respondent's February 24 submission, production operators would start at the yet lesser figure of \$7.50/hour and receive 25-cent increments every 6 months until they reached the maximum rate for their classification. Employees on the active payroll at the maximum classification rate also would receive quarterly bonuses totaling \$500/annum during each year of the contract. Under the Respondent's proposed new two-tiered wage system, the new minimum rates were not to affect current employees, only new hires. Woodcock explained to Schmitt how these new hires would move from the minimum to the maximum rates. Woodcock told the Union that, under the proposed two-tier system, the pay rates for the new hires would be comparable to all other employees over the term of the agreement.

Schmitt complained about the large wage cuts, pointing out that, under the Company's proposal, the employees also would be contributing much more toward their medical insurance, would be faced with increased deductibles and out-of-pocket maximums, would be losing holidays and vacation time. He reiterated that there was nothing in this proposal that would prompt employees to agree to a 5-year labor agreement. Schmitt reminded the Company that on the day that Quigley had made his presentation to the Union on the state of the Company's business, on cost compression and on what the Company was able to charge for their product, the Respondent's labor costs seemed to be on an even keel. Woodcock responded that the Company's profit margins were shrinking and they were not getting the expected return.

In the last collective-bargaining agreement, the deductibles for medical health insurance had been \$100 per covered person with a maximum of \$300 per family. The single maximum out-of-pocket expense was \$500 per individual per calendar year and \$1000 for a family. The deductible was included in the maximum out-of-pocket expense. After the deductible had been met, 80 percent of the next \$2000 would be paid by the Company and 20 percent by the employee to the end of the calendar year. The Respondent had paid 90 percent of the cost of the coverage.

Under the Respondent's initial proposal, the individual and family deductibles were to be \$200 and \$600, respectively. After the deductibles, coinsurance would be at 70/30 percent. Individual and family out-of-pocket expenses would be \$1000 and \$2000, respectively. A maximum lifetime benefit was to be imposed for the first time. The Respondent proposed paying 80 percent of the single monthly premium, 70 percent of the single parent monthly premium and 60 percent of the cost for families.

In the Respondent's February 24 proposal, the medical health insurance plan was to be modified by instituting respective individual and family deductibles of \$250 and \$750; coinsurance at 80/20 percent of the next \$2,500; and single and family out-of-pocket expenses of \$750 and \$1500. The Respondent offered to pay 80 percent of the monthly premiums.

Woodcock told Schmitt that the Company would continue to provide \$2000 of life insurance for retirees and that the term life insurance currently provided employees would be increased by \$1000 on March 1, 1996, 1997, and 1998.

As to group leaders, Woodcock announced that the Company's new position was to give incumbent group leaders 6 months to assume and learn the new responsibilities as defined by the Respondent's group leader job descriptions. Woodcock

reaffirmed that the Company would be providing training in many places throughout the agreement.

Woodcock announced, as at the February 23 session, that to resolve the status of employees who had been discharged for failure to meet or maintain the previously imposed production standards, the Respondent would be sending such employees letters offering them reinstatement with full seniority. They would return with clean slates. The Union again asked to see the letters.

The Respondent also offered to provide severance pay for employees so terminated who did not want reinstatement. When Schmitt asked Woodcock what the lump-sum severance amounts would be, Woodcock asked if Schmitt had any thoughts on it. Schmitt declared that those employees should be made whole.

The Respondent reiterated its above-referenced \$500 annual, quarterly paid bonus proposal in return for the holidays, vacation, and washup times which the Company was eliminating from the contract.

Also on February 24, the Company stated that it would extend absences to be allowed for local Union affairs to permit leave by five employees, if 2 weeks' notice was given.

After returning from a lunchbreak, Schmitt asked the Company representatives, "What the hell are we going to do?" Woodcock replied that unless the Union gave the Company some counterproposals there was nothing that he could do. Schmitt again charged that the Company's intention all along was to not reach a labor agreement but to negotiate toward a confrontation, to force the people out on the street, to replace them and to become union free. Schmitt declared that if the parties were going to have a confrontation, they should get on with it. He told the Company to give the Union its last best offer and "Let's get on with it."

Having nothing further, the parties agreed to resume on the morning of February 28.

o. February 28, 1994

At the February 28 bargaining session, the discussions commenced with the lengthy contract article on miscellaneous contract provisions. While there was some detailed exchanges, the parties reached no new agreement.

Schmitt asked about the Respondent's deletion of the \$9000 of life insurance previously given to those already retired. The answer was that such insurance did not apply after an employee retired.

On February 28, the Union was provided with copies of the letters, dated February 25, that the Respondent had sent to the seven employees who had been discharged for failure to meet the production standards.²⁰ The letters, identical to each recipient and signed by Church, read as follows:

Commencing in the fall of 1992 and continuing to today's date, Alwin Manufacturing Company has implemented and enforced minimum standards and levels of production as a measure of a fair day's work for a fair day's pay. As a result of that program, you were termi-

nated from employment for failure to achieve and maintain an acceptable level of production.

That discharge was the subject of a grievance and an unfair labor practice charge with the National Labor Relations Board. Recently, Alwin Manufacturing has negotiated in good faith with the United Steelworkers of America, Local 6039, which represents its production and maintenance employees and was your bargaining representative at the time of termination, with respect to appropriate production standards and levels of production. Based on those negotiations, the Company has now initiated a new formalized procedure for the setting and maintaining of appropriate levels of production. Those levels of production which were in effect at the time of your termination have been deemed acceptable and appropriate for all employees.

This is to advise you that as a result of the negotiated procedures, you are now offered unequivocal reinstatement to your former position with full seniority. This offer of reinstatement is to be in effect March 1, 1994, the effective date of the new production standards procedure, as negotiated with the Union, and will be at the rates of pay, benefits, and working condition provisions in effect on that date. You will, of course, be expected to achieve and maintain the acceptable levels of production in accordance with the procedure negotiated with the Union as proven by subsequent events, including a satisfactory performance by fellow employees since your termination. In the event that you are unable to return to work on March 1, 1994, please call the undersigned to make arrangements to return to work as soon as possible after that date, or to discuss your future employment at Alwin Manufacturing.

Woodcock told Schmitt that, under the Company's proposal, all employees who had been disciplined for not having met or maintained the previously imposed production standards, including those discharged, would come back with a clean slate. Schmitt asked whether the proposed offer to reinstate the seven employees and union acceptance of the Respondent's contract offer were interdependent. Woodcock said that they were not; the reinstatement proposal was not part of the Respondent's final offer. For those who did not want reinstatement, the Company was prepared to offer a lump-sum payment on receipt of a full release. When Schmitt asked how much the lump-sum payment would be, Woodcock replied that he did not know and asked if Schmitt had a proposal. Schmitt suggested that those individuals be made whole. Later, in that session, Woodcock announced that the Company was going to offer \$10,000 lump-sum payments to terminated employees who waived reinstatement and signed releases saving the Company from future and current liability. When Schmitt asked whether the Company intended to appeal if Judge Scully should order full backpay, Woodcock replied that he did not know.

Answering Schmitt's query as to what the Union could do to avoid the proposed reductions in wages and benefits as part of a five year contract, Woodcock declared that nothing could be done. Even if the Union agreed to all of the Company's language changes, there still would be substantial cuts in wages and benefits.

In discussing vacation scheduling, Schmitt told the Company that the parties were so far apart on the contract that it really didn't make much difference.

²⁰ The seven terminated individuals who received these letters were Harold Basinski Jr., Jessie Del Marcelle, Peter Filipiak Jr., Robert E. Hudson, Michael Mahlik, Robert Pallock, and James L. Plog. In addition, the record shows that employees Kevin DeKeyser and Joseph Mir had been suspended for failure to meet the standards, while Diane Miller and Alan Desotell had received warnings.

After having met for about 3 hours, the parties took a 1-hour lunch recess.

After lunch, the Company gave the Union its best and final offer and agreed to the Union's proposal that leaves of absence for union business, upon 3 days prior notice, be approved for up to five employees to a maximum of 10 days per year. The Respondent also, for the first time, agreed to permit leave to attend to Local Union business, as opposed to just allowing leaves for International Union affairs. Agreement was reached on bereavement leave which, for the first time, was expanded to also allow absence for the loss of stepchildren.²¹

The Company's final offer, consisted of two parts—a proposed contract and an attached memorandum of agreement covering pensions, health insurance, group leaders, production standards, vacations, and bonuses.

As to production standards, the Respondent's final position basically did not change. Schmitt again was told that the Company's proposal on production standards was designed to resolve all outstanding grievances and unremedied unfair labor practices. In its proposal, the Employer still intended to unilaterally establish production expectations for all manufacturing jobs and to maintain in effect all production standards which were in place on February 28, 1994. They would not be subject to challenge either by union timestudies or by the grievance procedure.

The Respondent, in its final offer, adhered to its earlier position as to the reduced amounts of vacation employees were to receive predicated upon increased years of qualifying service, partially offset by the proposed bonus program. Employees who worked less than 1600 hours in a year still would not qualify for vacations. Employees, who by virtue of 20 and 25 years of service under the former contract, had become entitled to respectively 5 and 6 weeks of vacation would, under the final offer, receive bonuses of \$100 and \$200, respectively, for the vacation weeks they no longer would be able to take. Woodcock maintained that the Company considered vacations an earned benefit and that employees who were on workers compensation or any kind of medical leave for various time periods were not earning that benefit.

The Employer also initially had proposed that the reduced vacation times apply retroactively so that employees would lose vacation weeks earned earlier during 1994. According to the Company, the terms of whatever agreement was in effect, would govern the vacation schedule. Since the proposed effective date of the new contract was to be March 1, 1994, employees previously entitled to 6 weeks vacation who had not taken same until after March 1, 1994, would have their vacation entitlements reduced to 4 weeks. Although the Respondent never varied from its intent to eliminate the existing fifth or sixth weeks of vacation or that, whatever was agreed on with respect to vacations would become applicable as of March 1, 1994, during that session, it later did agree that employees eligible under the old contract for 5 or 6 vacation weeks could take them during calendar year 1994 and that the anticipated reductions would become effective January 1, 1995. This would delay the effective date by a year. Schmitt replied that the Union was not going to agree to any reductions in wages and benefits as long as the Company was proposing taking away a

²¹ From the Union's standpoint, the above changes in union business and bereavement leaves were the only improvements of any type over what had been provided in the prior collective-bargaining agreement.

floating holiday and the fifth and sixth weeks of vacation. The Union would make no counterproposal or accept any remaining holiday and vacation language not been agreed to at that point.

In practice, while negotiations were taking place, the Respondent had been limiting its employees' ability to take single days of vacation at a time. There were to be no individual vacation days, only block periods of at least a week. The Employer's subsequent continued insistence on receiving one week's notice before granting a single day off later was modified to permit employees to take up to 2 days of single-day leave in the event of illness.

The Respondent proposed increasingly lower starting hourly pay rates for new employees as negotiations progressed. In its initial December 16 proposal, the Company had advocated that the technician starting rate be \$9, that the rate for spray painter be \$8.50, and that the rate for production operators be \$8. Under the Respondent's February 24 proposal, the starting wage would be \$7.50 for new employees in all classifications, which rate further was reduced in the Respondent's February 28 final offer to a starting range of \$5.50 to \$7.50. The new, lower, \$5.50 starting rate was to be applied to newly hired production operators, which classification was expected to comprise the great bulk of the future work force.²²

Incumbent employees were to be affected, not by the lower starting rates, but by the approximately \$3/hour reductions in the pay maximums for their classifications which, under the Respondent's final offer, except for partially offsetting bonuses would be frozen in place for 5 years.

Under the Company's proposed two-tiered wage system, employees hired after March 1, 1994, would come in at the new rates, and then receive 25-cents/hour-wage increases every 6 months during the term of the contract until reaching the maximum for their respective classifications. As noted, all employees who had been in the bargaining unit as of March 1, 1994, would be payout by receiving the reduced maximum hourly rates. In lieu of wage increases, these employees also would be given quarterly bonus payments totaling \$650 for the first year, gradually increasing to a combined \$1000 for the fifth year. The Respondent's February 28 bonus proposal represented an increase over what it had offered during the February 23 and 24 sessions. The Union counterproposed that there be no reduction in wages, while accepting the bonuses.

On medical health insurance, under the Respondent's final offer, deductibles for medical health insurance were reduced to \$200 and \$600 from the previously proposed \$250 and \$750, respectively, for single person and family coverage. The Respondent improved its previous offer by proposing to pay 85 percent of the premium cost with the employees contributing 15 percent. As per the previous offer, but contrary to the then-extant collective-bargaining agreement, the lifetime maximum benefit would be \$2 million. The company-paid pension plan would continue as under the then existing contract, funded at the level of the last year of that agreement,²³ but the life insurance provision would be removed.

²² Church did not recall whether the proposed \$7.50/hour at the high end of the range was to apply as the starting rate for all other classifications.

²³ During each of the 3 years of the prior collective-bargaining agreement, the provided payment for each employee covered by the pension plan increased by \$1 per month per year of credited service. Under the final offer, there would be no increases during the 5 years of the proposed contract.

For the respective reasons indicated above in connection with prior sessions, virtually all earlier areas of disagreement between the parties continued through the February 28 session—on the Respondent's efforts to expand the management-rights article; on the grievance procedure, both with respect to the contrasting time periods to be allotted to the respective parties to act at the different steps and as to the limitations on the movements of grievance committee members in processing employees' grievances; on the compression in the number of job classification and the redesignation of so many employees as production operators; on changes in overtime and starting times; on the elimination of cleanup times; on when probationary employees would receive health care coverage; on the reduction in the role of seniority in temporary transfers, job bidding, layoffs, and recall; and on the use of part-time, temporary and leased employees to replace unit employees who should retire or otherwise leave the Respondent's employ.

When the Union did not accept the Respondent's final offer, Woodcock declared that he considered the parties to be at impasse and that the Company would implement its final offer on the following day.²⁴ Schmitt told Woodcock that it was a sad day. Woodcock said, "Well, we will look forward to the future tomorrow." Woodcock told the Union that, if conditions improved, the parties always could get together during the term of the labor agreement and discuss things. Schmitt retorted that that would be like a cold day in hell.

The Company agreed to provide sufficient copies of the final offer for distribution to the union membership for their vote on the final offer. Union Committeemen John Tilly and Mike Martin waited for those copies while Schmitt and Local Union President Peters went to the hall to make sure everything was set up properly.

2. The February 28 strike vote; the start of the strike

Unlike the negotiating sessions, there was a factual contest as to events occurring at the February 28 union meeting, where the union membership rejected the Respondent's final offer and simultaneously voted to strike. This meeting was held at Kut-ska's Hall in Howard, Wisconsin, a western suburb of Green Bay, and was attended by Schmitt, the local union bargaining committee and 118 unit/union members, all of whom participated in the vote.

Schmitt testified that, at that meeting, union officials passed out copies of the Respondent's final offer to each member. Schmitt then read through the final proposal, page by page, pointing out the company-proposed changes and the Union's objection to each. When the proposal had been discussed and the questions answered, a secret-ballot vote was taken. The results of that vote were 115 to reject, 2 to accept, and 1 void ballot. The ballot question put to the membership was whether they accepted or rejected the Company's proposal. Before the vote was taken, a discussion occurred as to whether to have a separate strike vote should the contract be voted down or whether a vote to reject the final offer was to be considered as an automatic vote to strike. A majority of the members decided that a vote to reject the contract simultaneously would be a vote

to strike. Prior to the vote, Schmitt, on behalf of the union leadership, recommended that the employees reject the final offer.

Highlighting Schmitt's stated objections to the final offer before the vote, reindicated during his review of same with employees, Schmitt pointed out that the Union would be unable to challenge any production standards in effect before March 1, 1994. This, according to Schmitt, was important because the members knew the employees who had been disciplined, and even terminated, for not achieving or maintaining those minimum production standards. With no ability to challenge the fairness of those standards, employees could not know if they were going to be the next candidates for disciplinary action. At the time of this meeting, on the issue of production standards, there were 60 to 70 related unresolved grievances and the pending decision in *Alwin I*.

In reviewing the proposed wage decreases, Schmitt testified that he told the employees that approximately 90 percent of them would undergo a wage reduction of \$3.04 an hour over the term of the 5-year agreement, which would result in a \$30,000 pay loss per person. There would be no wage increases during the contract term and that the per capita company-proposed bonuses over the 5 years would total about \$3450. Accordingly, the employees still would have a net loss of approximately \$27,000 during the proposed contract term, without considering cost-of-living increases.

Schmitt described to the employees the company-proposed changes in the vacation schedule and their foreseeable impact. Approximately 25 long-term employees would lose either their fifth or sixth weeks of vacation and about 40 employees would lose 1 week because of the increased qualifying employment periods.

The loss of a paid holiday was mentioned and the employees were advised that the temporary transfer language of the seniority section of the labor agreement, under the final offer, was to be changed to enable the Company to transfer employees for up to three months without regard to seniority. Such 3-month periods could be extended even further by temporarily transferring employees from their regular jobs for periods of 2 months and 29 days and then returning them to their original positions for a day. The Company then immediately again could temporarily reassign such employees for virtually another 3 months before returning them to their regular work stations. This could effect job bidding under the contract since, if the Employer could temporarily transfer its employees at will, it would be likely to post very few jobs.

Schmitt pointed out the proposed changes in the job posting procedures under which employees were to be chosen on the basis of skill, ability and qualifications, with seniority reduced to a smallest consideration. There no longer would be an automatic trial period. The clause in the then-expiring contract which provided that transfers, temporary transfers, layoffs, recalls, etc., were to be based on strict seniority providing that the employees were qualified to perform the job, was to be completely replaced. Schmitt told the employees that, under the final offer, the role of seniority generally would be reduced in defining bumping rights should there be a reduction in the work force.

The employees were told that the management-rights clause was being changed so that the Company could make decisions, at will, in all areas where employee rights were not preserved by specific contract language. The Company would be able to unilaterally establish attendance schedules and disciplinary

²⁴ On the method of reaching impasse, Woodcock, throughout the negotiations, had advised the Union that, if the Company made a proposal which drew no union counterproposal, the Company would assume that the parties were at impasse on that issue because it was looking for compromises to be made in the form of movement from the other side.

programs, items which in the prior agreements had been negotiated. There would be loss of time and one-half overtime pay for Saturday work and that overtime premiums would be paid only when employees had worked over 40 hours in a week, as opposed to eligibility for same after above 8 hours work in a day. Washup times before the noon break and quitting time would be lost.

Schmitt explained that the Respondent's proposed provisions for virtually unrestricted use of part-time, temporary, and leased employees could be used to erode the bargaining unit since the Company could utilize them to replace bargaining unit employees who had retired, who had terminated their employment, or who had been terminated by the Company. There was no understanding in the final offer that such individuals ever would come under the terms of the labor agreement; the Union did not know what they would be paid.

A remaining major item reviewed before the vote was the grievance procedure. The union leadership's explained that the Respondent's proposed grievance procedure was designed to make it more difficult for the employees and Union to process grievances. Because the time limits in which action could be taken on the employees' behalf at the various grievance steps were being shortened, it would become easier to miss them. Schmitt pointed out a proposed new provision in the grievance procedure that any grievance not processed by the Union within the time limits set forth would be considered settled on the basis of the Company's last answer. Even if the Company's last answer should be more bothersome to the employee than the subject matter of the original grievance, if that grievance was not processed during the prescribed time limits, there would be no recourse. At the same time, the Employer's times to act in the various grievance steps would be lengthened.

Schmitt testified that some employees reacted angrily, shouting that the Company was guilty of unfair labor practices; that it had not bargained in good faith. Schmitt told the employees that, sometimes, something described as unfair might not necessarily be a violation of the law, but that he would be talking to his director and to the Union's attorney to see whether in fact the Company had been guilty of bargaining in bad faith.

As noted, the vote then was taken to reject the final offer and to strike. When the meeting ended, Schmitt called Church and informed him of the membership's decision. Church said that he was sorry to hear this. Schmitt told him that the Union was ready to meet and try to iron out their difficulties to arrive at a contract settlement. Church's reply was, "Okay, if and when."

The strike began on March 1, 1994, at 12:01 a.m.

Grievance committee member Kevin DeKeyser²⁵ also described reasons for the strike, testifying that, on about March 1, he was called by a reporter for the local Green Bay newspaper, *The Press-Gazette*, who had asked the reasons therefor. In the published article resulting from that interview, which appeared later that day, DeKeyser was quoted as saying that the strike primarily had occurred because of wage give backs, loss of seniority and vacation benefits, increases in the employees' insurance premium payments and the introduction of production standard quotas that employees were required to meet in order to keep their jobs. DeKeyser, in testimony, explained that

²⁵ DeKeyser, employed by the Respondent for about 16 years in a variety of unit positions, most recently in the paint shop, had served as a grievance committee member for approximately 6 years. He participated in the strike, but had not been recalled to work at the time of the hearing.

he had mentioned this because, due to production quotas, he had been on the verge of losing his job before transferring into the paint shop and that he and other employees already had been disciplined to the point of dismissal. DeKeyser's published comments pointed out that the Union historically had worked with 3-year contracts providing for pay increases. DeKeyser stated that the Respondent currently was seeking wage give backs ranging from up to \$3.92/hour for lower paid workers to \$2/hour for senior employees who might have been earning \$12.50/hour, or more. The article also emphasized that the Employer was seeking to eliminate the fifth and sixth weeks of vacation time, to increase the employees' share of insurance premium costs to 15 percent from 10 percent, to raise the deductible on insurance policies and to eliminate triple time pay for holiday work. DeKeyser also was quoted as saying that management was finding reasons to discharge longtime employees by setting unrealistic performance quotas or by placing older workers into jobs they physically could not accomplish within the set standards.²⁶

Jeanette Stuckart,²⁷ testifying for the Respondent, described the February 28 ratification meeting differently than Schmitt. This was the first meeting of this union that she had attended. According to Stuckart, Schmitt was in charge of the meeting, but negotiating committee member John Tilly did most of the talking. Tilly read the Company's proposals, telling the employees while he read, that he did not like them and that the employees should not accept the proffered contract. After Tilly had reviewed the contract, one vote was taken on its acceptability and the employees went on strike. However, before the vote was taken, Stuckart, in effect, asked Schmitt whether, if the Union was having so much trouble in negotiations, was it going to file unfair labor practice charges against the Company. According to Stuckart, Schmitt replied that the Union did not have any grounds to do so. Although Schmitt spoke at the end of the meeting, he did not say that he was going to confer with the Union's attorney or anyone else about whether the Respondent's conduct during negotiations constituted unfair labor practices.

Mary Landry²⁸ also testified as a Respondent's witness concerning the strike vote meeting. She related that Tilly and Schmitt were in charge of the meeting and that a vote to strike was taken. Landry heard Stuckart ask at the meeting if there

²⁶ Schmitt also sent Local 6039 officials a copy of a May 4, 1994 press release announcing the issuance of Judge Scully's above April 27 decision in *Alwin I*. The release, which was given by the Local Union officials to the Green Bay newspapers and television stations, noted that the minimum production standards, found by Judge Scully to have been unlawfully effectuated, was one of the issues in the strike action and also was part of the final contract proposal implemented by the Respondent on March 1, 1994.

²⁷ Stuckart, employed by the Respondent for about 7 years, had worked before the strike on the main line, assembling and testing cabinets. A union member who had been active as such at her place of prior employment, she joined the March 1 strike at its inception, but returned to work during the second week. At the time of the hearing, Stuckart was a group leader earning above the senior production rates under the Respondent's newly implemented contract terms.

²⁸ Landry, employed by the Respondent before the strike in assembling and testing cabinets, had been with the Respondent for about 5 years at the time of the hearing. Like Stuckart, she initially joined the March 1 strike as a union member, but also returned to work during the second week. At the time of her testimony, Landry, too, was a group leader.

was any way the employees “could come back with the Company on unfair labor bargaining.” Schmitt replied the Company had bargained faithfully.

The February 28 session was the first union meeting Landry attended. While Schmitt and Tilly did most of the talking, contrary to Stuckart’s account, Landry related that It was Schmitt who reviewed the Respondent’s proposal with the employees and expressed his difficulties with it, a process in which Tilly also participated. Landry did not recall whether, during the course of that meeting, Schmitt, as he testified, had told the employees that some conduct might be unfair but not necessarily illegal or that he was going to confer with counsel about the lawfulness of the Employer’s conduct and the strike.²⁹

I credit Schmitt’s account of what occurred during the February 28 union meeting. His recollection was clear and consistent with the weight of the evidence and of logic. While Schmitt may not have wanted to express an independent legal opinion to the membership as to whether the Respondent had bargained unlawfully without first consulting with the Union’s attorney and his own superiors within the Union, contrary to Landry and Stuckart, it is not likely that Schmitt would have said anything detrimental to the Union’s legal position just before a strike vote. This view is reinforced by Schmitt’s having attended 14 bargaining sessions during which the Employer persistently had sought to unravel virtually all of the economic and noneconomic terms of the prior collective-bargaining agreement and had pushed to asserted impasse on a final offer which included the two unremedied unfair labor practices previously litigated in *Alwin I*. Schmitt had been a principal witness in that matter. Accordingly, from the record of this case, it is difficult to find that Schmitt had told employees, while urging that they vote to reject the final offer and strike, that the Respondent had bargained in good faith.

3. Implementation of the Respondent’s final offer

Schmitt, as noted, called Church after the February 28 union meeting, informing him that the employees had voted to reject the Respondent’s final offer and that they would begin to strike at 12:01 midnight that night.

It is undisputed that on the following day, March 1, 1994, the Employer implemented its final proposal in its entirety. This proposal, as put into effect, included the previously litigated provisions later found unlawful in *Alwin I*—the unilaterally imposed minimum production standards and the above changed vacation policy.

Schmitt called Church approximately 2 weeks after the start of the strike to ask what the replacement workers and union members who had crossed the picket line were being paid. Church advised him that union members who had returned to work were being paid the top rates for the jobs they were working and that the replacement workers were being paid the starting rates, all as provided in the Company’s implemented final contract offer.

4. The August 26, 1994 negotiating session

The next and last bargaining session relevant here occurred on August 26, while the strike still was in progress.³⁰ Schmitt

²⁹ Landry had poor recollection of the contract topics discussed and found objectionable at the February 28 meeting. Where she could recall referenced topics, she had difficulty remembering what had been said.

³⁰ By August 26, the Board had issued its July 28, 1994 decision in *Alwin I*.

had initiated the process shortly before by calling Church and requesting a date for negotiations which later was agreed. This was the first session since the start of the strike, although Schmitt had called Church almost weekly from about the third week in March until May to ask if there was any change in the Company’s position and about renewed negotiating sessions.³¹ Schmitt, however, had not specifically requested a meeting. Church’s reply basically had been that, if the Union was willing to come over to the Company’s position, the parties could sit down.

The August 26 meeting, held at a hotel in downtown Green Bay, was attended by Federal Mediator Dean Cedarstrom and by the same negotiating teams as before—Woodcock, Thiede, Prust, and Church for the Respondent and Schmitt, Peters, and Tilly for the Union.

The Union submitted its prepared counterproposal. Schmitt identified certain priority items which had to be resolved and reviewed its proposal with the Company. These key issues included wages, production standards, seniority, the rights of union members to come back to work, and the revocation of disciplinary actions taken for alleged picket line misconduct. The Company’s position on the wage proposal was unchanged. Woodcock said that the Company would not debate whether or not it could afford to pay the labor rates of the expired contract.

On production standards, Schmitt had proposed that those standards that were in effect prior to March 1, 1994, be subject to challenge by the Union. Woodcock said no. Schmitt then went through a counterproposal on production standards and made a proposal on seniority. The Company’s position in these areas remained unchanged. On the replacement worker issue, when Schmitt proposed that all striking bargaining unit employees who wished to return to work be so entitled, the response was that that was possible. The Company’s answer to the proposal to rescind disciplinary actions taken against employees for alleged picket line misconduct was that the parties could talk about it.

The Union, in its proposal, declined to accept wage decreases proposing instead that there be no wage increase the first year of the new contract with 3-percent pay increases during both the second and third years.

In addition to wages, the Union proposed increasing the life insurance program, the accidental death and dismemberment coverage, the sickness and accident benefit and the pension factor. Woodcock told Schmitt that these proposals were 180 degrees from where the Company needed to be; they did not recognize the Company’s need for a reduction in labor costs; none of the Union’s proposals provided a reduction in labor costs. Since the strike had begun, the Company’s customers continued to demand price reductions. Market studies concerning the company-proposed wage rates showed that they were in line with what the pay was for comparable work in the Green Bay area. He asked what the Company had to do to get such a

³¹ Schmitt testified that when he called Church on May 4, his last conversation before the series of calls that set up the August 26 meeting, Church again asked if the Union was willing to come over to the Company’s position but, in response to Schmitt’s query, had expressed a need to consult with other management members to find out if the Union would have to come over all the way. When Church called Schmitt back, he asked if the Union would accept the Company’s last offer. Schmitt, after polling the members in attendance at a weekly union meeting, declined to do that. Accordingly, the standoff continued.

decrease. Schmitt replied that his membership was adamant about not taking wage reductions while they also were losing seniority.

Schmitt reiterated that he did not know if the established production standards were fair. Employees working under the standards were being threatened with job loss and were toiling at, perhaps, 140 percent. Woodcock initially stated, as many times before, that since the employees had proved before the strike that those standards had been fairly established, he did not see why the Union needed to challenge those already in place. However, during the August 26 meeting, Woodcock significantly moderated his position, telling Schmitt that, if this was a problem for the Union, the Company, having established the standards fairly, was not afraid to have them arbitrated. This would include those already in place. Woodcock saw Schmitt's unwillingness to talk about wage reductions as the impediment to getting a contract, not the Company's willingness to have the production standards tested. He declared, for the first time, that Schmitt was free to have a time study expert come in and look into the standards even though the Union (because of the strike) did not then have any people working at the plant.³² If any standards were deemed inappropriate, the parties could arbitrate those standards. Woodcock asked if Schmitt wanted to do this. Schmitt said no. Schmitt also declined Woodcock's repeated invitation to negotiate wage reductions and, also, the results of the Board proceedings in *Alwin I*.

During the August 26 session, Schmitt asked for data concerning the Employer's financial condition. Woodcock replied that profitability was not the question; the market place was. Woodcock stated that the Company had provided documentation to the National Labor Relations Board's Regional Office. All Schmitt had to do was read the newspaper about what has happened at Scott Paper. The Respondent did not furnish requested financial information to the Union.³³

Schmitt also asked for the Employer's position with respect to the return to work of striking employees and the treatment of replacement workers. Woodcock said that they all would be treated according to the law.

The August 26 meeting ended with no new agreement or with any indication that the Respondent had taken, or was about to take, measures to comply with the Board's Order in *Alwin I*. In this regard, Church testified that, at no time during the August 26 session, did the Company agree to rescind the production standards that had been put into effect and maintained, as, inter alia, required by that order. To Church, as he testified, that issue still was in dispute. While the Respondent offered on August 26 to have the unilaterally-imposed production standards tested and, if necessary, arbitrated, it never rescinded them.

On the issue of the unilaterally effectuated changes in vacation policy, also remedied by the Board's *Alwin I* Order, the Employer, contrary to that order, continued without interruption to the time of the hearing its above proscribed practices, initiated in 1992.

³² When the offer to permit arbitration of existing production standards was made, there were less than 10 nonstriking employees who had been members of the Union's bargaining unit at work in the Respondent's facility.

³³ The Respondent's refusal to furnish financial data when requested by the Union was not alleged as violative in the consolidated complaints and, accordingly, no finding concerning that refusal is made herein.

5. The unconditional offer to return to work; the Respondent's reaction

On October 27, 1994, Obert Joel Vattendahl, director, Steelworkers District #32, to whom Schmitt reported, sent a letter to Church advising that the strike by members of the Steelworkers had been terminated as of that date and that the Union was making an unconditional offer to immediately return to work. Church's November 1 response to Vattendahl acknowledged receipt of his letter containing the Union's unconditional offer to return to work made on behalf of all employees represented by Steelworkers Local 6039. Church expressed pleasure that the work stoppage had terminated and announced that the Company was placing those strikers seeking to return on a preferential hiring list and would recall them by seniority and ability to perform the available work, in accordance with the Respondent's last, best offer, as available permanent openings occurred.

Thiede testified that, at the end of October 1993, there had been approximately 123 employees in the bargaining unit. The Respondent hired replacements during the strike, advising when engaging them that they were permanent replacement employees hired to fill openings wherever they occurred. While Thiede testified that subsequently, in October 1994, the Respondent had from 80 to 85 employees performing unit-type work, the seniority list he propounded for that time period showed 96 names.

6. Bypassing the Union; direct negotiations with employees

On November 2, 1994, without advance notice or discussion with the Union, Church sent copies of a questionnaire to all former strikers acknowledging receipt from the employees' union representative of an unconditional offer to return to work made on their behalf. So that the Company might know who would be available to return to work, the Respondent asked that the recipients return the letter, circling on its bottom, the "yes" or "no" answers to questions set forth there as to whether they were available to return to work immediately or whether they would not be returning to work.

Schmitt learned of this questionnaire after it had been sent when Local Union President Peters gave him his own copy. Vattendahl responded with a November 14 letter to Church wherein he acknowledged receipt of Church's November 1 letter refusing reinstatement to the former strikers and which maintained the Respondent's previous bargaining position. Vattendahl related in this letter that he recently had learned that the Company was communicating directly with the former strikers rather than the Union concerning their availability for employment. He expressed the Union's disappointment in these actions, which would be vigorously pursued as additional violations of the Act. Vattendahl requested resumption of negotiations and for certain information concerning persons then employed in the bargaining unit. The Respondent did not reply to Vattendahl's letter.

Earlier on March 1, the first day of the strike, Company President Krueger sent copies of a three-page "Dear Employee" letter to all striking employees stating his regret that, after several weeks of "good faith contract negotiations," the parties had not been able to reach agreement and that the Union had called a strike. That the employees might know their rights and those of management during a strike, Krueger pointed out that employees had a legal right to strike, or to refuse to strike and remain at their jobs; that the Employer had the right to operate

its plant during a strike; that the Employer also had the right to hire new employees on a permanent basis to replace employees who were on strike; and that “[a]s a striking employee your employment may be terminated and you could be replaced by a new employee subject only to your preference for hire if an opening occurs in the future.” In sum, the letter urged employees not to join the strike and advised that, in addition to lost wages and no unemployment compensation, the employees also would have to continue their insurance on their own.

Church testified that, during the strike, certain striking employees had contacted him about returning to work and that about ten of them did come back. Church told each of these returnees that the Union could, and had the right to, fine them should they go back to work and that the only way to avoid this was to resign from the Union. Church asked that these employees provide him with copies of their resignations in the event that they left the Union. The parties stipulated that, during March and April 1994, the Respondent received letters or documents purporting to be resignations, or relinquishments of membership in, the United Steelworkers of America and/or its Local 6039 from nine employees—Wayne Ulmen, Alan Pierquet, Mark Kittell, Mary Landry, Mary Magnin, Pamela Tim, Joy Tourtillott, Jeanette Stuckart, and Shelby Brusky.³⁴

7. Prestrike disciplinary actions for failure to meet the minimum production standards; further direct negotiations with unit employees

Before the *Alwin I* decisions were rendered, but after the hearing in that matter had closed, the Respondent, as noted, had sent the above-described identical February 25, 1994 letters to seven individuals who had been terminated for not having met the production standards—Harold F. Basinski Jr., Robert E. Hudson, Robert Pallock, Peter Filipiak Jr., James L. Plog, Jessie Del Marcelle, and Michael Mahlik.³⁵ These letters, copies of which were furnished to the Union during the February 28 negotiating session, had offered the employees reinstatement subject to their future ability to meet the assertedly negotiated production standards. The Respondent noted that the production standards in effect when the recipients were terminated had been deemed appropriate and acceptable for all employees. The Union, of course, disputed the accuracy of these representations.

On April 13, 1994, Church sent identical letters to each of the above seven terminated employees. These letters reminded the recipients that, during collective-bargaining agreement negotiations, the Company had informed the Union that it was extending to all employees terminated under the production standards an alternative to reinstatement—a \$10,000 lump sum severance payment.³⁶ Acceptance of this offer would require

³⁴ The record shows that, following their return, Ulmen became a supervisor and Landry, Magnin, Brusky, and Stuckart became group leaders.

³⁵ In addition to the seven above-named dischargees, the Respondent also had suspended for the same reason employees Kevin DeKeyser and Joseph Mir. Two other employees, who had worked as a team, Diane Miller and Alan Desotell, had received documented verbal warnings. The above seven dischargees, before finally being terminated, also had been variously warned and suspended for not meeting the minimum production standards.

³⁶ Noting that Church could not recall if the Union had agreed to this \$10,000 or lump sum reinstatement alternative, I credit Schmitt’s unequivocal testimony that the Union’s consistent position had been that these employees be made whole.

that the employee waive reinstatement rights and provide the Respondent with a full release from liability under the Americans with Disabilities Act, the Age Discrimination in Employment Act, any pending grievances, unfair labor practice charges, Equal Employment Opportunity charges or State of Wisconsin Department of Industry, Labor, and Human Relations charges. The letter noted that this alternative still was open to the recipients. By the hearing in the present matter, of the seven named dischargees, Basinski, Hudson, and Mahlik had accepted and were paid the \$10,000 in alternative to reinstatement. The others, notwithstanding the Board’s order in *Alwin I*, have received no backpay. Del Marcelle and Pallock never responded to the offer. Filipiak expressed an interest but never followed through. The record reflects no response from Plog.

The General Counsel and Union contend that in making the offers of qualified reinstatement and in making and pursuing the alternative lump-sum offers, Church bypassed the Union and dealt directly with the employees to whom these overtures were made. These parties further contend that these offers were insufficient for compliance with the Board’s subsequent Order in *Alwin I*.

8. Disciplinary actions taken against employees since the strike for failure to meet the minimum production standards

a. Sheldon Anderson

It is undisputed that, from the start of the March 1, 1994 strike, and after the October 27, 1994 unconditional offer to return to work, the Respondent applied to its replacement employees and to the returning strikers the terms of its implemented final contract offer. As noted, those terms included the minimum production standards that had been in effect before the start of the strike. This production quota policy affected returnees Sheldon Anderson³⁷ and John Tilly. Anderson became the first striker to be offered employment by the Respondent. The parties stipulated, with respect to the period before Anderson’s December 1994 recall to work, that from March 1 through October 20, 1994, the Respondent had issued one formal disciplinary notice to a nonprobationary employee for failure to achieve minimum production standards.

Church called Anderson on Friday, December 8, 1994, asking if he wanted to come back to work. Church told Anderson that there was no opening in the warehouse where he had worked before the strike, but that production operator jobs were available if Anderson would take one of those positions. Church gave Anderson the option of waiting until there was a warehouse opening or of coming back immediately in a production department. When Anderson agreed to accept the then-available production job, Church declared that he would get a registered letter through the mail and that Anderson was to report to foreman Bob Schenk.

As directed, on Monday, December 11, Anderson reported to Schenk, who assigned him in drive rollers³⁸ and general assem-

³⁷ Anderson, employed by the Respondent for about 41 years and the most senior bargaining unit employee, had worked at the warehouse in shipping and receiving for approximately 20 years before the start of the strike. There, he had made out shipping orders and had helped load trucks. A member of the Union since 1961, Anderson participated in the strike from its beginning until it ended in late October 1994.

³⁸ Anderson had worked in roll towel, then-called finish assembly, for 10 years—1965 to 1975—before going to the warehouse. At that

bly to putting pins in rollers and installing a spring. As described by Thiede, the operation involved using a rubber roller that was molded onto a shaft. The employee hammered a pin into one end, put an antireversing spring on the other end, put the completed pieces in a box and, when filled, placed the box on a pallet. Since Anderson did not know how to do these tasks, Schenk demonstrated by doing two or three pieces. He told Anderson that the employees who did this work usually averaged about 180 (units) an hour and that the Company usually gave newly assigned employees a couple of days to meet this standard.

On December 16, Schenk informed Anderson that he was not getting out the required amount of work. At the time, Anderson was producing about 130 to 135 units/hour, as compared to the 180 unit standard. Anderson replied that he was doing the best he could. Nothing more was said until the end of the day when Schenk took him to the office of Director of Manufacturing Thiede, where Anderson met with Thiede and Schenk.

Thiede declared that Anderson was not meeting the expected quota. Anderson said that he was doing the best he could. Thiede retorted that Anderson was making a meager effort. Anderson reiterated that he was doing the best he could; he was not "goofing off." Anderson then was given a disciplinary notice signed by Schenk—a verbal documented warning. This noted that Anderson had been told what was expected of him with regard to the minimum production standards on the specific job in drive rollers and that he had been given the remainder of that day and the next 3 days to meet that requirement. Anderson had not reached that standard during that time period and, on December 16, again had been reminded of what was expected and was informed that continued failure to put forth good effort to meet this minimum production requirement might subject him to further disciplinary proceedings up to and including discharge.

Anderson continued to work on the same drive roller job on the following day, December 17. Near the end of that day, Anderson was called to Thiede's office where, again, he met with Schenk and Thiede. Thiede told Anderson that he was not putting out what he was supposed to on the quotas. Anderson again responded that he was doing the best he could. Thiede countered that he was not and stated that Anderson could be in for a layoff if he did not produce. He informed Anderson that, under the rule of 75 provision, he could bump into a different department.³⁹ Thiede recognized that Anderson was 60 years old and did not think that he should be able to produce just like the next guy. Anderson then was given the next, written documented warning for failure to meet the minimum production standards on the drive roller job. This warning essentially was an extended repetition of the documented verbal warning issued earlier.

On December 20, Anderson was offered a rule of 75 move at a meeting in Thiede's office with Thiede and pressroom foreman Lee Stueber. During this session, Thiede reiterated that Anderson was not doing the job in general assembly and roll towel. Anderson repeated that he was doing the best he could.

time, some Finish Assembly employees riveted backs on cabinets and others installed locks, functions Anderson principally had performed during his years in that department.

³⁹ Under the contractual rule of 75, an employee whose age and Company seniority totaled 75 years could exercise a one-time option of bumping into a different department at a lateral or lesser-paid job.

Thiede again advised Anderson that under the rule of 75 contract provision, he had one chance, if he desired, to go into another department. When Anderson expressed interest, Thiede told him that he could choose any production department he wanted. Anderson said he would go into the pressroom. Thiede informed Anderson that, in the pressroom, he would be working under Stueber running different presses. Thiede never offered to return Anderson to the warehouse. When Anderson asked if there was an opening in the warehouse, Thiede replied that, if there was, he could go back there.

After Anderson's December 20 meeting with Thiede, he reported to the pressroom where he worked with different presses. For the first few days, he stamped out blanks for Sanitor cabinets, after which he stamped out face plates. Thiede had told Anderson that he had to put out specified numbers of units per hour; there were different quotas for different jobs. On December 22, Stueber and Thiede told Anderson that he again was not doing what he was supposed to. Anderson answered that, since he had not worked in that department before, it was taking him more time.

On December 22, Stueber took Anderson to Thiede's office where he met with Stueber and Thiede. Thiede told Anderson that he was not doing the right amount of work. Anderson replied that he was new on the job and was doing the best that he could. Anderson then was given written notice, signed by Thiede, Church, and Stueber, of a 3-day disciplinary layoff, administered from December 22–26, 1994. This suspension cost Anderson holiday pay because he had been ineligible to work on the requisite days before and after Christmas Day. Anderson responded to the charge that he had been putting forth a meager work effort by stating that he did not so consider it. He had been doing the best could, had not taken breaks and had been working straight through. The layoff was unjust.

As directed, Anderson returned to work in the pressroom on December 27. On December 29, Supervisor Roger Diederich accompanied him to another meeting with Thiede. There, Thiede again accused Anderson of not putting out like he was supposed to. Anderson again answered that he was doing the best he could and thought that he was doing a fair day's work. At that session, Anderson was given a discharge caution signed by Thiede and Diederich and acknowledged by Anderson. This document recited the prior warnings given to Anderson since his return, stated that his work performance, as observed by his immediate supervisor and by Thiede on December 28, continued to be subpar, that Anderson continued to have very little interest in performing his job, that he was putting forth as very meager work effort and that, as a result, continued failure to put forth a good work effort as a production operator in the press and assembly department might subject him to discharge. Responding to these charges, Anderson again told Thiede that he was doing the best that he could and that he could not see how Thiede could say that he had no interest in his job. Anderson wanted to continue working.

On Anderson's return to work in January 1995, he was assigned to another job—the 970 line. On this line, sheet metal was formed into cabinets by undergoing the folding sequence of four presses; the tops and bottoms were riveted into place; and the newly formed cabinets were put on pallets to be taken to the paint shop. The first form was made on the lead press and thereafter moved to the other presses on a track situated between them. After the fourth press, which made the final fold, the cabinets were conveyed to the riveters so that the tops and

bottoms could be riveted to the cabinets. Seven employees were involved in this operation and, every half hour, the employees were rotated to the next position—moving sequentially to the four different presses and the three riveting stations.

On January 25, Stueber took Anderson to Thiede's office for a meeting with Thiede, Church, and Stueber. Thiede began by telling Anderson that the Company was laying him off because he was not producing the required number of cabinets. Anderson did not respond. Thiede continued that the cabinet hinges and locks Anderson had been riveting had loosened up. Anderson replied that he had not noticed this. Anderson was told that he was holding up the line, was being disciplinarily laid off and that, at the conclusion of his disciplinary layoff, on Monday, January 30, 1995, he would be placed on indefinite layoff status. Should a position open in the warehouse, Anderson would be recalled to fill it. Anderson was given written notice of a 3-day disciplinary suspension for improperly riveting hinges and locks on specified covers on January 20, for inattentiveness and for running inferior quality work. He had been assigned to the job in question on the previous day. The 295 covers that, resultedly, had been run with loose rivets also had sustained bent hinge barrels. Anderson also was given a written layoff notice. This document summarized his work history since his return and the charges against his asserted poor work ethic. The notice concluded that, because of Anderson's long length of service, because this was not his regular job classification, and because he had been unable to attain satisfactory job performance, he was considered unqualified as a production operator. The notice confirmed that, at the conclusion of his disciplinary layoff on Monday, January 30, 1995, he would be placed on layoff status with the possibility of recall to the warehouse should a position open in that classification. At the meeting, Anderson reiterated that he was doing the best he could.

Anderson testified without contradiction that, during his approximately 20 years at the warehouse, he never had been disciplined or told that he had not been performing his work adequately. Although his ability to view the warehouse, to which he had asked to return, had not been good, he did see the trucks moving in and out and estimated that somebody had to be doing the work. In his prior warehouse job, Anderson had used forklifts and although the Respondent employed two forklift operators moving between the warehouse and the manufacturing areas to supply the work areas with raw materials and to take away finished product, he had not been offered a forklift position and did not discuss that prospect with management.

Thiede testified that, since the October 1994 unconditional offer to return, other strikers besides Anderson had been called back to work and, in fact, returning strikers had made up the additions to the Respondent's work force since that time; there were no newly hired production operators. Anderson's own replacement was former striker Bob VanArk, the next employee on the preferential hiring list. Thiede confirmed that Anderson currently was on layoff subject to recall if the warehouse position he had held before the start of the strike should become available. During Anderson's pos-strike employment, and since the strike ended in October 1994, there had been no vacancy in his home warehouse position.

According to Thiede, Anderson, for whatever reasons, had not been willing to attain the standard on drive roller assemblies, his first assignment after his return. Thiede initially had told supervision to put Anderson on the drive rollers because it

was the easiest job with the shortest learning curve. Through Thiede, the Respondent introduced records confirming that Anderson never had produced to standard while working in that area. Thiede personally had observed Anderson from December 12 to 16, and noted that he was working at a slow pace and was not even trying to attain the production standard. For this, it had become necessary to repeatedly meet with and discipline Anderson and to move him to other work. The Respondent's evidence establishes, and Anderson conceded, that he did not meet the production standards for any of the above-described jobs to which he was assigned after returning from the strike. In the pressroom, Anderson produced from 191 to 205 units/hour as compared to the 242/hour standard and that on the 970 body line, he created bottlenecks, smashed the barrel of a hinge and ran 295 pieces with loose hinges which could not be reworked. Accordingly, Anderson was disciplined as described and laid off pending occurrence of a vacancy in the warehouse.

b. John Tilly

John Tilly, a member of the Union's contract negotiating committee, a strike participant and, before the strike, a group leader⁴⁰ in final assembly,⁴¹ was the next to be recalled to work. He returned on December 27, 1994, after receiving a call from Church. As Church described the conversation, he had phoned Tilly after first recalling Anderson, had informed Tilly that the Respondent had a production operator classification open and asked if he wished to be recalled to that job. When Tilly inquired if his old job was available, Church replied that there was no opening in the group leader position at that time, that Tilly could remain on layoff until a opening occurred, but that the Company did have a production operator opening available if he wished to return.

Tilly accepted the production operator position.

Tilly's immediate supervisor on his return, Robert Schenk, assigned him to the drive roller pin area. Schenk told Tilly that he would have approximately 2 days to get oriented after which he would have to meet the 180 unit per hour production quota.

On December 27, Tilly also met with Thiede and Schenk. In response to Thiede's query as to whether Tilly had any questions, Tilly replied that he had none. Thiede told Tilly that he did not want him to go out there and harass anybody. Tilly replied that he thought he was above that. Thiede declared that he would not be able to use Tilly differently from anybody else in the plant. Tilly replied that he had not figured that Thiede would.

Tilly worked on the above-described steel drive rollers but, during December 27–28, he did not meet the 180 piece quota, producing about 160 to 170 units/hour. Supervisor Schenk asked Tilly to remain after a December 29 safety meeting. When the meeting ended, Schenk handed Tilly a verbal docu-

⁴⁰ At all relevant times, the group leader positions were within the bargaining unit.

⁴¹ Tilly, employed by the Respondent for approximately 38 years, was second from the top of the seniority list after Anderson. He had held the group leader's position in the roll towel department for about 5½ years, setting up production lines, setting up and adjusting riveters, assigning employees to jobs and ensuring that they had the necessary equipment. He had spent much time taking apart cabinets for repainting. He had served as group leader over the finish assembly employees who had performed the drive roller job, but had not done that work on an extended basis. His experience long had been limited to briefly demonstrating how the work should be done to newly assigned employees by running one or two illustrative pieces.

mented warning, telling Tilly that he was sorry to have to do this but that Tilly was not meeting the quota. The warning, which noted that Tilly, having been told on December 27 what was expected of him with respect to meeting the minimum production standards set by management, had not attained that standard on December 27, 28, or 29. Accordingly, Tilly was being warned that continued failure to meet those standards might subject him to further discipline. Schenk asked if there was anything he could do. Tilly replied that he did not think that there was. He was applying himself, doing the best he could.⁴² Tilly disputed the accuracy of the sentence in the warning that read, "and that continued failure to put a good faith effort to meet this minimum," because from his return, Tilly had given his best effort. However, such effort never was good enough. He had gone back to the Respondent because he needed the work and had communicated this to Thiede and Church.

After several days on the drive roller job, Tilly did meet the production standards for that position. Following a short evaluation by Supervisors Schenk and Wayne Ulmen, Tilly was reassigned to a different job—the lever and actuator, two parts of the dispensers instrumental in releasing the paper towels. Schenk told Tilly that that the job quota there was 189 per hour. At first, Tilly fell short but again, after several days, he attained the quota.

On about February 1, 1995, Tilly was returned to the drive roller job,⁴³ but did not again immediately attain the 180 unit standard there, producing about 160–165. Accordingly, for this failure, Schenk gave Tilly a written documented warning, dated February 3,⁴⁴ in the presence of supervisor Ulmen. When Schenk told Tilly that he was giving him this written documented warning because he had not met the quota, Tilly replied that he was working at this job the best way he knew and realized that he had attained the quota the last time he was on the job. Tilly protested that he was working to his best ability but had sores on his hand from the earlier lever and actuator job. Schenk did not say respond.

On February 4, Tilly was reassigned to riveting lock catches on covers. This entailed taking the cover out of a box, partially removing its wrapper, riveting on a clip and piling the processed covers on a pallet. Tilly did not meet the production standard for that job. He previously only had riveted two or three pieces to demonstrate to employees how the job was done. It never had been his regular assignment.

On February 7, after a few days on the clip/cover riveting job, Schenk told Tilly that he was not meeting the standard there and brought him to Thiede's office for a session with Thiede, Church, and Schenk. Thiede and Church both told Tilly that his failure to meet the quota for that position would call for a 3-day disciplinary layoff. However, as his age and years of

service totaled 75 or more, under the contractual rule of 75, he could exercise one move option; Tilly could transfer either to become a paint shop helper or a press operator. Tilly, stating that he could not afford to have 3 days suspension, opted for the pressroom position. Because he had accepted the transfer under the rule of 75, his 3-day suspension was waived. Nevertheless, Tilly that date was given notice of a 3-day disciplinary layoff.

After February 7, Tilly was assigned to the press department.⁴⁵ There, Tilly, as part of the above-described 970 line seven-member work team, put emblems on covers.

Lee Stueber, Tilly's immediate supervisor, showed him how to roll form the 957 body, a circular cabinet. This was done by placing a piece of steel on a press roller, removing the steel after its revolution around the roller, piling the processed pieces on pallets and repeating the procedure with the next piece of steel.

On Tuesday, March 28, 1995, at approximately 10:30 a.m., Stueber told Tilly to report to Thiede's office where he met with Thiede, Church, and Stueber. Thiede declared that he and Stueber had been observing Tilly and that Thiede felt that Tilly was putting in a meager work effort on this job. Tilly answered that he was doing the job the way he had been shown. Thiede asked if Tilly had ever thought of having a piece running directly behind the one he was working on. Tilly replied that he had not been shown to do it that way but that Thiede had something there. He acknowledged that, perhaps, he should have done so and stated that, if Thiede and Stueber had been watching him work the wrong way or too slowly, he would have appreciated their telling him at the time. Tilly would have been willing to try because, as he earlier had said, he needed the work. This was why he had come back to Alwin. Thiede answered that that just was something he had suggested. At that session, Tilly was given a 3-day disciplinary layoff notice, dated that day. The notice summarized his earlier production infractions, including the February 3 written warning for failure to attain the drive roller standard on February 2, after having demonstrated on January 3, 4, and 5, respectively, that he could meet those standards; his February 7 inability to attain the production standards for riveting lock springs onto doors; his February 7 exercise of his bumping rights under the rule of 75; and his observed meager work effort in roll forming 957 bodies on March 24. Tilly was warned that continued failure to provide a good work effort might subject him to discharge. Tilly was told that the suspension would come out to 2-1/2 days. Tilly left the shop at approximately 10:45 a.m. and was to return that Friday, March 31.⁴⁶ However, Tilly later was given a bereavement day for March 31 to attend a family funeral.

On his return, Tilly went back to the press department where he mostly performed the same jobs, again embossing the covers and doing punch presswork. Some of the assigned jobs were new to him.

When Tilly received his May 31, 1995 discharge caution, he was working at the lead position on the first press. There, he took blanks off a small pallet, put them in the press, pushed certain handles, took the pressed blanks out of the press, flipped

⁴² Both Tilly and Anderson were disciplined for not having met the production standards on the same drive roller job. Tilly testified without contradiction that the production standard for the drive roller job in question had been effectuated in 1992 and was involved in most of the seven employee discharges in connection with the production standards.

⁴³ Tilly received no explanation from Schenk when the latter sent him back to drive rollers from lever and actuator operation where, as noted, Tilly had been meeting the 189 unit/hour standard.

⁴⁴ The language in the February 3 documented written warning to the effect that Tilly again had been assigned to drive rollers on February 2, instead of February 1, was typographically incorrect.

⁴⁵ Tilly had worked in the press department in April 1957, when he first started at Alwin Manufacturing, and continued there through October 1958 when drafted into the armed forces. When Tilly returned to Alwin, there being no opening in the pressroom, he was assigned to the finish assembly department.

⁴⁶ Tilly grieved the respective disciplinary actions taken against him for not attaining the minimum production standards.

them over and put them on the track for the second operation. The numerical quota for that job was 378 per hour.

On May 31, Supervisor Wayne Ulmen told Tilly that Thiede wanted to see him in his office. Tilly reported there with Robert Pallock, a fellow union member who, as noted, had been terminated before the strike for not having met the production standards, and who subsequently had been recalled. Awaiting them in Thiede's office were Thiede, Church, Stueber, and Ulmen. Thiede and Church began by telling Pallock that he was not meeting the 378-per-hour standard. Pallock replied that he was working to the best of his ability. After giving Pallock a disciplinary notice, Thiede asked Tilly to remain.⁴⁷ Thiede then told Tilly that the Company had recorded him as doing only 298 pieces per hour and that it was management's view that he was not putting forth a good work effort. Tilly replied that he could not do the job any differently; he was working in the best way he knew. Church interjected that he never had seen Tilly with sweat on his back. Tilly reiterated that he was working to his best ability. He told Thiede that in all his work years at Alwin Manufacturing, he never had had to put his hand behind his back when given a paycheck because he had felt as though he had earned each check and more. Tilly then was given a discharge caution, citing his production level that day, as opposed to the standard quota, and that three supervisors had observed him putting out a meager work effort.

The record shows that Tilly earlier had testified on behalf of the Union during the unfair labor practice hearing in *Alwin I*, as he had been familiar with the circumstances surrounding the October 1992 terminations of certain employees in the department where Tilly then had been group leader. The discharged employees had been in Tilly's group when terminated.

In December 1994, when Tilly returned to Alwin Manufacturing, the group leaders' positions in the finish assembly department were filled by employees Shelby Brusky and Jeanette Stuckart who, before the strike, had worked in the roll towel area and consistently had been on the 970 test line. Both Brusky and Stuckart were former Local Union members who had returned to work during the strike.

As in Anderson's case, Thiede testified concerning Tilly's failure, for whatever reasons, to attain the minimum production standards on the various jobs for which he had been disciplined. While agreeing with the general sequence of events described above as affecting Tilly, the Respondent produced records to establish Tilly's performance shortfalls, the ability of other employees to meet these standards and how Tilly's production output, and that of other employees, had been tracked. In areas, such as the pressroom, where the production standards had not yet been time-studied, employees were expected to work to supervisor—computed averages, historical averages, or time-studied averages that had yet to be formally implemented. For each pressroom job, in the absence of standards, the supervisor instructed each employees to produce to the average.

Thiede avowed that the drive roller job to which Tilly was recalled was very simple to perform, was run every day and that Tilly should have been familiar with it, having been group leader in that area. Tilly received the various disciplinary actions described above for failure to meet the required production standards on the various jobs to which these penalties related. Tilly had exercised his one time option, under the rule of

75, of bumping into the pressroom when he had failed to meet the standard for the lever/door assembly job and, thereby, averted the 3-day disciplinary layoff which otherwise would have been his due under the Respondent's system of progressive discipline. His pressroom job was a team assignment and, since the employee who was ahead of Tilly, had had trouble with parts sticking to his die, all Tilly had had to do was produce what the person ahead of him had been producing, which was well below the expected standard. Tilly had failed to do even this and the pieces had been stacked on his machine.

As an indication of the fairness of these standards, according to Thiede, Tilly had been able to satisfactorily meet the drive roller quota on January 3, 4, and 5 and later had performed "excellently" on lever and actuators. Consistent with the company practice of reassigning employees to other jobs, as needed, Tilly was moved from drive rollers to levers and actuators and, later to door assembly, putting lock springs on cabinet doors, because the Respondent had undergone major design changes in which certain dispensers, drive rollers and levers were being phased out. Fewer drive rollers were needed. It, therefore, had become necessary to reassign Tilly as jobs he had been working on no longer were being run every day and as some parts that he had been assembling were being purchased complete. In being so transferred, Tilly had not been treated differently than other employee since all were moved around.

Thiede related that the supervisors, rather than himself, were responsible for the documented written and written warnings that had been given to Anderson and Tilly and that he did not become involved in the disciplinary progression until the suspension process was reached. However, before these warnings were administered, the employees' production was discussed daily with the supervisors. Pointing out that only former strikers, including Anderson's replacement, have been added to the work force since the end of the strike, Thiede denied that the union activities of Anderson and Tilly, including their participation in the strike, had played any role in their treatment by the Respondent. They were disciplined solely for their failure to meet, and in Tilly's case, to maintain, the minimum production standards.

c. Adelaide Carmody

Adelaide Carmody,⁴⁸ unlike Anderson and Tilly, was not alleged as a discriminatee but was called as a General Counsel's witness to attest the Respondent's discriminatory intent with respect to employees who had returned to work after participating in the strike.

Carmody testified that, on May 12 or 13, 1994, during the strike, Thiede had interviewed her for employment in his office. Thiede asked what Carmody was applying for. She told him the press; Carmody had had 15 years' pressroom experience.

Carmody expressed her reservations about crossing the picket line. Thiede answered that it was a tough decision, that the union people were lazy, that they did not want to work, and that they felt they had to have a 10-minute break every hour. Thiede also stated that there were a lot of good people out on the street. When they discussed wages, Thiede said that the Company paid \$6.50 an hour. Carmody noted that the newspa-

⁴⁷ Tilly had been present during Pallock's disciplinary session in his representative capacity as Pallock's union grievance committeeman.

⁴⁸ Carmody worked for the Respondent from May 16, 1994, through May 25, 1995.

per ad she was answering had read \$8.⁴⁹ Thiede explained that employees started at \$6.50 and went to \$9 an hour. When Carmody asked how soon she could be making \$9 an hour, Thiede answered not that long. Thiede told Carmody that it was her choice—if she wanted to come to work for the Respondent, she could do so. Carmody stated that she would come to work. Thiede asked if Carmody wanted to start then. She replied that she would prefer waiting until the next Monday, May 16.

As arranged, Carmody started work on May 16. On her first day, she worked at a riveter on the one piece body line and then moved to the area where welding, riveting, and deburring was done. This was part of the press group but was in a separate room. Carmody thereafter worked there full time except when on leave for 2 months in November and December 1994. Before she took that leave in November, her group leader, Mary Magnin, told Carmody that there were no (production) quotas.

Carmody learned in October 1994 that the striking employee would be returning to work when, as she and other employees were leaving work, they were stopped at the back door by one of the Company's owners—either Vice President Prust or President Krueger. There had been a number of such meetings at that rear door and Carmody did not remember which of the two owners was involved at that specific instance. The owner announced that the Union had abandoned its strike. The striking employees would be coming back as needed but the Company was working on behalf of the employees gathered there and they did not have to worry about their jobs.

Carmody returned to work from her leave on January 9, 1995. Group Leader Magnin always handed out assignments in Carmody's work area. On one occasion, Carmody asked Magnin if she wanted her to work on the support platforms. Magnin said no, she was saving them for the strikers. Carmody described work on the support platforms as hard, dirty, and oily. The support platform job entailed deburring a jagged edged steel bar, about 12 inches long and 3 inches wide, by running it across a wire wheel. Often, employees who did that work went home covered with oil. Wires would fly off the wheel and stick into the employees. The job also carried a very high production rate.

From early March 1995, Carmody occasionally served as backup group leader, substituting for Magnin and, on March 20, Carmody became temporary group leader when Magnin took off Thursday afternoons each week for about 6 weeks to attend school.

During the afternoon of Thursday, May 11, Leon Bonk, a paint department supervisor, spoke to Carmody, then substituting as group leader, about Doris Avery, an employee who, at the time, was deburring the support platforms. Bonk approached Carmody about 20 minutes before the end of the shift asking if there was anything else that Doris could do. When Carmody said yes, Bonk told Carmody to put her on it; this (platform supports deburring) job was to be saved for Bob Pallock and Ken _____, two returning strikers. They had been told to be there in the morning and would be doing that job.

In early April 1995, Carmody spoke with Supervisor Lee Stueber while he was reviewing her job performance. Stueber began by going through the review list, rating Carmody very good on each job aspect. Carmody then asked when the em-

ployees would be going on four 10-hour day workweeks, from Mondays to Thursdays. Stueber replied that the Company was shooting for April 17. Carmody declared that, if the overtime continued, the employees still would be working Friday mornings after they went on their 4–10 schedule. Stueber told Carmody that the Company wanted to keep up and get everything done that it had to get done because it did not want to call back any more “you know whos” than it had to.⁵⁰

Carmody received the higher \$9.50/hour pay rate only for the time she worked as backup group leader. The rest of the time, she was paid at the \$8 rate to which she had advanced after having been given six 25-cent raises from her \$6.50/hour starting rate. Accordingly, she still was earning less than the \$9 promised at her initial interview.

On May 25, Carmody gave Stueber 2 weeks' notice that she was leaving because she had not received promised raises to reach the \$9/hour. Carmody felt that she had been lied to. Late that afternoon, Carmody was called in to Thiede's office where Thiede told her that the Company appreciated her giving 2 weeks' notice. However, Carmody would be done at the end of the day. When Carmody replied that she really would have liked to work the full period, Thiede told her that this was not an option, that work was slow and that there was not enough work out there. Thiede reiterated to “the end of today.” Carmody reminded Thiede that, at her job interview, he had told her that getting to \$9 would not take very long. Carmody became angry and called Thiede a “f___g liar” and other choice names.

9. Economic pressures affecting the Respondent's bargaining stance

The Respondent presented comprehensive evidence in effort to establish that while its bargaining positions during the 1993–1994 negotiations and its general approach to the Union since the signing of the last fully agreed contract, may have been more stringent than in the past when the Union had been able to gain improved wages, benefits, and other terms and conditions of employment at the bargaining table, its current stance had been necessitated by economic pressures, applied domestically and abroad. The Company had not been motivated by antiunion sentiments. These pressures, to reduce dispenser prices by cutting its own costs, and even to provide rebates on the purchase prices, had come from its principal customers who, as noted, were the paper product manufacturers who purchased the Respondent's dispensers and whose corporate names appeared thereon.

Company President Krueger testified that in early 1992, Scott Paper Company, the Respondent's principal customer and provider of between 70 to 75 percent of its business, determined that it would be necessary to undertake substantial changes affecting its suppliers. This course was first announced in a March 20, 1992 letter to Krueger from Sharon Robbins, the newly for appointed vice president procurement for Scott Worldwide. There, Robbins announced that Scott Paper was taking a new direction in terms of the way it planned to do business and the roles and obligations of Scott and its suppliers. To ensure that Scott met its needs and that the suppliers under-

⁴⁹ Although telling Thiede she was answering a newspaper advertisement, Carmody testified that she had been referred by an employment agency.

⁵⁰ Thiede testified that the Company regularly worked overtime until some time in April 1995 when the volume of orders went down. The Respondent has been off overtime ever since. According to Carmody, the Respondent did go to a 4-day, 10-hour day workweek on May 8 or 15, while she still was employed.

stood those needs, its key suppliers, including Krueger, were "invited" to attend a meeting in Philadelphia on April 6, 1992. At Krueger's direction, Sales Director Quigley went to that meeting and reported back to him.

This was followed by a May 13, 1992 letter from Robbins to Quigley which noted that the Respondent previously had agreed to participate in Scott's Worldwide Corporate Premium program. Enclosed for signature with this letter was a revised Corporate Premium Agreement. Under this new procedure all Scott Paper suppliers were to rebate to Scott an amount equal to one percent of their sales to that customer, payable no later than 15 days from the end of each calendar quarter. The monies so obtained were to be used, at Scott's sole discretion, to found a program "to study aspects of the supply and procurement function relating to designated products purchased by Scott." Scott, again at its sole discretion, agreed to share information thus obtained relating to uncovered practices which might be of use to the suppliers. By then, Krueger and Quigley had attended several meetings at Scott's Philadelphia headquarters on this subject and knew that Scott was considering this program. Krueger testified that the rebate program dramatically affected Alwin's earnings but that his company had no recourse if it wished to continue to be considered for designation as a preferred Scott supplier except to comply immediately. The Respondent had had no time period in which to adjust pricing or to make any other modifications.

Quigley received a July 7, 1992 letter from D. (Denis) M. Canty, Scott's director of marketing, who worked under Robbins. This letter summarized concessions the Respondent previously had made for consideration as a preferred supplier, indicating several relatively immediate price reductions on a key line of dispensers, the institution of certain payment terms, and noted that the Corporate Premium (rebate program) would be taking effect. The products identified for cost reductions in this letter then represented approximately 70 percent of the Respondent's sales to Scott. The Respondent in 1992 did reduce the price on one major referenced product by 4 percent and on two other items by 3.6 and 2.9 percent, respectively.

Joseph M. Woods III, Scott's manager of marketing procurement, commercial business, sent an August 31, 1992 letter to Quigley, with a copy to Krueger, which stated Scott's concerns that, since that Company had cut costs by reducing inventories, it was important for Alwin Manufacturing, as a supplier, to make timely dispenser shipments to Scott. This in practical terms meant that, in order to keep Scott's products available to the public at consistent levels, the Respondent, at greater cost to itself, had to do whatever was necessary to maintain a sufficient inventory for Scott if it wished to continue being evaluated as a preferred supplier candidate for Scott. As a result, the Respondent began to maintain a higher than desired product inventory level for Scott Paper—an expense borne directly by Alwin. Scott's demand in Woods' August 31 letter never was withdrawn and remained current at the time of hearing.

A February 22, 1993 letter from Robbins invited Krueger to come to the first annual preferred supplier seminar, which he attended on May 5, 1993, in Philadelphia. At this seminar, Scott's representatives told the assembled suppliers that final decisions had not yet been made as to preferred suppliers but that they, as candidates, still were in the running. The attendees were reminded that Scott Paper was very dedicated to continuing its strategies for cost reductions and that it would be explaining in the coming year what further things it had in mind.

The suppliers could not assume that they already had been selected as preferred suppliers.

In February 1993, the Respondent was confronted with the fact that, although it could not raise prices, labor costs would continue to increase yearly under the collective-bargaining agreement. The next increase in the employee wage and benefit schedule was to become effective in March 1993.

On June 3, 1993, Vice President Prust sent a letter to all employees, describing the difficulties brought about by changing customer demands and the need to be able to deal creatively with a paper industry weakened by global competition. Prust generally informed the employees of the problems that the Company was facing.

Krueger sent all employees a July 13, 1993 written communication continuing and expanding the dialogue set forth in Prust's June 3 letter, indicating the Respondent's interest in better communications with its employees and emphasizing the need for change.

Subsequently, Krueger received an August 17, 1993 letter from Troy Nyeste, the Scott worldwide fixture supply manager, who reported to Canty. This letter introduced Nyeste to the Respondent as being in a newly created role responsible for the development and implementation of a worldwide fixture supply system intended to deliver fixtures at the lowest total cost to all of Scott's worldwide markets. Until then, the Respondent never had dealt with a Scott Paper representative who was solely focused on the cost containment of dispensers.

Quigley prepared a November 17, 1993 agenda proposing subjects to be discussed at a scheduled meeting later held with Scott in Philadelphia on November 30. Krueger, who attended the meeting, related that the primary focus was on Scott's repeated questions about cost reduction methods. While Quigley's proposed topics were discussed at the meeting, the continuing question asked then, and at every meeting with Scott Paper during that time period, was how the Company could reduce costs on product. Scott, at one point instructed, the Respondent to go only to certain sources of supply with regard to certain production materials. The Respondent, in turn, asked for some flexibility.

Krueger testified that Scott Paper knew the effective dates of the Respondent's labor contracts and had kept track of the dates of the Respondent's negotiating sessions. Scott Paper had frequently reminded the Respondent that, notwithstanding any disruption in production that might be caused by a labor contract dispute, Scott still expected the Respondent to maintain product availability. At the November 30 meeting, Scott's representatives asked if the Respondent was preparing for negotiations and if it anticipated any unusual circumstances that might cause them shortage of product. Krueger replied that the Respondent was preparing to communicate earlier with the Union, that the Respondent had serious concerns, but was prepared to try to arrive at an amicable contract settlement with the Union. The Respondent had a number of issues to cover but felt that Scott's product availability would not be disturbed.

A January 26, 1994, Scott Paper press release, sent to Krueger's attention, announced Scott's reduction of its worldwide work force by approximately 25 percent in support of its ongoing productivity improvement and cost containment program. Krueger explained that the announced reductions in Scott's staff meant that the Respondent would have to do more of the work formerly done by Scott with no additional way of charging for those services. Accordingly, the Respondent un-

dertook additional responsibilities in the development of dispensers when Scott discontinued its fixture engineering group which had been delivering most of the developed product to the Respondent. Sometimes the Respondent was compensated for this product development work, sometimes not. The Respondent also was asked to take on the scheduling of Scott's monthly dispenser needs, another job previously done by Scott personnel. While some of Scott's work had been shifted to the Respondent before 1994, this movement became significant on and after the first quarter of that year. In addition, Scott's realignment and its closing of older facilities had led to a decline in the Respondent's volume of business from Scott.

In an April 27, 1994 press release, Scott Paper announced that the Respondent, among others, finally had been selected as a national preferred supplier, picked in that category with one other company. The release referenced the Respondent's commitment to continually improving the value of the product and Scott's costs.

Quigley sent a June 17, 1994 letter to Frank Consoli at Scott Paper Company, who had been represented by his employer as being involved in overseeing procurement. This letter proposed a list of topics for discussion at a meeting to be held June 21. Krueger attended this meeting, the principal thrust of which, again, was cost reductions.

While the Respondent was undergoing these price reductions at Scott, it was experiencing like difficulties with other of its customers in the paper industry. The Respondent, before the start of contract negotiations in 1993, had committed appreciable capital for new equipment and technology. The Respondent also introduced a series of charts prepared in anticipation of litigation tending to show that in the years before, during and since, the start of the 1993-1994 collective-bargaining agreement negotiations, its pricing had been flat and its return on product diminished.

10. The Respondent's concurrent treatment of its nonbargaining unit personnel

The impact of these business difficulties on the Respondent appears mixed. As noted, the officers of the Respondent, a privately held corporation, were Krueger, who served as president and acting treasurer, and Prust as vice president and acting secretary. The board of directors consisted of Krueger, Prust, Attorney Joseph Nicks, Certified Public Accountant Roy Bruechert, and retired Alwin employee Lee Krueger. The nine stockholders all were members of the Krueger and Prust families.

The Respondent's board of directors met quarterly and then once annually at a year-end meeting usually held in the second or third month of the following year. At the directors' August 24, 1993 meeting, they noted a substantial second quarter drop in earnings and, also that, during the first quarter of 1993, sales had decreased by about 35 percent from the corresponding period of the year before, resulting in a specified drop in net earnings. The directors discussed the need for increased inventory in order, as noted, to service Scott Paper, focusing on whether that much inventory was needed. Krueger testified that the directors concluded that the inventory level was required to satisfy that customer's needs. Notwithstanding the directors' concerns about the higher inventories, equipment additions well into six figures, a 6-month decrease in cash funds, combined with the sales allowances and cash discounts afforded Scott through its rebate program, which factors lessened net income, the directors voted a shareholders' dividend on common stock

of \$1.50/share, an amount totaling into five figures. This was a reduction in the dividend from prior years.

At the directors' November 2, 1993 meeting, the members reviewed the 9-month comparative financial statements; the respective 3-month quarterly periods were compared, showing the sales volume effect on net income. The minutes of that meeting stated, "The favorable direct labor ratios have contributed to the company's operating results. Management continues to push for production efficiencies." Krueger, in testimony, explained that the indicated favorable direct labor ratios had come about because the Respondent had pushed for production efficiencies.⁵¹ Some of the effects this would have on return at the bottom line were discussed. The directors, inter alia, noted that the dividend payments declared to that point in 1993 were one-half the 1992 annual dividends, and voted a dividend of \$3/share, twice that declared during the preceding Board meeting.

The next directors' meeting was held on December 21, 1993, when the members discussed the Respondent's current financial status. Annual sales were projected to be below 1992 and financial statements for April, May, and June 1993 indicated substantial pretax losses. Krueger reported on the preparation for union negotiations, which were to start in the following month. The board discussed contributions to the employee deferred benefits plan, concluding that, because of the anticipated drop in 1993 earnings, its contributions to that program would be reduced.⁵² It was resolved that a \$100,000 reserve for possible employee backpay awards re *Alwin I* was to be recorded on the Company's financial statement. Review of dividend payments showed that \$15/share had been paid in 1992, while only \$10.50/share had been paid to date in 1993. A \$1.50/share dividend payable in December was voted.

Krueger, at the February 22, 1994 directors' meeting, summarized operations for 1993 and expressed concern with the financial outlook for 1994 and with the uncertainty of the then-ongoing labor contract negotiations. He was increasingly concerned that that it would be a more difficult year. In view of the uncertainties of the time, it was decided that officers' salaries should remain the same as in the preceding year, subject to review later in the year and, while 1993 dividends were about 20 percent less than those paid in 1992, another \$1.50/share dividend was voted to be paid in February 1994.

By the time of the next Board meeting on May 24, 1994, the strike had been in progress for nearly 3 months. The status of the strike was briefly discussed. Since there were no new negotiations or union proposals, early settlement was deemed unlikely. At that time, the current shop labor force was noted as being at 92 employees, including nine former union employees. In the discussion of the Company's financial position, sales for the second quarter of 1994 were similar to those in the first quarter. The second quarter was expected to be somewhat similar. The Company's financial position and ratios were comparable to December 1993 but, because of a precipitous drop in sales, net income was substantially less. Dividends to be pay-

⁵¹ On cross-examination, Krueger admitted that, in November 1993, the Respondent had learned from its certified public accountants that it was experiencing favorable labor costs.

⁵² The Respondent's deferred benefit plan was participated in by all salaried employees, from Krueger down to office clerical employees. Employer contributions were made to that program during 1993, 1994, and 1995.

able in May 1994 were reduced to \$1.25/share. This was less than in prior years.

During the directors' August 16, 1994 meeting, it was noted that July sales were down, probably due to delays by the customers' freight forwarders. While there were some financial concerns, there was activity in new product and customer development. The Board noted that no new negotiations or union proposals were pending at that point and that the Respondent was waiting to see what might happen thereafter. After other previously described problems within the paper industry were discussed, a dividend of \$1.75/share was approved for payment in August 1994.

The Respondent also introduced evidence tending to summarize percentage and actual price reductions in its various products in the years before and after the start of the 1993–1994 labor contract negotiations and the unanticipated decline in its foreign sales.

In spite of these business pressures, stockholder dividends regularly were paid in 1993 and through the first half of 1994,⁵³ although at lower levels than in prior years. Krueger and the Respondent's other executives took no salary decreases during 1993, 1994, or 1995 but, instead, contrary to the minutes of the February 22 directors' meeting, were given pay increases. Similarly, none of the Respondent's salaried employees below the executive levels, including supervisors and office employees, experienced paycuts during 1993, 1994, or 1995. Rather, during those years, they, too, continued to receive pay increases. In addition, nonbargaining unit employees received bonuses during 1993, 1994, and 1995 and, as noted, during those years the Respondent continued to contribute to these employees' deferred benefit plan.

C. Analysis and Conclusions

1. The refusals to bargain during contract negotiations

This case does not turn on credibility issues or whether, as the Respondent argues, existing market pressures justified its use of hard bargaining methods in pursuit of a concessionary collective-bargaining agreement. Rather, this matter revolves about the Respondent's premeditated, unwavering insistence to asserted impasse on, and implementation of, a final contract proposal containing two previously adjudicated, still-unremedied violations of the Act. It is undisputed that, contrary to the Board's Order in *Alwin I*, which had issued more than 1 month before the August 26, 1994 negotiating session and which subsequently was enforced by the U.S. Court of Appeals for the Seventh Circuit, the Respondent did not materially modify its negotiating position on, or rescind the unilateral unlawfully implemented minimum production standards or changed vacation policy. The record of this proceeding shows that the Respondent concurrently continued to enforce both issues throughout negotiations and during the remaining term of the labor contract with the Union until its February 28, 1994 expiration. The Respondent thereafter continued to implement these terms as part of its effectuated final offer. As will be discussed, penalties administered to employees for not meeting or maintaining production standards before and since the Board's *Alwin I* Order never were rescinded and employees suspended and/or discharged for that reason were not reinstated and made whole as therein required. The record, instead, shows that the

⁵³ The record contains no evidence concerning respondent dividend payments after the August 1994 board of directors' meeting.

Respondent has continued to enforce the production standards and to discipline employees for failing to meet or maintain them. All remedial gestures to disciplined employees and offers of job recall before and since the strike were made contingent upon the recipients' compliance with these illegally imposed standards.

As restated by the U.S. Court of Appeals for the Tenth Circuit, in *Intermountain Rural Electric v. NLRB*:⁵⁴

A bargaining impasse occurs when parties to a negotiation exhaust all possibility of reaching agreement and further negotiations would be futile. . . . To determine whether parties have negotiated to good faith impasse, the Board traditionally considers (a) the parties' bargaining history, (b) the parties' good faith in negotiations, (c) the length of the negotiations, (d) the importance of the issues over which there is disagreement, and (e) the contemporaneous understanding of the parties as to the state of negotiations on the crucial date. *Taft Broadcasting Co.*, 163 NLRB 475 (1967) [enfd. sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (C.A.D.C. 1968)].

As further explicated by Administrative Law Judge Kleiman in his Board-approved decision in *Circuit-Wise, Inc.*:⁵⁵

[A] part(y)'s declaration that an impasse has occurred will not be dispositive in determining whether one does indeed exist—all of the circumstances of the case must be analyzed.⁶⁴

A finding of impasse presupposes that the parties prior to the impasse (had) acted in good faith. Generally, a lawful impasse cannot be reached in the presence of unremedied unfair labor practices.⁶⁵ The Board long has held that, ("A party may not parlay an impasse resulting from its own misconduct into a license to make unilateral changes")⁶⁶

While no unfair labor practice is insignificant, in the context of determining whether an impasse is present, some have more significance than others in the negotiating process and its progress. For example, unilateral changes in employees' terms and conditions of employment may constitute significant violations of the Act in the context of which misconduct, no lawful impasse can be reached.⁶⁷ [Parenthesized material added.]

⁶⁴ *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176 (5th Cir. 1982). Also see *Teamsters Local 175 v. NLRB*, 788 F.2d 27 (D.C. Cir. 1986).

⁶⁵ *White Oak Coal Co.*, 295 NLRB 567 (1989); *LaPorte Transit*, 286 NLRB 132 (1987), enfd. 888 F.2d 1182 (5th Cir. 1989).

⁶⁶ *Wayne's Dairy*, 223 NLRB 260 (1976).

⁶⁷ *White Oak Coal Co.*, supra.

As the Board stated in *Noel Corp.*:⁵⁶

Although an Employer who has bargained in good faith to impasse normally may implement the terms of its final offer, it is not privileged to do so if the impasse is reached in the context of serious unremedied unfair labor practices that effect the negotiations.³³

³³ *Columbian Chemicals Co.*, 307 NLRB 592, 592, 596 (1992), enfd. mem. 993 F.2d 1536 (4th Cir. 1993); *J. W. Rex Co.*, 308

⁵⁴ 984 F.2d 1562 (1993), enfg. 305 NLRB 783 (1991).

⁵⁵ 309 NLRB 905, 918 (1992).

⁵⁶ 315 NLRB 905, 911(1994).

NLRB 473, 473, 496 (1992), enfd. mem. 998 F.2d 1003 (3d Cir. 1993).

Here, negotiations foundered in material part because the Respondent never complied with the Board's Order requiring, inter alia, that the unlawfully implemented minimum production standards and changes in vacation policy be rescinded and that all disciplinary actions taken against employees for not having achieved or maintained those standards be remedied in the ways prescribed by the Board. Instead, the Respondent, without interruption, continued to maintain and enforce both the disputed changed vacation policy and the minimum production standards—still progressively disciplining to suspension and discharge employees who subsequently failed to adhere to those standards. At the same time, the Respondent has not remedied the its illegal actions against employees previously so punished. The Respondent's insistence on maintaining these unlawful employment terms through the entire negotiating process resulted in continued friction and disagreement at the bargaining table. The Respondent's conduct in this regard not only thwarted the Board's purpose in ordering rescission, but further retarded the bargaining process by precluding resolution of the approximately 60 to 70 grievances that then were pending for production standards-based incidents of employee discipline.

The Board had directed repeal of these standards and of the vacation policy changes so that the parties thereafter might bargain on a more equal footing; to enable the Union, when required to address these issues at the bargaining table, to negotiate their every aspect, including initial implementation. It was not intended that the Union be reduced, as here, to picking over the details of accomplished facts only to the extent permitted by the Respondent while that Employer continued to enforce these changes against the unit employees. Since the breakdown in negotiations, in material part, was a proximate result of the Respondent's unyielding continued adherence to its unremedied unfair labor practices, I find that the Respondent was not entitled to declare impasse and that it violated Section 8(a)(5) and (1) of the Act when it unilaterally implemented its final contract proposal embodying and continuing those illegalities.

The Respondent has argued that it did not deliberately act in opposition to the Board's *Alwin I* Order during so much of the negotiating process as preceded the strike because those bargaining sessions occurred before any decision had issued in that matter. Nevertheless, *Alwin I* already had been litigated before the start of the 1993–1994 negotiations and the matter then was pending before Judge Scully. Accordingly, the Respondent, having acted with knowledge that the lawfulness of its implemented minimum production standards and changes in vacation policy were the subjects of active litigation before the Board, it proceeded at its own risk. However, since, as noted, the issuance of the successive decisions by Judge Scully and the Board in *Alwin I*, both of which came out before the August 26, 1994 negotiating session, did not materially deter the Respondent from its chosen course, at that last meeting or thereafter, the evidence does not indicate that a Board decision in *Alwin I* rendered earlier in the negotiating process would have caused a difference in the Respondent's conduct.

The Respondent's insistence throughout negotiations—to final offer, asserted impasse, and unilateral implementation—on a labor contract containing the two unremedied violations establishes that it further violated Section 8(a)(1) and (5) of the Act by engaging in surface bargaining; going through the mo-

tions of bargaining with no good-faith intent to reach agreement. There is little difference between the present situation and that in *Reichhold Chemicals*,⁵⁷ where the Board found that an Employer had violated Section 8(a)(1) and (5) by insisting to impasse that the Union waive access to Board processes, a nonmandatory subject of bargaining. In *Reichhold Chemicals*, supra, the Union was pressured to directly waive access to the Board's processes, while here, the Respondent did what it could to get the Union to forego the results of those processes. It is difficult to distinguish a parties' right of access to the Board's processes from its entitlement to the fruits thereof. While the issues of imposing minimum production standards and formulating vacation policy, clearly terms and conditions of employment, normally would be mandatory bargaining subjects on which impasse validly might be reached, this would not be applicable here where those matters stand as two adjudicated violations of law. Accordingly, until remedied, these issues cannot serve as valid grounds for deadlock during contract negotiations because excluded as nonmandatory subjects of bargaining. In fact, here, those matters were illegal, as distinguished from merely permissive, subjects of bargaining.⁵⁸ Therefore, the Respondent's continued insistence, through the 14 negotiating sessions that preceded the strike and the one session that was held during its course, on the here illegal subjects of minimum production standards and changed vacation policy further violated Section 8(a)(5) and (1) of the Act.

In addition to the aforesaid conduct, the Respondent has further engaged in surface bargaining by its general negotiating performance. As the Board held in *Atlanta Hilton & Tower*:⁵⁹

Under Section 8(d) of the Act, an employer and its employees are mutually required to "meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession." Both the employer and the union have a duty to negotiate with a "sincere purpose to find a basis of agreement,"⁹ but "the Board cannot force an employer to make a 'concession' on any specific issue or to adopt any specific position."¹⁰ The Employer is, nonetheless, "obliged to make *some* reasonable effort in *some* direction to compose his differences with the union, if § 8(a)(5) is to be read as imposing any substantial obligation at all."¹¹

It is necessary to scrutinize an employer's overall conduct to determine whether it has bargained in good faith. "From the context of an employer's total conduct, it must be decided whether the employer is lawfully engaging in hard bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement."¹² A party is entitled to stand firm on a position if he reasonably believes that it is fair and proper or that he has sufficient bargaining strength to force the other party to agree. *NLRB v. Advanced Business Forms Corp.*, 474 F.2d 457, 467 (2d Cir. 1973).

Although an adamant insistence on a bargaining position is not of itself a refusal to bargain in good faith, *Neon Sign Corp. v. NLRB*, 602 F.2d 1203 (5th Cir. 1979), other

⁵⁷ 288 NLRB 69, 71 (1988), enfd. in relevant part 906 F.2d 719 (D.C. Cir. 1990).

⁵⁸ *Reichhold Chemicals, Inc.*, 288 NLRB 69 at 72 fn. 19.

⁵⁹ 271 NLRB 1600, 1603 (1984).

conduct has been held to be indicative of a lack of good faith. Such conduct includes delaying tactics,¹³ unreasonable bargaining demands,¹⁴ unilateral changes in mandatory subjects of bargaining,¹⁵ efforts to bypass the union,¹⁶ failure to designate an agent with sufficient bargaining authority,¹⁷ withdrawal of already agreed-upon provisions,¹⁸ and arbitrary scheduling of meetings.¹⁹

⁹ *NLRB v. Herman Sausage Co., Inc.*, 275 F.2d 229, 231 (5th Cir. 1960).

¹⁰ *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131 (1st Cir. 1953), cert. denied 346 U.S. 887 (1953).

¹¹ *Id.* at 135.

¹² *J. D. Lunsford Plumbing*, 254 NLRB, 1360, 1370 (1981), quoting from *West Coast Casket Co.*, 192 NLRB 624, 636 (1971), enfd. in relevant part 469 F.2d 871 (9th Cir. 1972).

¹³ *NLRB v. Wonder State Mfg. Co.*, 344 F.2d (8th Cir. 1965); *Crane Co.*, 244 NLRB 103 (1979).

¹⁴ *NLRB v. Holmes Tuttle Broadway Ford*, 465 F.2d 717 (9th Cir. 1972).

¹⁵ *NLRB v. Fitzgerald Mills Corp.*, 133 NLRB 877(1961), enfd. 465 313 F.2d 260 (2d Cir. 1963), cert. denied 375 U.S. 834 (1963).

¹⁶ *Cal-Pacific Poultry*, 163 NLRB 716 (1967).

¹⁷ *Billups Western Petroleum Co.*, 169 NLRB 964 (1968), enfd. 416 F.2d 1333 (5th Cir. 1969).

¹⁸ *Valley Oil Co.*, 210 NLRB 165 (1963).

¹⁹ *Moore Drop Forging Co.*, 144 NLRB 165 (1963).

As restated by Administrative Law Judge Robbins in her Board-approved decision in *Coast Engraving Co.*:⁶⁰

in assessing motivation, a party's proposals may be taken into account. Thus, although the Board may not compel concessions or otherwise sit in judgment on the substantive terms of Collective-bargaining agreements, "it, of necessity, must take some cognizance both of conduct away from the bargaining table and of the reasonableness of the positions taken . . . in the course of bargaining negotiations." *NLRB v. American National Insurance Co.*, 343 U.S. 395, 404 (1952); *NLRB v. Herman Sausage Company*, 275 F.2d 229 (5th Cir. 1960); *Sweeney & Co.*, 176 NLRB 208, 211-212 (1969).

The Board also held in *Reichhold Chemicals*,⁶¹ that, consistent with the legal principals set forth in *Atlantic Hilton*, supra, it would adhere to the general proposition that the content of bargaining proposals, in certain circumstances, would be evidence of an intent to frustrate the bargaining process.

In agreement with the General Counsel, I find that the Respondent's economic and noneconomic contract proposals, were broadly calculated to be so unreasonable and difficult either to force a strike during which, as it did, it could replace its union employees with nonunion workers, or to subdue the Union into insignificance.

The Respondent's economic proposals included pay reductions of approximately \$3/hour from the most recent collective-bargaining agreement for the top-rated production operators who, under the Respondent's proposed job reclassifications, would comprise the great majority of the bargaining unit. Even with these pay cuts, employees at the top of their classifications were to receive no wage increases during the 5-year term of the new contract. This also would be true for employees in other classifications who likewise would receive major paycuts under

the Respondent's proposals. Health insurance and all benefits were to be significantly reduced with increases in the amounts of employee contributions; starting wages, regressively proposed, would be much diminished, presaging introduction of a two-tiered pay system to yet further undermine the unit wage structure; employees would be required to work longer for overtime pay, which no longer was to be available after 8 hours work per day but only after 40 hours work in a week; a floating holiday was to be lost; vacations were to be reduced and earned vacation time was to be lost. In this regard, under the Respondent's proposals, no employee could accumulate more than 4 vacation weeks and, accordingly, employees with respectively 20 and 25 years of service, or more, would lose their fifth and sixth weeks of vacation, although previously earned under the terms of earlier collective-bargaining agreements. All employees would have to work additional qualifying years for the various extra weeks of vacation in building up to the 4-week maximum. While offering modest bonuses in lieu of the eliminated cleanup, break, and reduced vacation times, and indicating some willingness to delay the effective date of its termination of the fifth and sixth vacation weeks, the Respondent never significantly compromised the content of its economic positions.

The Respondent's noneconomic proposals similarly were designed to be unacceptable to the Union. As the Respondent propounded, the unit description was to be geographically narrowed, the rights of management clause was to be expanded, in effect, to allow management to work its will in administering the bargaining unit without having to bargain with the Union even as to conventional matters. Any area that had not been reserved in writing to the Union would become a nonnegotiable company prerogative. The Respondent sought unfettered freedom to use part-time, temporary and leased employees, who would remain outside the unit, to replace departing unit employees, to an extent that ultimately would enable it to completely eliminate the unit; to have the right to unilaterally set working conditions, seeking to reserve to itself the right to establish work schedules, shifts and assignments; to largely end seniority as a principal factor in job bidding, transfers, layoffs, and recalls, while substituting other, more subjective, criteria; and to so expand the use of temporary transfers as to virtually eliminate the need for job bidding. The grievance procedure was to be altered to lessen the time available for employees to file grievances and the Union, as representative, to act in each grievance step. Meanwhile, the times in which the Company's representatives could respond at all steps were to be tripled. While promulgating these obstacles, the Respondent would have required that any grievance not processed in timely fashion be settled on the basis of the Respondent's last answer. In this regard, even the number of grievance committee members who might respond to a problem within the plant was to be reduced, with given committee members being assigned to react within specific areas of the plant. Additional burdens were placed on committee members reobtaining supervisory permission to leave their work areas in order to perform their grievance/investigatory functions. Church testified that, except for extending the availability of bereavement leave to cover the loss of stepchildren and leave to attend to union business, the Company did not offer or compromise on one provision during negotiations that would have produced an employment term more beneficial to employees than had existed under the prior labor contract. From the foregoing, I find that, if the Union had

⁶⁰ 282 NLRB 1236, 1250 (1987).

⁶¹ 288 NLRB at 70.

agreed to the Respondents final offer, it would have negotiated itself into moribundity and, ultimately, into its own demise. This is because the Respondent, as noted, would have reserved to itself, through the use of part-time, temporary, and leased employees to replace departing unit employees, the capacity to wipe out the bargaining unit.

The Company's expectation that its contract proposals would not lead to a new agreed collective-bargaining agreement, at least without a strike, was evidenced not just by the content of its proposals, but also by the November 1, 1993 letter it wrote to its customer, Wisconsin Tissue, 1-1/2 months before negotiations began. This letter advised that negotiations soon would begin, that the Respondent could not be certain that the new labor contract would be resolved without some slowdown or work interruption and that that company should authorize advance delivery of its March and April 1994 dispenser requirements, thereby referencing the first 2 months after expiration of the then-effective collective-bargaining agreement, when a strike would be most likely to occur. The Respondent's intent further was indicated by the care it took months before the start of the bargaining sessions to ready itself for a strike as part of its negotiating preparedness program. While Church testified that he customarily made strike arrangements a part of all of his negotiating preparations, in view of what subsequently happened here, such testimony hardly describes a routine expectation that his prepared bargaining positions would result in negotiated agreement.

As argued by the General Counsel, I find that, during negotiations, the Respondent bypassed the Union on February 25 when it sent letters directly to seven employees, terminated for not meeting the production standards, offering them reinstatement with full seniority, effective March 1, 1994, at the anticipated reduced pay rates and benefits to be in effect on that date, subject to their meeting the production standards. The Union did not receive copies of those letters until the February 28 negotiating session, days after they had been mailed.

As followup to the above February 25 correspondence, the Respondent, after the start of the strike, again bypassed the Union and made a second direct approach to employees. On April 13, 1994, the Employer sent another set of identical letters to the seven aforesaid discharged employees, this time offering the \$10,000 lump-sum payments in exchange for their waivers of reinstatement and of all other legal claims against the Respondent, including those under the Act. The Union had not agreed to such an arrangement, having taken the position that the employees be made whole. Nonetheless, the Respondent pursued this offer and, by the time of the hearing, three of the recipient employees—Basinski, Mahlik, and Hudson—had accepted and had been paid the \$10,000 in return for waiving reinstatement and any other rights or benefits that they might have had. I further find that in bypassing the Union and dealing directly with employees via its correspondence of February 25 and April 13, 1994, respectively offering reinstatement on unlawful terms and, alternatively, offering lump-sum severance pay in place of reinstatement, and by its subsequent \$10,000 payments to the three employees who had accepted the second offer, the Respondent committed separate violations of Section 8(a)(5) and (1) of the Act.

The Respondent negotiated regressively, both with respect to starting pay rates and the employees' time to act in the first grievance step. The Respondent, in later proposals, reduced what originally had been offered in starting pay rates. At the

first, December 16 negotiating session, the Respondent proposed that new production operators start work at \$8/hour and that technicians and spray painters start at \$9 and \$8.50, respectively. Under the Respondent's February 24 proposal, the starting rate was to be \$7.50/hour for new employees in all classifications. In the Respondent's final, February 28 offer, the starting range for new employees was to be \$5.50 to \$7.50, with the \$5.50 going to newly hired production operators, who would make up the great majority of the unit. Church was not clear as to who would receive the \$7.50 starting rate.

In its later grievance procedure proposals, the Respondent additionally reduced its employees' time to act in the first step from the 2 scheduled workdays initially proposed to 2 calendar days.

Finally, as noted, the Respondent's above bargaining posture occurred against a background of its aforesaid unlawful and unremedied unilateral changes in the implemented production standards and altered vacation policy. It was made clear to the Union that there could be no agreed labor contract unless it was willing to accept provisions incorporating those terms. Until late in the negotiations, to enable the Company to readily change the standards as it saw fit, the Respondent was not willing to include them in the new contract, but merely would have referenced them in the management-rights clause. The standards, themselves, would have been contained in a separate document. It was not until the August 26 negotiating session, months after the strike had begun, that the Respondent expressed a willingness to allow the Union to have the imposed standards tested and, if necessary, arbitrated. Until then, the Respondent's position had been that the production standards in place had been proven to be fair and were not subject to union challenge. Even under the Respondent's August 26 modification, the Union was not afforded an opportunity to negotiate what standards would be before their implementation. It merely was being allowed a first time opportunity to use arbitration to challenge specific standards that the Employer had unilaterally put in place—to uncertain result. Moreover, the more standards the Union challenged through the arbitral process, the greater would be the resulting costs and time consumption. In the meantime, disputed standards would continue to be enforced.

Therefore, from the face unreasonableness of the Respondent's bargaining positions; its unwillingness to compromise in any meaningful way; its regressive proposals; its having bypassed the Union to deal directly with terminated bargaining unit employees so as to offer unilaterally prescribed terms for their reinstatement or lump-sum payments in place of reinstatement;⁶² I find, even without consideration of the two above unlawful unilateral changes, that the Respondent further engaged in surface bargaining under the criteria of *Atlantic Hilton & Tower*⁶³ in violation of Section 8(a)(5) and (1) of the Act. While the Board cannot force an employer to make specific concessions or to adopt particular positions, and adamant insistence on a bargaining position is not of itself a refusal to bargain in good faith, as set forth in that decision and elsewhere, "[t]he Employer is, nonetheless, 'obliged to make *some* reason-

⁶² As will be separately considered and found below, the Respondent additionally violated the Act in bypassing the Union and directly negotiating with employees with respect to matters that had not been mentioned during negotiations. However, it is not necessary to include those incidents to determine whether the Respondent engaged in surface bargaining.

⁶³ 214 NLRB at 1603.

able effort in *some* direction to compose his differences with the union, if Section 8(a)(5) is to be read as imposing any substantial obligation at all.”⁶⁴ From the entire record of this proceeding, I conclude that the Respondent made no such reasonable effort.

To justify its bargaining positions, the Respondent has introduced detailed evidence that it contemporaneously had been subjected to unprecedented market and financial pressures. Its principal customer, the provider of about 70 percent of its business, Scott Paper, had obliged the Respondent to lower its prices; to cut costs; to mandatorily refund a 1-percent rebate on its gross sales to Scott; and to increase its inventory and product development expenses on Scott’s behalf. Also, the Respondent’s domestic sales were down and its sales abroad were being affected by the lower wages paid by foreign competitors. However, in finding that the Company, in fact, was being subjected to adverse financial pressures I place no credence on the 1993–1994 Chamber of Commerce (Green Bay Area) Wage and Benefits Study, offered to show that its wages were in excess of what was being paid to like workers in the Respondent’s industry and geographic area. As found above, that document, contrary to the date on the title page, actually cited data for an earlier period than that represented, when wages were lower. Not less persuasive was the notation in the minutes of the Respondent’s November 2, 1993 board of directors’ meeting, *supra*, that, “favorable labor ratios (had) contributed to the company’s operating results.” The there—observed “favorable labor ratios” had been achieved under the terms of the then existing collective-bargaining agreement.

The effect of the described financial pressures on the Respondent, while real, cannot be found to justify the Respondent’s refusals to bargain in good faith. The Respondent, during negotiations, never pleaded poverty, but merely expressed interest in protecting its profit margins while rejecting all union requests for production of its financial records. No such records were presented at the hearing to show, as best evidence of same, the impact of the asserted pressures on the Respondent’s overall financial situation. While stockholder dividends during the last half of 1993 and the first 5 months of 1994 were less than in prior years, they always were voted and paid on time. None of the Respondent’s executives, supervisors and office employees were called on to take paycuts during 1993, 1994, or 1995 but, instead, all received wage increases. In addition, non-bargaining unit employees were given bonuses during those years and the Employer concurrently continued to make contributions on their behalf to the above-described Employees Deferred Benefit Plan. From the above factual pattern, it would appear that in order to share in the Respondent’s asserted business difficulties, it was necessary to be a member of the bargaining unit.⁶⁵

⁶⁴ *Id.*

⁶⁵ I am not persuaded by the Respondent’s argument that comparisons between the compensation and benefits afforded to executives and other nonunit personnel and to those within the bargaining unit would be invalid because the more generous treatment given to those outside the unit was driven by market considerations. At the highest levels, the Respondent’s policies were set, not by executives brought in from the competitive business world, but by individuals who had inherited their corporate positions and ownership status. As noted, the Respondent was a closely held private corporation, the shares of which were owned by members of the founding Krueger and Prust families. Since the Company’s president, Donald Krueger, owned 51 percent of the Re-

In any event, the Respondent’s difficulties in negotiating to impasse for a more favorable contract in the present matter stem from its failure, in the ways found above, to have bargained in good faith. The Board has recognized the right of employers to engage in hard, good-faith bargaining in order to obtain more favorable labor agreements.⁶⁶

These findings provide additional grounds for the above conclusion that the Respondent was not entitled to declare impasse and that it violated Section 8(a)(5) and (1) of the Act when it unilaterally implemented its final contract proposal.⁶⁷

2. The strike; refusal to reinstate the unfair labor practice strikers

a. In general

As Administrative Law Judge Miller held in his Board-approved decision in *Capitol Steel & Iron Co.*:⁶⁸

A strike which is motivated or prolonged, even in part, by an Employer’s unfair labor practices is an unfair labor practice strike. *C-Line Express*, 292 NLRB 638 (1989); *Tall Pines Inn*, 268 NLRB 1392, 1411 (1984); *Pace Automobile*, 256 NLRB 1001, 1010 (1981). . . .

. . . .

As unfair labor practice strikers, Respondent’s striking employees were entitled to immediate reinstatement upon their unconditional application. *Laidlaw Corp.*, 171 NLRB 1366, 1368 (1968), *enfd.* 414 F.2d 99 (7th Cir. 1969); *Pecheur Lozenge Co.*, 98 NLRB 496, 498 (1952). This is so even if so-called permanent replacements have been hired to fill their jobs and must be terminated to make room for them.

In the present case, as found above, the Respondent’s bargaining unit employees simultaneously voted to reject the Respondent’s final offer and to strike at a union meeting where the terms of that document had been reviewed aloud and discussed by union officials. The various provisions, and noneconomic, virtually all of which were less beneficial and more costly than

spondent’s stock, its board of directors, other shareholders, and executives were relegated to advisory roles.

⁶⁶ See *A.M.F. Bowling Co.*, 314 NLRB 969 (1994), *enfd.* in relevant part 63 F.3d 1293 (4th Cir. 1995). The Respondent’s counsel repeatedly proclaimed during negotiations, and in testimony, that the violations found in *Alwin I*, somehow would be remedied at the bargaining table. This comment was particularly evident on occasions when the Respondent submitted revised proposals relating to the production standards. It is axiomatic that Board proceedings are brought to remedy violations of the National Labor Relations Act, a Federal statute, and that Board Orders, issued in the public interest, cannot be ameliorated without the Board’s consent. The Board, not the Charging Parties, ultimately determines whether compliance with its remedial orders has been achieved. As a practical matter, the Board, at its discretion, might consider a Charging Party’s motion for modification of previously directed remedies in circumstances where the Respondent subsequently has bargained in good faith and it would appear that such modification would facilitate agreement on a new labor contract and/or Collective-bargaining in general. However, the Charging Union in the present case never has asked that the Board reconsider or moderate its *Alwin I* remedies, apparently having been denied incentive to do so. Accordingly, the *Alwin I* requirements, as now enforced by the enforced by the Court’s Order, remain in place.

⁶⁷ *Frontier Hotel & Casino*, 318 NLRB 857, 858, and 877 (1995); *Noel Corp.*, 315 NLRB at 911. *Coast Engraving Co.*, 282 NLRB 905, *supra* at 1250.

⁶⁸ 317 NLRB 809, 813–814 (1995).

before to employees, were indicated. As found above, this final offer was the culmination of the Respondent's pattern of surface bargaining wherein it had insisted to impasse on generally unreasonable contract terms which included the unremedied minimum production standards and changed vacation policy previously found to be unlawful in *Alwin I*. Although Schmitt, before the vote, had been guarded in characterizing whether the Respondent's conduct was violative of the Act, saying only that he would be talking to his director and the Union's attorney to learn whether the Company actually had been guilty of bargaining in bad faith, it is the fact that employees were motivated to strike by the Respondent's unlawful conduct that is determinative.⁶⁹ That the Respondent's unlawful conduct may have been discussed in terms of the harshness of the proffered contract terms, as well as in the context of the shouted accusations of bad-faith bargaining by employees opposed to ratification, is irrelevant. It is not required that the employees, when they voted to reject the Respondent's final contract offer, correctly perceive the unlawful nature of the Respondent's actions.⁷⁰

Accordingly, I find that, from its inception, the strike here was an unfair labor practice strike which was prolonged by the Respondent's conduct in bypassing the Union and dealing directly with its striking employees, its threat to discharge and replace them permanently, as will be found below, and its ongoing maintenance and enforcement of the unlawful production standards and changed vacation policy. Even after the Board had ruled on the illegality of these last terms, the Respondent continued to seek to force their legitimization during the August 26, 1994 negotiating session.

The Company's announcement in its letter to the union answering the unconditional offer to return to work, that it would be placing the strikers on a preferential hiring list and that it would recall them by their seniority and ability to perform the available work in accordance with the Respondent's last, best offer as permanent openings occurred, was incognizant of, and unresponsive to, its obligations to these workers. As unfair labor practice strikers, these employees became entitled to immediate reinstatement on their unconditional offer to return even if, to make room, it became necessary to terminate replacements hired to fill their jobs.⁷¹ The Union's October 27, 1994 letter to Church notifying the Company that the strike was being terminated as of that date and making, on behalf of the striking employees, an unconditional offer to return to work was clear and unconditional. Accordingly, as stated, all striking employees became entitled to immediate reinstatement to their former positions or, if those positions no longer existed, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges.⁷² Contrary to the Respondent, such immediate reinstatement was not to be conditioned upon the Employer's subjective assessment of these employees' abilities to perform the available work as job vacancies developed.

Also, contrary to the Company's response offering possible eventual employment under the terms and conditions contained in the Respondent's implemented final contract proposal, the striking employees, after the unconditional offer to return, became entitled to be immediately called back to work under the

terms and conditions of employment set forth in the Collective-bargaining agreement that had expired on February 28, 1994, including the there-prescribed pay, benefits and job classifications; free of the unilateral changes found unlawful in *Alwin I*. As the Board held in *Spentonbush/Red Star Companies*:⁷³

An employer's offer to reinstate unfair labor practice strikers based on terms and conditions that have been unlawfully imposed is not a valid offer. *White Oak Coal Co.*, 295 NLRB 567, 572 (1989); *PRC Recording Co.*, 280 NLRB 615 fn. 2 (1986), *enfd. sub nom. Richmond Recording Corp. v. NLRB*, 836 F.2d 289 (7th Cir. 1987).

b. Anderson and Tilly

Having found for the reasons described herein, as did the Board in *Spentonbush/Red Star*, *supra*, that terms and conditions of the Respondent's implemented final contract proposal were unlawfully imposed on unfair labor practice strikers seeking to return to work, I conclude that the Respondent's belated recall to employment of Anderson and Tilly, two such strikers, to positions not their own, months after the unconditional offer to return, did not constitute valid offers of reinstatement and that the Respondent's disciplinary actions later taken against them in connection with the production standards were violations of the Act.

Specifically, the Respondent failed to meet its legally mandated responsibilities to Anderson and Tilly in the following ways: First, while the unconditional offer to return was received in late October 1994, these employees were not recalled to work until various dates in December of that year. It is undisputed that replacement employees who had been filling these employees' prestrike positions, performing the work Anderson and Tilly previously had done, were not released or relocated to make room for them.

Second, Anderson and Tilly were not brought back to work in their former jobs which, as noted, the record shows still existed. Although Tilly, before the strike, had been a group leader in the Roll Towel Department and Anderson had worked in the warehouse, both had been put into the newly minted production operator classification to do work neither had regularly performed before the strike. As stated, Anderson, Tilly, and the other unfair labor practice strikers had the right to be immediately reinstated to their former positions as such jobs were constituted and classified before February 28, 1994.

Third, the Respondent unlawfully brought back Anderson and Tilly to work under the terms and conditions contained in its unlawfully implemented final contract proposal, including the disputed production standards, which it used as the basis for repeatedly disciplining them. Anderson finally was indefinitely laid off until a vacancy might open in the warehouse, when the Respondent might choose to recall him. Evidence was adduced at the trial and described above concerning these employees' inabilities/abilities to meet the production standards for the various jobs to which they were assigned after their return, their performances as compared to those of other production operators, and the progressive disciplinary actions taken against them for their continued incapacities in this regard. However, since Anderson and Tilly should not have been subjected to the production standards on their return, evidence of their failure to comply with them was irrelevant.

⁶⁹ *Id.*

⁷⁰ *Id.*, citing *F. L. Thorpe*, 315 NLRB 147, 150 fn. 8 (1994).

⁷¹ *Laidlaw Corp.*, *supra*.

⁷² *Capitol Steel & Iron Co.*, *supra* at 815.

⁷³ 319 NLRB 988, 990 (1995).

I find the Respondent's conduct in not recalling Anderson and Tilly immediately after the receiving the unconditional offer to return; in not reinstating them to their former positions although those jobs then existed;⁷⁴ in progressively disciplining them, in finally laying off Anderson, all in enforcement of its minimum production standards; and, generally, by applying to these employees the terms of its unlawfully implemented final offer, to be respective violations of Section 8(a)(1) and (5) of the Act. These actions followed from, and were indigenous to, its above-found unlawful refusals to bargain with the Union.

It further is concluded that the Respondent, in its above treatment of Anderson and Tilly, discriminated against them in violation of Section 8(a)(1) and (3) of the Act because they had participated in the strike. In so finding, I note the Company's animus against returning strikers as reflected in the unrefuted testimony of former employee and striker replacement Adelaide Carmody. Carmody related that, in May 1994 while substituting as a group leader, she was told by Paint Department Supervisor Leon Bonk to reassign an employee who then was doing what Carmody described as the dangerous, dirty and difficult job of deburring support platforms in order to save that work for two other returning strikers who would be reporting back to work the next day. Carmody also testified without contradiction that, in October 1994, she and other employees were told by either Krueger or Prust that the Union had abandoned its strike, that the striking employees would be coming back, as needed, but that the Company was working on behalf of the employees gathered there (the replacements) and that they need not worry.⁷⁵ Thiede testified that he had told all employees hired during the strike that their positions with the Respondent would be permanent. Most pointed, however, was Supervisor Stueber's April 1995 statement to Carmody that the Company wanted to get everything done because it did not want to call back any more "you know whos" than it had to—a reference to the strikers.

In finding unlawful discrimination, as argued by the General Counsel, I also note that Anderson and Tilly were successively disciplined in connection with their difficulties in meeting the production standards for the same drive roller job that had been the basis for the Respondent's earlier disciplinary actions against other employees, including Hudson and Filipiak. Since Anderson and Tilly, as two of the Respondent's oldest employees, only had had remote experience in regular production work, the Employer, in spite of Thiede's testimony that the job was easy to learn and perform, could not have reasonably expected that they would succeed on a job where other, younger employees previously had not. Moreover, as indicated by the

⁷⁴ The two group leaders' positions in the roll towel department, one of which Tilly previously had held, were filled by two employees who had not been group leaders before but who had returned to work during the strike. One of these new incumbents, Jeanette Stuckart, had testified as a Respondent's witness with respect to the strike vote.

⁷⁵ Contrary to the General Counsel, no reliance is placed in this area on Carmody's testimony that she had been told by her group leader that the Respondent had no production standards since it does not appear that the group leader's comments were binding on the Employer. This is because, in spite of some functional supervisory indicia, the parties' consensus was that group leaders were nonsupervisory members of the bargaining unit and there was no evidence that Carmody's group leader, Magnin, otherwise was an agent of the Respondent within the meaning of Sec. 2(13) of the Act. In fact, the General Counsel, in alleging Tilly as a discriminatee under the Act, here seeks to protect him in his position as a group leader.

General Counsel, although the Respondent had promised during negotiations that employees would receive training, Anderson and Tilly had received little, if any, training in the work that they were to perform as production operators before being disciplined.

There is no direct evidence that the Respondent, as argued by the General Counsel, also discriminated against Tilly in violation of Section 8(a)(4) of the Act because of his earlier testimony in *Alwin I*. However, while not specifically argued by the General Counsel, it would appear that the Respondent's conduct herein was so inherently destructive of its employees' interests that its treatment of Tilly could be deemed proscribed by Section 8(a)(4) of the Act without need for proof of an underlying improper motive.⁷⁶ In *International Paper Co.*,⁷⁷ the Board distilled the Supreme Court's development and application of the doctrine of employer conduct inherently destructive of employee rights into four fundamental guiding principles. First, "conduct inherently destructive of important employee rights is that which directly and unambiguously penalizes or deters protected activity."

Second, inherently destructive conduct requires a recognition of the distinction between conduct of a temporary duration which seeks to put pressure on union members to accept a particular management proposal from conduct that has such far reaching effects as would hinder future bargaining and create visible and continuing obstacles to the future exercise of employee rights.

Third, "the label 'inherently destructive' may be applied only to conduct which exhibits hostility to the *process* of Collective-bargaining itself; actions which merely further an employer's *substantive* bargaining position in particular contract negotiations are not 'inherently destructive' as long as the employer respects the employees' right to engage in concerted activity."

Fourth, conduct may be inherently destructive of employee rights if it discourages Collective-bargaining by making it seem a futile exercise in the eyes of employees.

Even after finding that an Employer's conduct is inherently destructive, the Board still "must additionally weigh in each case the asserted business justification against the invasion of employee rights in order to determine whether the employer has committed an unfair labor practice. [This is] to weigh the interests of the employees in concerted activity against the interest of the employer in operating his business in a particular manner and to balance in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct. *Erie Resistor Corp.*, 373 U.S. at 229. . . . See *Metropolitan Edison Company v. NLRB*, 460 U.S. 693, 703 (1983)."⁷⁸

Here, in addressing these four principles, first, the Respondent's insistence to impasse on a final offer containing two adjudicated, unremedied unlawful provisions; its continued practice of punishing employees who failed to meet or maintain its unlawfully imposed production standards; its above-found unreasonable economic and noneconomic bargaining proposals; its inflexibility at the negotiating table; its conduct in bypassing the Union and dealing directly with unit employees; its threats to discharge and refusal to reinstate its striking employees after

⁷⁶ *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33 (1967); *Erie Resistor Corp.*, 373 U.S. 221, 227-228 (1963).

⁷⁷ 319 NLRB 1253, 1269-1270 (1995). The footnotes accompanying the passages from *International Paper Co.* quoted below are omitted.

⁷⁸ *Id.*

the unconditional offer to return; and its other above actions indicate a pattern of conduct calculated to prevent the Union from effectively representing the unit employees. The Company's failure to remedy its unfair labor practices, as the Board had ordered in *Alwin I*, had the further effect of suggesting to employees that, while they were employed by the Respondent, they were unprotected by the Act. Accordingly, I find that such conduct, which in its totality, caused and prolonged a lengthy unfair labor practice strike and attendant job dislocation, was patently harmful to employees who had sought to exercise their bargaining rights, penalizing and deterring their protected activities.

Second, the Respondent's proposals and related conduct were designed not merely to pressure the Union and bargaining unit employees into acceding to a particular management proposal, or even to a series of proposals. The Respondent's proposals were such that, had the Union accepted its final offer with the embodied illegalities, the Respondent essentially would have required the Union and the unit employees to waive their rights to a previously afforded, outstanding Board remedy; the Company would have had authority to work its will on the bargaining unit unhampered by effective bargaining obligation, free to use temporary, leased and part-time employees to ultimately erase the unit, free to remove the Union from the first step of the grievance procedure, and free to reduce the Union's time to respond in each later step of the grievance procedure, while tripling the Company's response times. Far from seeking acceptance of particular management proposals, the Respondent, as noted, was constraining the Union to agree to its own ultimate demise at the Respondent's facility.

Third, by its overall conduct discussed and found herein, the Respondent has demonstrated its rejection of the bargaining process. While, as considered above, the Respondent has shown that it had been subjected to economic pressures, particularly from its principal customer, Scott Paper, which might have warranted an effort to obtain a contract reducing its labor costs, as noted above, nothing in this decision would have prevented the Company from attempting to do this had it timely remedied its violations and observed the bargaining process.

Accordingly, noting the above finding that the Respondent has not sufficiently demonstrated business justification for its conduct herein in the context of its disparate treatment of unit and nonunit personnel; its refusal to comply with a Board Order; its virtual abandonment of the bargaining process during contract negotiations; its threats, found below, to discharge, to permanently replace and, ultimately, its above refusal to reinstate, unfair labor practices strikers; its discriminatory treatment of former strikers who did return, its direct dealing with unit employees and its other above-found unlawful conduct, when considered with Tilly's prior testimony as a adverse witness in *Alwin I*, I conclude that the Respondent made Collective-bargaining appear futile in the eyes of employees. Therefore, I find that the Respondent has engaged in conduct inherently destructive of the Act motive.

For the above reasons, even without direct proof of an underlying improper motive, it is found that the Respondent also violated Section 8(a)(1) and (4) of the Act in failing to immediately recall Tilly to his former group leader position when the strike ended and in having repeatedly disciplined him in con-

nection with the production standards since his return to work.⁷⁹

3. Additional strike-related conduct

In Company President Krueger's March 1, 1994 letter, sent on the first day of the strike, the Respondent notified all its striking employees that they could be terminated and permanently replaced by new employees, subject only to their respective preferences for hire should future openings occur. The letter urged the employees not to join the strike. As found in *Capitol Steel & Iron Co.*,⁸⁰ because the law prohibits the discharge and/or replacement of unfair labor practice strikers, such threats violate Section 8(a)(1) of the Act. Solicitations that such employees work during the strike in the context of such threats were similarly violative.

The record shows that Church advised employees who had returned to work after abandoning the strike that the Union had the right to fine them for so doing and that the only way to avoid this was to resign from the Union. He asked that they provide him with copies of their resignations from the Union should they choose to leave. The parties stipulated that Church thereafter received copies of nine such resignations from specified employees. The Respondent, in collecting its employees' written resignations from the Union, violated Section 8(a)(1) of the Act by having acted to ascertain whether the employees had availed themselves of their Employer-enunciated right to leave the Union. Had the Employer merely taken the initiative of advising the employees of their right to resign from the Union without their having taken the first step, that, in itself, would not have been sufficient to violate the Act.⁸¹

The Respondent also violated Section 8(a)(5) and (1) of the Act after the Union made the unconditional offer to return to work by sending questionnaires to all unfair labor practice strikers inquiring as to their availability for recall and as to whether they would seek to return to the Respondent's employ. The Respondent, by such conduct, bypassed the Union and dealt directly with the employees. In so doing, the Respondent utilized a procedure that it had unilaterally established.⁸²

Finally, as also argued by the General Counsel, I find that the Respondent violated Section 8(a)(1) of the Act when, approximately 6 months after the unconditional offer to return had been made, its supervisor, Lee Stueber, told strike replacement employee Adelaide Carmody that the Respondent did not "want to call back any more you—know—whos than it had to." This, as noted, was a threat to discriminate against strikers by not recalling them. This interpretation is supported by Carmody's further testimony describing company animus against returning strikers when, about 1 month later, Supervisor Leon Bonk directed her, while she was acting as a group leader, to reassign the employee she then had deburring support platforms and to save that job for two strikers who were scheduled to come back to work the next morning. Carmody described the support platform deburring job as dirty, difficult and dangerous, with high production standard requirements.

⁷⁹Although Anderson, too, was alleged in the complaint as an 8(a)(4) discriminatee, unlike Tilly, the record lacks foundation to support such a finding with respect to him because it does not establish Anderson's involvement in earlier Board proceedings.

⁸⁰317 NLRB at 814.

⁸¹*Chicago Beef Co.*, 298 NLRB 1039 fn. 5 (1990).

⁸²*Mount Airy Psychiatric Center*, 230 NLRB 668, 676-677, 680 (1977).

CONCLUSIONS OF LAW

1. The 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 Union, at all times relevant herein, has been and is the exclusive collective-bargaining representative of employees within the meaning of Section 9(b) of the Act in the following appropriate unit:

All production and maintenance employees of the Respondent at the Respondent's plant in the greater Green Bay area, Green Bay, Wisconsin; excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

4. The Respondent has violated Section 8(a)(5) and (1) of the Act by having:

(a) Unilaterally changed terms and conditions of employment of employees within the bargaining unit without first bargaining to valid impasse with the Union.

(b) Refused to retroactively rescind the minimum production standards and changed vacation policy to as of their respective 1992 implementation dates, as ordered by the Board and courts of appeals in *Alwin I*, and by failing to comply with the other requirements of that Order, including withdrawal of all disciplinary actions taken against employees for not meeting or maintaining the production standards, the reinstatement of employees terminated or suspended in connection with those standards, the requirements that such employees retroactively be made whole and that the Respondent remove references to such disciplinary actions from its records.

(c) Continued to discipline its employees who failed to meet the unlawfully imposed production standards, including its invalid reinstatement of, and various disciplinary actions taken against, returning unfair labor practice strikers Sheldon Anderson and John Tilly.

(d) Entered into contract negotiations with a fixed intent not to reach a collective-bargaining agreement with the Union by insisting to impasse on acceptance of a final contract offer containing as employment terms previously adjudicated, still-unremedied violations of the Act; by having a closed mind as to what subject matters should be included in a collective-bargaining agreement; and by presenting the Union with, and inflexibly insisting on, unreasonable contract proposals intended to cause a strike.

(e) Undermined the Union in bypassing it and bargaining directly with its bargaining unit employees by offering such employees unilaterally set terms for their reinstatement to employment and/or alternative lump-sum cash payments in exchange for their waivers of reinstatement and of all legal claims against the Respondent, including Board remedies; and in sending questionnaires to employees after receipt of the unconditional offer to return concerning their availability for employment.

(f) Refused to reinstate its returning unfair labor practice striker employees immediately after receiving the unconditional offer to return to work, and by permanently replacing them.

5. The Respondent has violated Section 8(a)(3) and (1) of the Act by:

(a) Refusing to reinstate its unfair labor practice striker employees immediately after receiving the unconditional offer to return to work, and by permanently replacing them.

(b) Refusing, upon the unconditional offer to return, to immediately reinstate its returning unfair labor practice striker employees, Sheldon Anderson and John Tilly, to their former prestrike positions, by recalling them to work in other jobs, subject to the employment terms of the Respondent's unlawfully implemented final contract offer, and by variously disciplining Anderson and Tilly for not having met the unlawful production standards. This discriminatory conduct was because of their participation in the unfair labor practice strike and other union and protected, concerted activities.

6. The Respondent has violated Section 8(a)(4) and (1) of the Act by its refusal to immediately reinstate its returning striking employee, John Tilly, to his former position as a group leader, by recalling him to work as a production operator subject to the above unlawful employment terms and by warning and suspending him for not having met the unlawful production standards. This Respondent's conduct was because of Tilly's prior involvement in *Alwin I*.

7. The Respondent has violated Section 8(a)(1) of the Act by:

(a) Sending its March 1, 1994 letter to all striking employees threatening them with discharge and permanent replacement if they did not abandon their unfair labor practice strike.

(b) Its statement to an employee after having received the unconditional offer to return to the effect that the Respondent did not want to recall any more of the unfair labor practice strikers than it had to.

(c) Taking action to ascertain whether its employees had resigned from the Union.

8. The strike which began on March 1, 1994, was caused and prolonged by the Respondent's unfair labor practices and was an unfair labor practice strike from its inception.

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

REMEDY

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

Having found that the Respondent has violated Section 8(a)(1) and (5) of the Act by refusing to bargain in good faith, I shall recommend that the Respondent be ordered to meet, on request, with the Union and bargain in good faith concerning rates of pay, wages, hours of work, and other terms and conditions of employment of the employees in the unit found appropriate and, if agreement is reached, embody such agreement in a signed contract.

The Respondent should be ordered to cease and desist from unilaterally changing the terms and conditions of employees in the bargaining unit without first bargaining in good faith with the Union to a valid impasse. On the Union's request, the Respondent should be required to retroactively rescind the unilateral changes contained in its final offer to as of their March 1, 1994 implementation, including the minimum production standards and changed vacation policy found in *Alwin I* to have been unlawfully effectuated, and to make whole its employees for any losses of wages, vacation credits, holidays, and other

benefits they may have incurred as a result of the unilateral changes, as set forth in *Ogle Protective Service*.⁸³ The Respondent also should be required to remit all payments it owes to pension and health care funds, with interest as provided in *Merryweather Optical Co.*,⁸⁴ and to make the employees whole for any expenses they may have incurred as a result of the Respondent's failure to make such payments, as set forth in *Kraft Plumbing & Heating*.⁸⁵ The Respondent should be obliged to continue such contributions and to honor the other terms of the Collective-bargaining agreement that expired on February 28, 1994, until it negotiates in good faith with the Union to a new contract or to impasse.⁸⁶

Having concluded that the Respondent has not complied with the Board's Order in *Alwin I* requiring that it retroactively rescind and withdraw the changed vacation policy and the effectuation of minimum production standards, respectively put into effect on June 25 and September 22, 1992, and with the Board's further Order that all disciplinary actions since September 22, 1992, resulting from the employees' failure to meet the minimum production standards be rescinded; that all employees suspended and/or discharged as a result of such disciplinary actions be offered immediate and full reinstatement to their former jobs or to substantially equivalent positions, if those positions no longer exist, without prejudice to their seniority, job benefits or other rights and privileges; that employees suspended and/or discharged in connection with the minimum production standards be made whole, with interest, and that the Respondent remove from its records and not use all references to such disciplinary actions, the Respondent should now again be required to comply with the terms of that Order. The remedial rights of employees adversely affected by application of the minimum production standards should not be contingent on their previously having filed a grievance.

This finding, that the Respondent should afford the above-prescribed remedy to all employees disciplined including those warned, suspended and discharged, for not having met or maintained the minimum production standards since September 22, 1992, specifically should be made applicable to terminated employees Robert Hudson, Harold Basinski, Jessie Del Marcelle, Peter Filipiak, Michael Mahlik, James L. Plog, and Robert Pallock, to suspended employees Kevin DeKeyser and Joseph Mir, to warned employees Diane Miller and Alan Desotell, and to any other employee determined during the compliance stage of this proceeding to have been disciplined in enforcement of the production standards. It having been found that the Respondent respectively violated Section 8(a)(1) and (5) of the Act in bypassing the Union to deal directly with the seven above-named discharges by sending them correspondence respectively offering reinstatement and alternative \$10,000 lump-sum payments in exchange for their waivers of reinstatement, of their right to be made whole under the Board's remedy and of the exercise of any other related legal claim or grievance they might have against the Respondent, I shall recommend that these offers of reinstatement or of lump-sum payments be held null and void and not legally enforceable or binding on employees who had accepted them. Accordingly,

⁸³ 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971).

⁸⁴ 240 NLRB 1213 (1979).

⁸⁵ 252 NLRB 891 (1980), enf. 661 F.2d 940 (9th Cir. 1981). See *Noel Corp.*, 315 NLRB at 913-914.

⁸⁶ *United Constructors*, 244 NLRB 72 (1979); *Crest Beverage Co.*, 231 NLRB 116 (1977).

while Pallock apparently accepted the proffered reinstatement to work under unlawfully implemented employment terms, and Hudson, Basinski, and Mahlik have received the \$10,000 lump-sum payments, these employees should not be precluded from claiming any more comprehensive remedy that otherwise would have been available to them under the Board's Order in *Alwin I*. In determining these employees' backpay entitlements in the compliance stage of this proceeding, the Respondent's liability, of course, should be reduced by the \$10,000 sums previously paid to those who had waived reinstatement, by the interim amounts paid in compensation and benefits to Pallock, Tilly, and Anderson, and by the interim earnings of all employees for whom make-whole remedies have been found appropriate.

It having been concluded that the Respondent failed to reinstate the unfair labor practice strikers immediately after an unconditional offer was made to return to work, the Respondent should be required to offer its former striking employees immediate and full reinstatement to their former jobs or, if those positions no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges, discharging, if necessary, all replacements hired after the March 1, 1994 start of the strike. The Respondent should make these employees whole for any loss of earnings that they might have suffered by reason of the Respondent's unlawful failure to reinstate them by payment to them of sums of money equal to that which they normally would have earned from October 27, 1994, the date of the unconditional offer to return to work, to the date(s) of their actual reinstatement, less net earnings, to which shall be added interest computed thereon in the manner prescribed in *F. W. Woolworth Co.*⁸⁷ and *Florida Steel Corp.*⁸⁸

It also having been found that the Respondent has violated the Act by belatedly recalling former unfair labor practice strikers Sheldon Anderson and John Tilly to work in jobs different from those they had held before their participation in the strike while their original positions continued to be filled by replacements; by variously warning and suspending them; and by finally indefinitely laying off Anderson until a vacancy might arise in his prestrike location in the warehouse, the Respondent should be required to reinstate Anderson and Tilly immediately to the positions they had held before the strike or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority, benefits and other rights and privileges, discharging if necessary all replacements hired or returned to work after the March 1, 1994 commencement of the strike to fill their positions. The Respondent also should be required to make Anderson whole for any loss of earnings and other benefits he may have suffered by reason of his indefinite layoff and to make both Anderson and Tilly whole for any such losses they may have sustained during their suspensions from work in enforcement of the production standards. Backpay is to be computed in the manner prescribed in *F. W. Woolworth Co.*, supra, with interest to be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Backpay and all other remedial benefits are to run for Anderson, Tilly and all other unfair labor practice strikers from the date of the unconditional offer to return.⁸⁹ Their backpay and

⁸⁷ 90 NLRB 289 (1950).

⁸⁸ 231 NLRB 651 (1977); see generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

⁸⁹ See *Capitol Steel & Iron Co.*, supra, 317 NLRB at 815.

such other benefits as might be required to make them whole, and the like entitlements of all other employees for whom make whole remedies have been found appropriate here, are to be tallied under the pay and benefits schedules contained in the collective-bargaining agreement that expired on February 28, 1994. This requirement is consistent with the above recommendation that changes in terms and conditions of employment effectuated by the Respondent on March 1, 1994, be retroactively rescinded.

In agreement with the Union and consistent with the criteria set forth in *Frontier Hotel & Casino*,⁹⁰ I shall recommend that the Respondent be ordered to pay to the Union and the General Counsel the costs and expenses incurred by them in the investigation, preparation, presentation and conduct of this proceeding, including reasonable counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses and per diem, and other reasonable costs and expenses, all such costs to be determined at the compliance stage of this proceeding. In addition, the Respondent should be required to pay to the Union the costs and expenses incurred by them in the preparation and conduct of collective-bargaining negotiations on and after November 10, 1993,⁹¹ such costs and expenses also to be determined at the compliance stage of this proceeding. Also, as a logical extension of the rationale of *Frontier Hotel*, supra, in the context of the Respondent's aggravated conduct in the present matter, the Respondent should be directed to pay to the Union its costs and expenses in connection with the unfair labor practice strike herein which, as found above, had been caused and prolonged by the Respondent's willful conduct. Such reimbursements to the Union should include picketing costs, strike benefits and any other assistance paid to the Respondent's striking employees during the strike, and thereafter, continuing until the Respondent issues full and proper offers of reinstatement to its employees who had participated in the strike. This poststrike requirement is because the Respondent's failure to reinstate the strikers immediately on the October 27, 1994 unconditional offer to return to work, in effect, further prolonged the work stoppage and the attendant hardship on participating employees. The Union may have been required to financially help address any continuing economic employee needs occasioned by the Respondent's conduct in this regard.

Here, as in *Frontier Hotel*, the Respondent "has engaged in egregious and deliberate surface bargaining with the (Union) which has unnecessarily diminished (its) economic strength. Moreover, through its reliance on frivolous defenses in its litigation, the Respondent has further depleted the Union's resources and needlessly wasted and depleted the resources of this Agency."⁹² In fact, the Respondent's conduct in the present case arguably was more flagrant than in *Frontier Hotel*. There, the determinative focus principally was centered on the misconduct of that Respondent's counsel prior to and throughout negotiations. Although that Company's collective-bargaining proposals, as here, were sufficiently unreasonable as to support a finding that they had been calculated to force a strike in the context of the Employer's inflexible insistence on their accep-

tance, unlike the present matter, none of the *Frontier Hotel* proposals pushed to impasse, in themselves, were independent outstanding violations of the Act. The Respondent demonstrated its contempt for Board processes by refusing to change its bargaining position concerning these unlawful issues so as to comply with the Board's *Alwin I* decision, which issued before the last, August 26, 1994 negotiating session. Even in the aftermath of that decision, the Respondent has continued to treat its striking employees as economic strikers, calling them back to work after the unconditional offer to return only as job vacancies opened and, then, as in the cases of Anderson and Tilly, not to the employees' previously held positions. As noted, employees so recalled were required to work under unlawfully implemented employee terms. Many of the acts of discrimination and unlawful bargaining adversely affecting employees for whom make-whole remedies have been provided here stem from the Respondent's original and continued application of its unrescinded production standards.

As in *Frontier Hotel*, the violations found here are not based upon credibility resolutions. While the facts of this case are extensive, covering 15 detailed negotiating sessions and other incidents wherein the Company abandoned the principles of good faith bargaining and otherwise discriminated against its union employees, what happened here essentially is undisputed. The Respondent's unyielding insistence during prolonged negotiations on its unlawful contract issues and on other terms calculated to reduce union representation to inconsequentiality, its continued unilateral actions affecting unit employees, its direct dealing with unit members, its threats to discharge and permanently replace the unfair labor practice strikers, and its other conduct found herein, frustrated the bargaining process and depleted the Union's resources.

Finally, by compelling the General Counsel and Union to prepare and try this matter which, in substantial part, concerns its continued previously determined and willfully unremedied unlawful conduct, the Respondent has necessitated frivolous litigation needlessly burdening the resources both of this Agency and the Union. In furtherance of the Board's stated concern in *Frontier Hotel* that a bargaining order alone would not ensure meaningful bargaining because, as here, the Union, economically weakened by futile protracted negotiations, a deliberately forced unfair labor practice strike and frivolous litigation, could not thereby be restored to its position before the hopeless negotiations began, I find that the Respondent's "flagrant disregard for its obligations under the Act, as well as for Board processes, compels the conclusion that the extraordinary remedies requested, in addition to the usual bargaining order, are appropriate in order to compensate the Charging Party and the General Counsel for their losses and to ensure meaningful negotiations."⁹³

Therefore, in addition to the extraordinary costs and expenses which I have found above should be afforded to the Unions and this Agency as was done in *Frontier Hotel*, I shall recommend, as a logical extension of *Frontier Hotel*, that the Union herein also be granted reimbursement of its expenses and costs incurred by the unfair labor practice strike. Having here found that the Respondent's unlawful conduct deliberately induced the unfair labor practice strike, it would be inconsistent with the effort under *Frontier Hotel* to restore the Union's resource-related position as effective bargaining representative to

⁹⁰ 318 NLRB 857 (1995). Also see *Care Manor of Farmington, Inc.*, 318 NLRB 330 (1995).

⁹¹ November 10, 1993, is designated because it was the date of the Respondent's letter notifying the Union that the existing collective-bargaining agreement was being terminated. Accordingly, it marked the time when the Union became obliged to prepare for negotiations.

⁹² *Frontier Hotel*, supra at 859.

⁹³ Id. at 857.

observe an arbitrary distinction between its strike-related costs and expenses and those of the other exceptional remedies found there to be appropriate. In recommending that such costs and expenses be provided for the duration of the unfair labor practice strike, and beyond until full and appropriate offers of reinstatement are made to the former striking employees, it should be noted that, in addition to its above-indicated conduct calculated to cause the strike, the Respondent, *inter alia*, by its written threats sent to all striking employees to discharge and to replace them if they did not abandon this unfair labor practice strike; its practice of bypassing the Union to negotiate directly with the employees; and by its refusal to offer immediate reinstatement after the unconditional offer to return, did what it could to prolong the work stoppage. The Respondent's refusal

to promptly reinstate the employees on the unconditional offer to return also may have also continued the Union's financial burdens associated with that work stoppage long after they otherwise would have ended. Such costs and expenses should be determined at the compliance stage of the proceeding.

Because the Respondent has demonstrated its rejection of the good-faith bargaining obligation imposed by the Act, because of its willful disregard of Board processes and determinations and because of the breadth of its activities found unlawful herein, a broad cease and desist order is appropriate.⁹⁴

[Recommended Order omitted from publication.]

⁹⁴ *Hickmott Foods*, 242 NLRB 1357 (1979).