ACF Industries, LLC *and* United Steelworkers of America, AFL–CIO, CLC. Case 6–CA–33614

August 28, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On February 1, 2005, Administrative Law Judge David L. Evans issued the attached decision. The Respondent, the General Counsel, and the Charging Party each filed exceptions and a supporting brief. The Charging Party filed an answering brief to the Respondent's exceptions, to which the Respondent filed a reply brief. The Respondent filed an answering brief to the General Counsel's and the Charging Party's exceptions, to which the Charging Party filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.[1]

I.

We find, in agreement with the judge, that the Respondent did not violate Section 8(a)(5) and (1) of the National Labor Relations Act by implementing its final offer on August 21, 2003.[2] For the reasons set forth below, we agree with the judge that the parties had bargained in good faith to a valid impasse as of that date.

The Respondent manufactures railroad cars in Milton, Pennsylvania, and has had a series of collective-bargaining agreements with the Union covering a unit of production and maintenance employees. The most recent contract was effective from August 3, 2000, to August 2, 2003. The parties began negotiations for a subsequent contract in June, and continued until the Respondent declared impasse in August.[3]

In April, 2 months before the beginning of the contract negotiations, the Respondent informed the Union that because the Respondent's parent corporation had no future need for a tax write off of the losses incurred by the Milton facility, and because of the competition in the market, it needed to reduce its production costs to maintain reasonable profits and job security for unit employees. Consistent with this position, at the first bargaining session on June 11, the Respondent submitted its written economic proposals indicating the need for major concessions, including reductions in pay, base rates, severance, and benefits. In response, the Union proposed increases in wages and certain other benefits. On June 12, the parties agreed to negotiate noneconomic issues first. Over the course of the next three bargaining sessions, the parties reached agreement on the noneconomic issues, and thereafter began negotiations on the economic issues.

On June 26, the Respondent provided the Union with a first "major concessionary proposal" for a 5-year agreement. The proposal included various wage cuts for the first year, no general increases for the second year, and 15-cent-per hour increases for the remaining years. The Respondent's proposal also included elimination of overtime premiums, paid holidays, shift differentials, severance pay, health insurance for employees after the month in which they were laid off, pension plan supplements, and substitution of the salaried workers' health insurance plan for the production and maintenance workers' plan.

On July 8, the Union submitted a proposal that contained some concessions from its previous economic proposals, but also proposed an increase in vacation pay, the retention or increase of certain other benefits, a neutrality agreement, and the retention of the current insurance and pension agreements. The Respondent answered by emphasizing the need for further reductions, and expressed disappointment that the Union's proposal was going in the opposite direction. For the next five bargaining sessions, the parties exchanged additional proposals but failed to reach agreement on wage rates and other benefits.

The parties met with a Federal mediator on July 25 and again exchanged proposals. The parties reached agreement on some issues, but failed to do so on others. The Respondent then presented its "Final Economic Proposal," stating that there was nothing left to offer.

By letter dated July 29, the Union notified the Respondent that in the event its membership rejected the Respondent's final economic proposal, the Union desired to resume negotiations and to extend the contract for 2 years. The Respondent answered that should its final offer be rejected, it would be interested in meeting promptly to discuss the factors controlling the rejection. However, the Respondent was not interested in extending the contract long term and stated its preference for continuing the contract on a day-by-day basis with a provision providing for a 48-hour strike notice.

[1] We shall modify the judge's recommended Order and the notice to reflect our reversal of the 8(a)(1) violation found by the judge.

[2] All dates are in 2003, unless otherwise noted.

[3] The parties met for 13 bargaining sessions between June 11 and August 7.

On August 3, the Union's membership rejected the Respondent's final offer by a vote of 275 to 22. On August 7, the parties met again with a Federal mediator. The Union submitted new proposals that entailed both concessions and increases from its previous proposals. The Respondent then submitted its "Best and Final Economic Proposal" which included some adjustments from its July 25 proposal. In presenting this proposal, the Respondent stated that it had no more room to move, that it was not going to make any further offers, and that the only thing that it could do "would be to remove something from pile A to pile B as long as it doesn't have any cost impact." The Union agreed to none of the terms presented by the Respondent. After this rejection, the Respondent made a few amendments to the proposal.

On August 15, the Union's membership rejected the Respondent's offer, this time by a vote of 167 to 113, and the Union requested further negotiations. On August 16, the Respondent informed the Union that it "had nothing further to offer" and that it would implement its final offer on August 21. In an August 16 telephone call with the Respondent, the Union's chief negotiator, Robert English, stated that the Union had additional proposals on health, welfare, and pensions, but he did not divulge what the proposals would entail. The Respondent's chief negotiator, Gary Rager, answered that the Respondent had nothing further to offer, that he has his "marching orders" and that "I got to implement."

On August 18, 3 days before the Respondent implemented its final offer, the Union submitted an extensive information request concerning health-and-welfare benefits. Also on that day, the Union sent a letter to the Respondent stating that it did not believe that the parties were at impasse, and requested to meet on August 19 and 20. The Respondent answered that it did not see any useful purpose in meeting again, and that the Union's request for health and welfare information was "disingenuous" because the Union waited until the "eve of implementation" in making the request. The letter further stated that the parties have negotiated for over 2 or 3 months about changes in health and welfare and that the Union's request should have been made earlier. The letter ended with the Respondent's offer to meet postimplementation.

By letter dated August 19, the Union repeated its objection to the implementation of the final offer, and further stated that it was prepared to make proposals on wage reductions and pension matters, but included no specifics of such proposals. The Respondent implemented its final offer on August 21.

The judge found that the parties were at impasse when the Respondent implemented its final offer on August 21. The judge found that although some progress had been made before the Union's rejection of the Respondent's August 7 final offer, no movement was attempted by the parties after August 7, and the parties were far apart on a number of significant issues when the Respondent declared impasse. The judge further found that the Respondent's economic positions were the essence of hard bargaining, not bad-faith bargaining, and that the Union's unwillingness to accept the proposals, which that bargaining posture produced, left the parties at impasse.

The judge also rejected the General Counsel's contention that impasse was precluded by the Union's August 16 statement that it was prepared to make additional proposals. The judge found that if the Union had meaningful proposals to make, it could have done so and asked for further negotiations on these proposals. The judge concluded that the reason the Union failed to do so was because it had no further (nonregressive) proposals to offer.

We agree with the judge, for the reasons he states, that the parties were at impasse when the Respondent implemented its final offer.

We note in particular that the Respondent informed the Union before negotiations began that its economic conditions necessitated major concessions in wages and benefits. Indeed, as found by the judge, the parties exchanged numerous proposals and engaged in hard but good-faith bargaining in 12 bargaining sessions over a 2-month period. By the time the Respondent declared impasse, the parties had engaged in extensive bargaining and yet remained far apart on a number of major issues. The Respondent had nothing left to offer beyond that which had already been rejected, and the Union similarly had offered no new proposals to demonstrate that further progress was possible.

Our dissenting colleague argues that the parties had not reached impasse when the final offer was implemented. The dissent contends that the Respondent gave the Union good reason to believe that it would be amenable to making additional concessions, beyond those in the August 7 final offer. Specifically, the dissent argues that the Respondent's willingness to amend its July 25 proposal, and the Respondent's statement before the Union's August 3 membership vote—that it was willing to meet in the event that the membership voted to reject the proposal—gave the Union reason to believe that it could elicit additional concessions after the membership's rejection of the Respondent's August 7 final offer. The record shows, however, that the Respondent could not have been clearer in conveying that it had nothing more to offer than that contained in

its August 7 offer, except to move something "from pile A to pile B" which would result in the same cost savings. The Union clearly understood the Respondent's position, rejected it, and offered no specific proposals in response. We recognize that, on August 7, the Respondent made a new proposal after its July 25 proposal had been rejected, and that the Respondent amended that new proposal after it was rejected. But after that amended proposal was rejected, the Respondent made it clear that it had no further proposals to make. Thus, we cannot agree with our colleague that the evidence demonstrates a realistic possibility that further bargaining at this point would have been fruitful.

Our dissenting colleague further contends that the Union's statement, that it had additional proposals on August 16, evinces an absence of impasse. The Union refused to divulge any specifics of such proposals, and the Respondent clearly indicated that it had nothing further to offer. In this context, the Respondent chief negotiator's statement that "I got to implement" makes perfect sense. Absent a concrete proposal from the Union, the parties were at impasse. In sum, inasmuch the Union failed to divulge any specifics about its purported new proposals, it gave the Respondent no reason to conclude that further bargaining at that time would have been fruitful.[4]

As noted above, the Respondent engaged in good-faith bargaining at all times during the negotiations. In these circumstances, the evidence of impasse cannot be ignored merely because of the Union's last minute statement—without any specifics—that it had new proposals. Otherwise, virtually any assertion of new proposals, no matter how vague or unsubstantiated, could be sufficient to defeat a claim of impasse.

Further, we agree with the judge that the impasse was not invalidated by the fact that the Respondent's final offer contained a nonmandatory subject of bargaining—the proposed early termination of the parties' separate insurance and pension agreements. However, we do not rely on the judge's rationale that the Union failed to object to the Respondent's inclusion of this proposal in its final offer. Rather, we rely on the judge's finding that neither the General Counsel nor the Union demonstrated that the Respondent's insistence on the proposal contributed to the impasse in any discernible way. See *Branch International Services*, 310 NLRB 1092, 1103 fn. 20 (1993), enfd. 12 F.3d 213 (6th Cir. 1993).

On this point, we find that the instant case is distinguishable from *Grosvenor Resort*, 336 NLRB 613 (2001), where the Board found that an employer engaged in bad-faith bargaining by, among other things, insisting to impasse on a nonmandatory subject of bargaining. In *Grosvenor Resort*, the Board found that the employer's "entire course of conduct did not envince a sincere desire to reach agreement" and that its "conduct constitutes evidence of overall bad-faith bargaining rather than individual violations of Section 8(a)(5)." 336 NLRB at 615. Here, the Respondent's overall course of conduct does not evince a lack of desire to reach an agreement, but, rather, demonstrates that it engaged in good-faith bargaining during the numerous bargaining sessions that occurred from June through August 2003.

Accordingly, we find in agreement with the judge that the parties had reached valid impasse when the Respondent implemented its final offer on August 21, and thus the Respondent did not violate the Act as alleged.[5]

II.

We agree with the judge that the Respondent did not violate Section 8(a)(5) by delaying the furnishing of information requested by the Union on August 18. As set forth above, after 2 months of negotiations and 3 days before the Respondent implemented its final offer, the Union submitted a request for information about the existing health and welfare benefits. Although the most recent collective-bargaining agreement had expired, the request came on a form instructing that "all information must be submitted 60 days prior to contract expiration date." The Union requested extensive employee "Census Information," and the request was not limited to the Respondent's represented employees. The request also sought detailed

[4] The dissent notes that the Board has used the term "the end of their rope" in describing the circumstances where parties have reached impasse. E.g., *Caldwell Mfg.*, 346 NLRB No. 100, slip op. at 12 (2006). However, "[t]he Board has defined impasse as the point in time of negotiations when the parties are *warranted* in assuming that further bargaining would be futile." (Emphasis added.) *A.M.F. Bowling Co.*, 314 NLRB 969, 978 (1994), enf. denied 63 F.3d 1293 (4th Cir. 1995), citing *Pillowtex Corp.*, 241 NLRB 40, 46 (1979). To that end, an impasse does not necessarily mean that bargaining is at an end. Indeed, if a party makes a new substantive proposal, the impasse can be broken. The problem here is that the Union never made such a proposal.

[5] Nevertheless, we agree with the judge that the Respondent violated Sec. 8(a)(5) and (d) of the Act when it implemented its proposed early termination of the parties' separate insurance and pension agreements, and unilaterally modified the agreements. The Board's standard remedy for such a violation is to require the Respondent to reinstate and honor the insurance and pension agreements through their expiration dates, and to adhere to the terms and conditions of the agreements thereafter until the parties reach either new agreements or a valid impasse. See *Bath Iron Works Corp.*, 345 NLRB 499, 501 (2005).

information on COBRA rates, insurance coverage and claims, and employee contributions.

As noted above, in its subsequent letters to the Respondent, the Union objected to the Respondent's declaration of impasse and its intent to implement. To that end, the Union acknowledged that it submitted the information request in conjunction with its contention that the parties were not at impasse, and that new proposals would be forthcoming in further bargaining. Indeed, in its August 19 letter to the Respondent, the Union insisted that it would make further health and welfare proposals. However, the Union did not provide the Respondent with any specific proposals, nor did it indicate any interest in engaging in postimplementation bargaining.

Significantly, the Union requested this information on the same day that it disputed the Respondent's contention that the parties were at impasse. Indeed, the Respondent replied that the request, on the "eve of implementation," was "disingenuous" because the parties had been negotiating for "over 2 or 3 months" about changes in the health and welfare plans. However, the Respondent did, in fact, provide the requested information on December 5.

We agree with the judge that the Union's information request was purely tactical and was submitted solely for purposes of delay. This finding is warranted by the fact that the Union requested the information after months of extensive bargaining, after the contract's expiration, after the Union's rejection of the Respondent's final offer, and after the Respondent declared that it had nothing left to offer.[6] In these circumstances, where the Respondent had a legitimate doubt as to whether the Union was truly interested in the information for purposes other than forestalling the lawful implementation, the Respondent cannot be faulted for not furnishing the information more promptly.

Further, even if the Union's request was not tactical, there would be no violation. In light of our findings that an impasse was reached, no negotiations were scheduled, and the Union showed no interest in postimplementation bargaining on the issue, we fail to see any urgency for the information. We therefore disagree with our colleague's view that the failure to promptly supply the information was unlawful.

III.

The judge also found that the Respondent violated Section 8(a)(1) of the Act by threatening employees with plant closure if they engaged in a strike. We disagree with this finding.

The record shows that, beginning in June 2003, the Respondent and the Union engaged in negotiations for a new collective-bargaining agreement. During a negotiating session on July 9, 2003, the Respondent's director of human resources and principal negotiator, Garry Rager, raised the possibility that the Union might go on strike if there was no contract. Specifically, Rager told the union negotiating committee, which included several employees, that a work stoppage would work dramatically against the Union, that the Respondent's president, Roger Wynkoop, would be disappointed, and that it was unpredictable how the Respondent's owner, Carl Icahn, would react to a work stoppage. In response, the Union's local president, Andy Yocum, said, "Yeh, he will say 'fuck 'em; close the plant down,'" to which Rager responded, "Yeah, he could say 'fuck 'em; close the plant down.'"

The judge found that, although Rager was doing no more than parroting Yocum, Rager's statement about what the Respondent's owner could do conveyed a threat of plant closure if the employees went on strike, and, as such, violated Section 8(a)(1). Contrary to the judge, we find that, when considered in context, Rager's statement was not an unlawful threat.

As noted by the judge, the very idea of a plant closure was brought up by the Union, not the Respondent. It was Yocum who first expressed the opinion that Icahn would "say . . . close the plant." Rager simply acknowledged that Icahn could make the statement that Yocum believed Icahn would make. Rager certainly did not state that he believed that the plant would—in fact—close down in the event of a work stoppage, or that he believed Icahn actually would take any action. Indeed, Rager had just previously said that it was unpredictable how Icahn would react. In these circumstances, employees would not reasonably construe Rager's statement as a threat of plant closure in the event of a work stoppage. Cf. *Central Transport*, 306 NLRB 166, 169 (1992), enfd. in relevant part 997 F.2d 1180 (7th Cir. 1993) (supervisor's comments to employees that the "shop would close" if the union won the election violated Sec. 8(a)(1) because they "were more than personal expressions of opinion").

In sum, we find that, when considered in context, Rager's comment did not rise to the level of a threat of plant closure. Accordingly, we reverse this finding by the judge and shall dismiss this complaint allegation.

[6] See generally *NLRB v. Wachter Construction, Inc.*, 23 F.3d 1378 (8th Cir. 1994) (employer did not violate the Act by failing to provide information requested in bad faith). However, we find it unnecessary to pass on whether the Respondent was not obligated to furnish the information at all.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, ACF Industries, LLC, Milton, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(a) and reletter the subsequent paragraphs accordingly.

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

MEMBER LIEBMAN, dissenting in part.

The Respondent employer sought major concessions from the Union, on relatively short notice. Although both parties bargained hard, the Union made significant concessions on the three biggest economic issues—pay, health coverage, and pensions—and indicated that it would make more. Moreover, on several occasions after asserting that it had made its "final" offer, the Respondent either made further concessions or indicated that it would make them. Although this is a close case, I cannot agree that the parties could reasonably have believed that they had reached "the end of their rope" and were consequently at a bargaining impasse under established Board law. E.g., *Caldwell Mfg.*, 346 NLRB No 100, slip op. at 12 (2006).[1] On that ground, I would find that the Respondent's implementation of its "last" offer violated Section 8(a)(5) of the Act. I would also find that the Respondent's delay in providing the information on health care requested by the Union independently violated Section 8(a)(5).[2]

I. IMPASSE

The standard for finding impasse is high. An impasse exists only when good-faith negotiations have "exhausted" the prospects of reaching agreement. *Taft Broadcasting*, 163 NLRB 475, 478 (1967), affd. 395 F.2d 622 (D.C. Cir. 1968).[3] Where a union has made significant concessions, the employer cannot declare impasse "simply because the union's concessions were not more comprehensive or sufficiently generous." *Larsdale, Inc.*, 310 NLRB 1317, 1319 (1993). "[F]utility rather than mere frustration, discouragement, or apparent gamesmanship, is necessary to establish impasse." G*rinnell Fire Protection Systems v. NLRB*, 236 F.3d 187, 199 (4th Cir. 2000), enfg. 328 NLRB 585 (1999). See, e.g., *Powell Electrical Mfg.*, 287 NLRB 969, 973 (1987), enfd. in relevant part 906 F.2d 1007 (5th Cir. 1990). And where there is a distinct possibility of further movement on important issues, there is no impasse even if there is still a "wide gap" between the parties' negotiating positions. *Newcor Bay City*, supra, 345 NLRB 1229, 1238.

Under this authority, the extent of the Union's preimplementation concessions is highly significant, particularly given the surrounding context. Less than 2 months before the start of contract negotiations, the Respondent told the Union that significant cost reductions were required at the Milton, Pennsylvania facility, because the facility was operating at a loss and no longer provided substantial tax savings to the Respondent's parent corporation. At the outset of negotiations, the Respondent demanded a wide range of substantial givebacks in pay, health coverage and pensions, and even stated its intent to modify the terms of the parties' respective health care and pension contracts prior to their expiration. While the Union resisted these demands and made substantially different counterproposals over a period of less than 2 months, it made major concessions in each of these three areas.

Specifically, after first demanding annual pay increases of 7 percent over 3 years for all unit employees, the Union offered to accept an immediate decrease of 50 cents an hour for current employees with no subsequent increases, and a decrease of $6 for new employees with annual increases of 40 cents. After first rejecting any pay reduction for "indirect work" (worktime that did not qualify for an additional incentive rate), the Union offered to accept a $1 reduction. After first rejecting any employee contribution to premiums for health coverage, the Union offered to accept copays of $7 for singles and $22.50 for families.[4] And

[1] This description of a bargaining impasse is often quoted in Board cases. See, e.g., *Caldwell Mfg.*, supra; *Newcor Bay City Division*, 345 NLRB 1229, 1238 (2005); *Essex Valley Visiting Nurses*, 343 NLRB 817, 840 (2004); *Northwest Graphics*, 343 NLRB 84, 91 (2004); *Cotter & Co.*, 331 NLRB 787, 788 (2000), enf. denied on other grounds 254 F.3d 1105 (D.C. Cir. 2001), cert. denied 534 U.S. 1130 (2002); *GATX Logistics*, 325 NLRB 413, 418 (1998); *Larsdale, Inc.*, 310 NLRB 1317, 1318 (1993); *PRC Recording*, 280 NLRB 615, 635 (1986), enfd. 836 F.2d 289 (7th Cir. 1987).

[2] I agree with the majority that the Respondent did not unlawfully threaten to close the plant.

[3] Relevant factors in determining whether an impasse existed include the bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issues in disagreement, and the contemporaneous understanding of the parties as to the state of negotiations. *Taft Broadcasting*, supra.

[4] It is true, as the judge emphasized, that the Union's health proposal represented a decrease in contributions from a previous proposal, and that the Union's last severance proposal represented a benefit increase from before. However, as the General Counsel and the Union point out, these "regressive" changes were at least arguably outweighed by the Union's latest concessions in its last wage and indirect work proposals. Similarly, although the Union's last pension proposal represented a benefit increase in the form of a shortened vesting period, that change—in view of the Union's other two-

after resisting any reduction in pension accruals, the Union offered to accept a 30-year cap for current employees and no accruals for new employees. Since 9 (and arguably more) of the 15 "areas of differences" listed by the judge to support his finding of impasse related to pay, health coverage, and pensions, the Union's concessions show that those differences were being substantially narrowed.[5]

In addition to having won these concessions, the Respondent gave the Union good reason to believe that it might make additional concessions of its own. On July 25, 2003, the Respondent made a "Final Economic Proposal" on the outstanding issues. However, even before the offer was submitted to the unit for a ratification vote, the Respondent wrote to the Union that in the event the "Final Economic Proposal" was rejected, it would meet with the Union "to determine what the controlling factors were" for the rejection. After the proposal was rejected, the parties met and the Respondent made a "Best and Final Economic Proposal" containing significant differences from its predecessor. When the Union rejected this proposal, the Respondent made a number of "amendments" changing it further. When the amended proposal was voted down by a smaller margin, the Respondent declared impasse.[6] The Union insisted that it had additional proposals to make, but the Respondent implemented its last proposal.

Given this negotiating history, the majority's conclusion that, at the time of the second vote, "the Respondent could not have been clearer in conveying that it had nothing more to offer" is something of an overstatement. It was, in fact, entirely reasonable at that point for the Union to believe that it might elicit additional concessions from the Respondent, even if the Respondent in fact had no intention of making any. Nor could the Respondent reasonably assume that the Union would make no additional concessions, in view of the concessions the Union had already made.[7] Under all the circumstances, neither party could reasonably believe that the other had "exhausted" its ability to make further concessions or that further bargaining would be "futile." The parties were therefore not at impasse when the Respondent implemented its last offer.[8]

The judge emphasized that the Union, while asserting after the Respondent declared impasse that it had additional proposals to make, failed to specify any of them. The Respondent, however, essentially told the Union that the new proposals would be futile, when its chief negotiator responded to the Union's protest by saying, "I can't do it, I got my marching orders, you know, I got to implement." Under these circumstances, the Union cannot be faulted for failing to specify the nature of its new proposals prior to a bargaining session. See *Newcor Bay City*, supra at 11 (union's failure to articulate proposals it said it had did not establish impasse); *Grinnell Fire Protection Systems*, supra, 328 NLRB at 585 (impasse was not reached simply because "one party had asserted that it had reached its final position and the other had not yet offered specific concessions").[9]

II. THE UNION'S REQUEST FOR INFORMATION

After the Respondent had declared impasse, but 3 days before it implemented its last proposal, the Union made a request for census information concerning the unit's current health coverage. The Respondent provided none of the requested information for almost 3 months.

In view of the lateness of the request in the course of negotiations, I agree that the Respondent's failure to provide the requested information prior to implementation did not taint the asserted impasse. But this does not mean that the Respondent was free to ignore the request until long after it had declared impasse. Regardless of whether the parties did in fact reach impasse, the Union remained the bargaining agent for the

tier concessions—would arguably have resulted in significant pay and benefit savings for the Respondent to the extent that it triggered earlier retirements and the replacement of senior employees with new employees. These "regressive" proposals consequently do not have the negative significance the judge attributed to them.

[5] By contrast, in *H&H Pretzel*, 277 NLRB 1327 (1985), enfd. 831 F.2d 650 (6th Cir. 1987), cited by the Respondent, the union refused to make any economic concessions whatsoever and even declined repeated invitations to review employer documents verifying the employer's financial condition. Similarly contrast *A.M.F. Bowling Co.*, 314 NLRB 969, 978 (1994), enf. denied 63 F.3d 1293 (4th Cir. 1995), where the union "never discussed a wage concession [the major issue in dispute] of any amount," and based that refusal on an improper demand for financial disclosure. 63 F.3d at 1300–1302.

[6] By contrast, in *Truserv Corp. v. NLRB*, 254 F.3d 1105 (D.C. Cir. 2001), cited by the Respondent, the employer made only one "final offer" and the union refused even to submit that offer for a ratification vote.

[7] As the Seventh Circuit has observed, a final offer is often followed not by implementation but by bargaining followed by another final offer followed by more bargaining. . . . [internal citation omitted.] Apparently the use of final offers as bargaining ploys is common. *Teamsters Local Union No. 639 v. NLRB,* 924 F.2d 1078, 1081 (D.C. Cir. 1991); *Presto Casting Co. v. NLRB,* 708 F.2d 495, 497 (9th Cir. 1983). . . . After final offers come more offers. *Chicago Typographical Union No. 16 v. Chicago Sun-Times*, 935 F.2d 1501, 1508 (7th Cir. 1991).

[8] This is true even assuming, as the majority finds, that the Respondent had operated in good faith before declaring impasse. *NLRB v. Katz,* 369 U.S. 736, 747 (1962).

[9] I do not agree with the judge that the Union's proposals on the permissive subject of a neutrality clause would have contributed to an impasse, since the Union never conditioned an agreement on those proposals.

unit and was presumptively entitled to information concerning unit members' terms of employment that it needed to carry out its representative duties. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967); *Samaritan Medical Center*, 319 NLRB 392, 397 (1995). The Respondent was accordingly required to provide such information upon request on a timely basis, and as quickly as possible. *Woodland Clinic*, 331 NLRB 735, 736 fn. 5 (2000).

Moreover, the Respondent's own bargaining position made the requested information directly relevant. The Respondent was proposing to terminate the unit's health plan and place the unit under the plan that covered its salaried employees. For the purpose of obtaining alternative coverage under the United Steelworkers' health plan, the Union requested the information bearing on the current cost of insuring the Respondent's work force. Given the Respondent's position, this request was entirely reasonable and the information was presumptively relevant to the Union's bargaining responsibilities.

The Respondent, however, initially refused to provide the requested information, then delayed providing any of it to the Union for almost 3 months. This delay was particularly blatant in view of the fact that the Respondent, at the time it declared impasse, specifically offered to continue bargaining with the Union on health care. Contrary to the majority, the Union's need for the information at issue was all the more "urgent" in view of the Respondent's declaration of impasse.[10] The delay accordingly violated Section 8(a)(5).

The majority adopts the judge's inference that the Union's motive for requesting information on health care was a "purely tactical" attempt to forestall impasse, and implies that the request was therefore made in bad faith. However, it is well established under Board law that an information request cannot be treated as in bad faith "if at least one reason for it can be justified." See, e.g., *Country Ford Trucks v. NLRB*, 229 F.3d 1184, 1192 (D.C. Cir. 2000); *Ormet Aluminum Mill Products*, 335 NLRB 788, 805 (2001); *AK Steel*, 324 NLRB 173, 184 (1997).[11] Given the relevance of the information sought, and particularly considering that the Respondent had offered to continue negotiations over health coverage after implementation, the Union had the right to the requested information.[12]

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT prematurely modify or terminate contractual agreements with the Union, United Steelworkers of American, AFL–CIO, CLC, without its consent.

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

WE WILL, upon request by the Union, rescind our unlawful unilateral modifications of the 2000 pension agreement with the Union.

WE WILL, upon request by the Union, rescind our unlawful unilateral termination of the 2000 health insurance agreement with the Union.

WE WILL make whole, with interest, all our employees and retirees for any losses they may have suffered as a result of our unlawful unilateral modification of the 2000 pension agreement with the Union or as a result of our unlawful unilateral termination of the 2000 health insurance agreement with the Union.

ACF INDUSTRIES, LLC

Gerald McKinney, Esq., for the General Counsel.

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[10] The majority's refusal to perceive any "urgency" for the information even assuming that the Union's request was not "tactical" is mistaken insofar as it implies that a union forfeits its right to the timely production of relevant information whenever an employer declares impasse.

[11] In *NLRB v. Wachter Construction*, 23 F.3d 1378 (8th Cir. 1994), cited by the majority, there was affirmative evidence that the union's information request was intended to harass and coerce employers to do business only with union firms. See *Supervalu, Inc. v. NLRB*, 184 F.3d 949, 952 (8th Cir. 1999) (limiting *Wachter*). Moreover, the Respondent did not raise bad faith as an affirmative defense in its answer to the complaint, as it was required to do. *AK Steel*, supra, 324 NLRB at 184 fn. 34; *Island Creek Coal*, 292 NLRB 480, 489 fn. 14 (1989), enfd. 899 F.2d 1222 (6th Cir. 1990).

[12] The majority, like the judge, notes that the request included census information for employees outside the bargaining unit, implying that the request was therefore improper. But the Respondent itself had made information on those employees directly relevant by insisting on including them in the same pool as unit employees. Nor does the fact that the Union's request form included some clearly outdated boilerplate text concerning response time negate the relevance of that information.

Herbert Levine and *Rene Kathawala, Esqs. (Orrick, Herrington & Sutcliff, LLP)*, of New York City, New York, for the Respondent.

Richard E. Gordon, Esq. (Grossinger, Gordon & Vatz, LLP), of Pittsburgh, Pennsylvania, for the Charging Party, with *Richard J. Brean* and *Paul L. Edenfield, Esqs., USWA*, of Pittsburgh, Pennsylvania, on the Brief.

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This case under the National Labor Relations Act (the Act) was tried before me in Lewisburg, Pennsylvania, on July 20–21, 2004. On August 19, 2003,[1] United Steelworkers of America, AFL–CIO, CLC (the Union) filed the charge in Case 6–CA–33614 against ACF Industries LLC (the Respondent) alleging various violations of the Act. After administrative investigation of the charges, the General Counsel of the National Labor Relations Board (the Board) issued a complaint alleging that the Respondent has violated Section 8(a)(1) of the Act by threatening employees with plant closure if they engaged in a strike. The complaint further alleges that the Respondent has violated Section 8(a)(5) and (1) by various acts; to wit:

> 11. At various times during the months of June, July and August 2003, Respondent and the Union met for the purposes of collective bargaining with respect to wages, hours and other terms and conditions of employment of the [Respondent's employees in a production and maintenance] Unit.
>
> 12. During the period described above in paragraph 11, Respondent engaged in the following conduct:
>
> (a) Bargained with an intent to reach impasse for the objective of implementing its last collective-bargaining proposal.
>
> (b) Falsely declared impasse.
>
> (c) Announced its intent to implement its last proposal in the absence of impasse.
>
> (d) Insisted as a condition of reaching any collective-bargaining agreement on demands which violated Section 8(d) of the Act.
>
> (e) Failed to provide the Union with information necessary for collective bargaining.
>
> (f) Implemented its final proposal without permitting further bargaining on that proposal.
>
> 13. By its overall conduct, including the conduct described above in paragraph 12, and below in paragraphs 14, 16, 18, 19, 20 and 24, Respondent has failed and refused to bargain in good faith with the Union as the exclusive collective-bargaining representative of the Unit.
>
> 14. On or about August 21, 2003, Respondent unilaterally implemented the terms of its last collective-bargaining contract proposal at a time when good faith impasse had not been reached in negotiations.
>
> 15. (a) Respondent and the Union are parties to an Insurance Agreement which is effective by its terms from August 3, 2000, to November 30, 2003.
>
> (b) Respondent and the Union are parties to a Pension Agreement which is effective by its terms from August 3, 2000, to December 31, 2003.
>
> (c) Said agreements were negotiated by the parties together with the agreement described above in paragraph 9 [which is a comprehensive collective-bargaining agreement that was effective by its terms from August 3, 2000, through August 2, 2003, as discussed infra] and constitute part of a comprehensive agreement relating to the wages, hours and other terms and conditions of employment of the Unit.
>
> 16. (a) Since on or about June 26, 2003, Respondent insisted, as a condition of reaching any collective-bargaining agreement, that the Union agree to modify the expiration date of the Insurance Agreement.
>
> (b) Since on or about August 7, 2003, Respondent insisted, as a condition of reaching any collective-bargaining agreement, that the Union agree to modify the expiration date of the Pension Agreement.
>
> 17. The conditions described above in paragraph 16(a) and (b) are not mandatory subjects for the purposes of collective bargaining.
>
> 18. On or about August 7, 2003, Respondent bargained to stalemate on the nonmandatory subjects described in paragraph 16(a) and 16(b) and thereby did not reach a good faith impasse in collective bargaining.
>
> 19. On or about August 21, 2003, Respondent failed to continue in effect all the terms and conditions of the agreements described above in paragraphs 15(a) and 15(b) by terminating the agreements prematurely.
>
> 20. Respondent engaged in the conduct described above in paragraph 19 without the Union's consent.
>
> 21. The terms and conditions of employment, described above in paragraph 19, are mandatory subjects for the purpose of collective bargaining.
>
> 22. Since on or about August 18, 2003, the Union, by facsimile transmission, has requested that Respondent furnish the Union with information concerning census information, current rate information, claims experience, COBRA rates and other information related to health care coverage.
>
> 23. The information requested by the Union, as described above in paragraph 22, is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the Unit.
>
> 24. Since on or about August 18, 2003, until about December 5, 2003, Respondent unreasonably delayed in furnishing the Union with the information requested by it as set forth above in paragraph 22.

[1] Unless otherwise indicated, all subsequently mentioned dates were in 2003.

In its answer, the Respondent admits paragraphs 11, 15, and 22 of the complaint, and it admits that this matter is properly before the Board, but it denies the other quoted allegations of the complaint, and it denies the commission of any unfair labor practices.

Upon the testimony and exhibits entered at trial,[2] and after consideration of the briefs that have been filed, I make the following findings of fact and enter the following conclusions of law.

I. JURISDICTION AND LABOR ORGANIZATION'S STATUS

The complaint alleges, and the Respondent admits, that at all material times the Respondent, a corporation, with an office and place of business located in Milton, Pennsylvania, has been engaged in the manufacture of railroad cars (mostly tanker cars, but some hopper cars). During the 12-month period ending July 31, Respondent, in conducting those business operations, sold and shipped from its facility goods valued in excess of $50,000 directly to purchasers located at points outside Pennsylvania. Therefore, at all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. As the Respondent further admits, at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

The Union has represented the production and maintenance unit of employees at the Respondent's Milton facility since 1945. In early 2003, there were approximately 350 employees in the unit. The Respondent's president is Roger D. Wynkoop; its senior director of human resources is Gary S. Rager. Rager was the Respondent's principal representative during the 2003 bargaining sessions with the Union. Rager was usually assisted by Dan Neimond, the Respondent's plant manager, Jim Bowles, comptroller, and Joe Heggie, an assistant to Rager. Robert English, staff representative, was the principal spokesman for the Union. English was usually assisted by David Andrew (Andy) Yocum, president of United Steelworkers of America (USWA) Local 1928 which represents employees locally at Milton, Rich Gardner, recording secretary, Galen Beach, chairman of the plant grievance committee, and Tom Hoy and Richard Leon, grievance committee members. English was the principal witness for the General Counsel and Rager was the principal witness for the Respondent.

(The Respondent also maintains a manufacturing operation at Huntington, West Virginia; just what is manufactured there was not explicitly stated by any witness, but apparently it is some type of railroad freight car other than a tanker. At any rate, the Union also represents the production and maintenance employees at Huntington. Negotiations for a 2003 collective-bargaining agreement at Huntington occurred about the same time as those at Milton, and those negotiations were sometimes mentioned during the 2003 Milton negotiations. Rager was the Respondent's chief negotiator at Huntington as well as at Milton, but English was not the Union's Huntington negotiator.)

On April 22, or about 2 months before the beginning of the 2003 Milton negotiations, Wynkoop addressed the Union's bargaining committee. Wynkoop, at length, explained that because the Respondent's parent corporation had no future need for tax writeoffs that historical losses by the Milton facility had been providing over the recent years, and because of competition in the market in which the Respondent was then operating, the Respondent's costs for producing railroad cars would have to be reduced in the future if reasonable profits for the Respondent and its parent corporation were to be achieved and if, derivatively, security of the unit employees' jobs was to be maintained.[3] The Respondent and its parent corporation are both owned by financier Karl Ichan to whom reference was made at one particularly important bargaining session.

By letters dated April 25, May 3, and June 3, respectively, Rager informed the Union that, pursuant to provisions of the various agreements, the Respondent intended to terminate the insurance agreement that was effective by its terms from August 3, 2000, through November 30, 2003 (the insurance agreement), the comprehensive labor agreement that was effective by its terms from August 3, 2000, through August 2, 2003, (the 2000 contract),[4] and the pension agreement that was effective by its terms from August 3, 2000, through December 31, 2003 (the pension agreement). At some point before negotiations began (or perhaps early in the negotiations—no witness was sure), Rager and English agreed that the parties should do their best to reach agreements by July 25. This resolution was consistent with prior negotiations in which the parties attempted to reach agreement at least a week before termination of the comprehensive agreement that was then in effect. The delayed dates for expirations of the 2000 pension and insurance agreements (that is, dates after the expiration date of the comprehensive agreement) was also not unusual; the parties historically staggered those dates to provide continuing coverage for employees in the event that there was no comprehensive agreement reached and a strike ensued.

Bargaining session 1, June 11. At their first bargaining session, the parties exchanged written proposals, some of which were specific, but most of which were stated in very general terms. The Respondent proposed, inter alia: (1) Changing the work shifts from 5-day, 8-hour shifts to shifts of 10 hours, 4 days per week (with workweeks beginning on Monday, Tuesday, or Wednesday). (2) "Reduction in pay of all employees with a large reduction of pay for those hired after August 3, 2003." (3) "Significant reductions in pay

[2] Certain passages of the transcript have been electronically reproduced; some corrections to punctuation have been entered. Where I quote a witness who restarts an answer, and that restarting is meaningless, I sometimes eliminate, without ellipses, words that have become extraneous; e.g., "Doe said, I mean, he asked . . ." becomes "Doe asked . . . ." All bracketed entries have been made by me.

[3] The parties stipulated to the admission of a great number of exhibits, including a copy of Wynkoop's speech, which Wynkoop testified he followed as best he could.

[4] As does the complaint, by "comprehensive" I refer to the agreement that comprehended all terms and conditions of the unit employees except for pension and insurance which had been made the subjects of separate agreements in 2000.

when a direct employee is transferred to indirect work." Generally, direct work (or direct labor) is production work that has an incentive rate that is added to an employee's basic hourly rate. "Direct employees" are employees who usually do direct-labor jobs. "Indirect work" is nonincentive work that is occasionally done by direct employees, such as moving things around or making adjustments to machines. Under the rates of the 2000 contract, direct employees who had assignments to indirect work took a reduction in their base rate, as well as losing their incentive rate. This reduction was sometimes referred to as "the penalty." The Respondent's initial proposal for the 2003 negotiations was therefore to the effect that the penalties would be even greater than they had been in the past. (4) Deletion of severance allowance provisions of the 2000 contract which had provided, in the event of a plant shutdown, from 4 to 8 weeks' pay, depending on seniority. (5) Elimination of health insurance for all future retirees. (6) A 5-year agreement. Previous agreements had been for 3 years. (7) Requiring unit employees to contribute to health insurance plans at the same rate as salaried employees (which was then $13 per week for single coverage and $45 for family coverage). The unit employees had previously contributed nothing to their health insurance premiums (although, since 1985, they had made copayments for some medical services). (8) "Freeze the Defined Benefit Pension Plan for all employees." As later explained, this was a proposal to discontinue future pension service accruals of the current defined benefit plan, not to abolish the plan or otherwise change it. (As previously noted, the Respondent's implementations of its ultimate proposals to modify the pension and health insurance plans are specifically made the subjects of paragraph 19 of the complaint as "premature" unilateral modifications of the separate agreements on those topics.) (9) Reduce sickness and accident benefits to $300 per week for a maximum of 26 weeks. Under the 2000 contract, the benefit had been $331 per week for a maximum of 39 weeks. (10) "Delete" (i.e., not renew) several side letters of agreement that had been issued during the 2000 negotiations, including one that required the building of tank cars only at Milton and another in which the Respondent agreed not to seek reduction of benefits during the contract term.[5]

The Union's proposal of June 11 was for a 3-year contract, with 7-percent wage increases each year, a 25-cent-per-hour increase in all incentive rates, a 10-percent increase in the "SRP" (which is an incentive plan of which nonincentive employees may sometimes take advantage), increases in the amount of employer contributions to employees' 401(k) plans in the amount of 8, 9, and 10 percent of all wages for each year of a 3-year contract (under the 2000 contract, the Respondent had matched 45 cents of each dollar, up to a maximum of 5 percent of earnings), increases in other benefits, and maintenance of those benefits that the Union did not then propose to be increased.

Depending on the price of steel, tank cars sell for between $55,000 and $70,000. English testified that at the June 11 session, Rager said that the Respondent needed reductions of $10,000 per car and that the negotiations would be tough. Rager testified that he consistently stated that reductions of tank-car production costs would have to be between $9000 and $10,000, that about $5000 of that figure would have to come from reductions in labor costs, and that the remainder would be from cost-cutting overhead and administrative changes. To the extent that they differ, I credit Rager. However, in either event, and for whatever reasons,[6] it is undisputed that the Respondent consistently demanded severe reductions in future labor costs.

Bargaining session 2, June 12. At this session, the Union gave the Respondent a few noneconomic proposals. The Union did not respond to the Respondent's economic proposals because the parties had agreed to address noneconomic matters first. At this bargaining session, English also presented Rager with an extensive information request, including the Respondent's Federal income tax returns for the preceding 5 years. English testified that at the June 12 session, the parties agreed to delete a letter of understanding on the assignment of classifications and agreed that the civil rights committee would meet only as needed, not every month. (During this session, Rager told English that the Respondent was about to issue a WARN notice of impending layoffs. The Respondent did so shortly thereafter, and layoffs did occur, but there are no 8(a)(3) allegations in regard to them.)

Bargaining session 3, June 24. At this session, the parties exchanged further proposals on topics that they considered non-economic such as 10-hour days, 4 days per week. (Ultimately, the Respondent withdrew the proposal for 10-hour days.)

On June 20 and 25, by letters of those dates, Rager supplied the requested financial information, except for Federal income tax returns "due to their consolidated nature."[7] The plant profit and loss statements that Rager provided showed that the Respondent had suffered significantly increasing losses since 1999.

Bargaining session 4, June 25. At this session the Union gave another response to the Respondent's noneconomic proposals.

Bargaining session 5, June 26. After further discussions and some minor agreements on noneconomic proposals, the Respondent gave the Union a "Summary Report of Wages and Cost of Hourly Employee Fringe Benefits, 2nd Qtr. 2002, thru 1st Qtr. 2003," showing $18.18 average unit wage

[5] How the latter letter came into being is not contained in the record; apparently it was an affirmation of the Respondent's obligation under Sec. 8(d), as discussed infra.

[6] On brief, the General Counsel attempts to make much of this issue, but if the Respondent had taken the position that it had been making a handsome profit for its shareholders but it wanted more it would have been just as lawfully entitled as the Union was in stating that the employees wanted more wages or other contractual benefits for themselves and their families. The issue before the Board is what the parties did to advance their respective positions.

[7] Para. 12(e) alleges that the Respondent failed to provide information during the negotiations. The General Counsel does not discuss the Respondent's June 20 and 25 responses on brief and, to the extent that the allegation may refer to these responses, I recommend that it be dismissed.

rates and a total of $35.82 total labor cost per hour, with fringes. The Respondent then submitted its first economic proposal. Rager characterized this proposal as a "major concessionary proposal," and it certainly was.

The Respondent's first economic proposal was for a 5-year agreement. The proposal listed as the effective date for all its provisions "August 3, 2003." Although August 3 was the first day after the comprehensive 2000 contract expired, it was, as mentioned, a date in advance of the express termination date of the 2000 insurance agreement (again, November 30, 2003) and a date in advance of the express termination date of the 2000 pension agreement (again, December 31, 2003). (After June 26, the Respondent continued listing August 3 as the effective date of its proposals until August 7 when it indicated that its proposals to change the pension plan would be effective December 1. That is, "August 3" in the early proposals was a something of a shorthand method of referring to the effective date of a successor contract.)

The final year the 2000 contract called for wage rate ranges from $13.87 to $16.08 for indirect-labor classifications (and work, when direct-labor employees were doing it) and from $13.69 to $16.32 for direct-labor classifications.[8] The Respondent's June 26 wage proposal was to create a two-tier wage structures for both direct-labor and indirect-labor jobs. For "current" indirect-labor employees (those who were employed by August 2), the Respondent proposed for the first year of a 5-year contract to decrease the wage rates that had been specified for the last year of the 2000 contract by $1.50. For new indirect-labor employees (those hired on and after August 3) the Respondent proposed a reduction of $5.75 per hour. For current direct-labor employees, the Respondent proposed to decrease all incentive (or "adder") rates by $1.50; for new direct-labor employees, the Respondent proposed to decrease the incentive rates by $5.75 per hour. The Respondent further proposed that all current direct-labor employees, when doing indirect-labor work, would receive an additional cut of $5.75 per hour in their pay. For all employees, the Respondent proposed no general wage increases during the second year of the successor contract, but proposed 15-cent wage increases for each year of the final 3 years of its proposed 5-year contract. In summary, the Respondent was proposing various wage cuts for the first year of the successor contract, no general increases or reductions for the second year, and 15-cent increases for the third, fourth, and fifth years.

The Respondent's June 26 proposal included the reduction or elimination of several other benefits, for the duration of the successor contract, including elimination of the existing production and maintenance unit employees' health insurance plan and substitution of the salaried workers' plan, with the same employee contributions to premiums. The Respondent further proposed that any changes in premiums or coverages in the salaried employees' plan "will also be applicable to the hourly medical insurance plan." The Respondent's proposal added the comment:

> The former Insurance Agreement effective August 3, 2000, and all the provisions contained therein and now in effect, shall terminate pursuant to its own terms and conditions with the expiration of the 2000 collective-bargaining agreement and will not be renewed or extended into the 2003 collective-bargaining agreement.

Although this proposal recites that the insurance agreement "pursuant to its own terms" will terminate with the expiration of the 2000 contract, there were no such "own terms." As noted, the Respondent admits that the insurance agreement did not terminate by its own terms until November 30. English testified that during negotiations the Union always took the position that the insurance agreement did not terminate until November 30. Rager did not dispute that testimony. English, however, did not testify that he ever told Rager that the Respondent was barred from making the proposal or that he ever told Rager that the Union would not bargain about early modification of the insurance agreement.

The Respondent further proposed on June 26 to eliminate all health insurance for future retirees and to terminate health insurance for current employees at the end of any month of any layoff. Under the 2000 insurance agreement, retirees had some coverage (and a life insurance provision), and laid-off employees had health insurance coverage for 6 months following the month of layoff. The Respondent further proposed to reduce sickness and accident benefits from $331 per week for 39 weeks, as had been provided by the 2000 contract, to $300 per week for 26 weeks. The Respondent further proposed to discontinue future pension service accruals (i.e., credit for seniority earned after August 2) and to eliminate supplements to the current defined benefit plan which allowed employees to retire early.[9] The Respondent further proposed to eliminate all non-statutory overtime premiums (e.g., time-and-one-half after 8 hours and on Saturdays; double overtime on Sundays, $2.25 for holidays), and the Respondent proposed to eliminate 2 of 11 paid holidays that had been provided by the 2000 contract. Under the 2000 contract, the unit employees were entitled to 4 weeks' vacation if they had between 17 and 25 years of service and 5 weeks after 25 years. The Respondent's June 26 proposal called for 4 weeks' vacation after 20 years' service and no additional vacation thereafter. The proposal further included elimination of shift differentials and severance allowances. After this presentation, Rager told the Union's committee that the Respondent had "very minimal" room for movement on its proposals.

Bargaining session 6, July 8. The Union submitted another economic proposal, this time calling for 5-percent wage increases for each year of a 3-year contract (down from 7

[8] Basic hourly pay rates for indirect-labor jobs are listed in appendix B of the 2000 contract, and rates for direct-labor jobs are listed in appendix B-1. An example of the latter is a job in classification 21 which had a base rate of $6.54 and an incentive rate of $9.77 for a total of $16.31 (rounded).

[9] As well as disability retirements, the supplements to the pension plan which the Respondent proposed to eliminate were the "Rule of 65" and "70/80" supplements, each of which combines age and years of service to allow for (reduced) retirement benefits before full retirement was earned upon 30 years of service.

percent in its original proposal), a 15-cent increase in all incentive rates (down from 25 cents), a 7.5-percent increase in the SRP plan (down from 10 percent), 8 percent of all earnings as employer contributions to employees' 401(k) plans for each year of a three-year contract, a sixth week of vacation (after an unspecified seniority level is reached), and retention of or increases in all other benefits.[10] The Union also proposed a "neutrality" agreement which would, inter alia, bar the Respondent from campaigning if the Union sought to organize any of its unorganized employees. The Union further proposed "current language" for insurance and pensions.

English testified that, during the July 8 bargaining session, Rager stated that the Respondent must reduce the price of tank cars by $5000, which would be accomplished, in Rager's estimation, by the $7.50 to $8 per hour reduction in labor costs. English testified that the Union's bargaining committee was "really shocked over the magnitude of the concessions that they were looking for." Rager testified that he, in turn, expressed "bitter disappointment" in the Union's proposals because they were pointing entirely in the opposite direction from what the Respondent needed; Rager further testified that he "adamantly rejected" the Union's neutrality proposal.

Bargaining session 7, July 9. English testified that the Union made some modifications of some of its prior noneconomic proposals and resubmitted its economic and neutrality proposals. At that point, Rager said that it was time for a session of "Ramble with Rager," in which he would give the Respondent's position on the issues between the parties. According to English:

> From this point forward, Gary seemed rather aggravated with our proposals, and he had earlier rejected the June 26th proposal.[11] But from this point forward, he seemed rather agitated, that we were not making movement that suited him . . . .
>
> Gary said, "We will continue to negotiate until I raise my big ugly hand, and say, 'We are at impasse.' We are offering a decent wage benefit package, and if we can't get concessions, we . . . won't build tank cars at Milton any more."
>
> He went on to say [that] if the membership withheld their labor, went on a work stoppage, that that would cause problems between the Company and the Union, and if the Union decided to strike, he said Roger [Wynkoop] would be pissed, and Carl Icahn would say, "Fuck 'em," and close the place. . . .
>
> We were all kind of in shock [at] Gary using the F-word, because . . . normally . . . he doesn't do that.

On cross-examination, English acknowledged that his notes do not reflect the "ugly hand . . . impasse" statement that he attributed to Rager. English was asked if Yocum had not used the "fuck 'em" statement before Rager did; English replied that he could not recall.

Yocum testified that at the July 9 bargaining session, during the "Ramble with Rager" segment:

> Mr. Rager said, if we were to have a work stoppage, or a strike, Mr. Icahn would say, "Fuck them, just close the place down, he doesn't care."

On cross-examination, Yocum testified that he could not recall Rager using the term "impasse"at this bargaining session; Yocum was further asked, and he testified:

> Q. During the course of the ramblings with Rager, did Gary Rager raise his hand and say, "I am going to raise my big fat hand, and say that there is an impasse"?
>
> A. I recall him having some hand gestures, but I don't recall any exact statement.

Yocum further acknowledged that there is no mention of such a statement by Rager in his notes. Then Yocum testified that Rager used the word impasse several times, but he could not remember the context. When pressed, Yocum again testified that he could not remember Rager's using the word "impasse" at all on July 9. When asked what he could remember that Rager had ever said about impasse, Yocum testified: "To my best recollection, something that we need to get a contract, because, if not, we could reach impasse, something to that effect. You will have to excuse me, I can't recall it."

When the Respondent called Gardner as an adverse witness, he also admitted that there was no mention of "impasse" in his notes of the July 9 bargaining session, and he admitted that he had no recollection of Rager having mentioned impasse at that session. Gardner also acknowledged that, as his notes reflect, English stated during this bargaining session that "We aren't going to give up a lot." Further, the Respondent asked Gardner and he testified:

> Q. You heard Mr. Yocum testify, that at some point during that rambles with Rager, that he said, also, "Icahn will say 'fuck 'em,' and close it down;" do you recall that testimony?
>
> A. I recall the testimony.
>
> Q. Do you recall that happening?
>
> A. No, I didn't hear that.

Then, however, the General Counsel elicited from Gardner that his notes of the bargaining session reflect that Rager told the Union's committee that "A work stoppage would just create ill feelings between company and workers," that by engaging in a work stoppage the employees would "cut our own throats," and that "Roger [Wynkoop] will be upset, and Icahn will say 'fuck them' and shut it down." Gardner further testified for the General Counsel that the notes were correct and that Rager did make those statements.

Based on this testimony by Gardner, English, and Yocum, the complaint alleges that, in violation of Section 8(a)(1), Rager "threatened to close the facility in retaliation if the employees engaged in a strike." The General Counsel and the Charging Party further contend, based on English's testimony about Rager's saying on July 9 that he would raise

[10] What dental coverage there was during the 2000–2003 period was not demonstrated, but on June 11, the Union proposed that all dental expenses be covered, to a maximum of $2000 per person; on July 8, the Union proposed a maximum of $1500.

[11] Only the Respondent, however, had made economic proposals on June 26.

"my big ugly hand" and declare impasse, that Rager thereby admitted that the Respondent's intention was to create an impasse in order to give the Respondent the putative right to implement its last offer.

Rager, when called by the Respondent, acknowledged that he was the first to raise the possibility of the Union's going on strike if there were no contract; he added that he told the Union:

> A work stoppage will work dramatically against you. . . . I indicated that Roger Wynkoop would be disappointed; that he was their best friend. And then I said, words to the effect, that it's unpredictable how Carl Icahn would react to a work stoppage.
>
> And about that point in time, Andy Yocum said, "Yeah, he will say 'fuck 'em; close the plant down.'"
>
> And I said, "Yeah, he could say 'fuck 'em; close the plant down.'"

Rager flatly denied that he used the word "impasse" during the July 9 session, and he flatly denied English's testimony about Rager's referring to his "big ugly hand." (Rager further denied that the word "impasse" was ever used at the bargaining table.)

On cross-examination, Yocum denied that he first said that Ichan would close the plant. Yocum again testified that Rager first said Ichan would say to a strike "Fuck them, just close the place down," and that Rager then added that Ichan "did not care." Yocum testified that he (Yocum) then stated to everyone else at the meeting: "See, fuckin' Icahn will shut the place down; he don't care."

I credit Rager on both accounts. Rager had a credible demeanor, but the factor that sways my finding, at least on the question of who at the July 9 meeting first stated that Ichan might close the plant, is the fact that the General Counsel did not call Gardner as his witness on the point, even though Gardner's notes had plainly stated that Rager had said that Ichan would close the plant. The only explanation for this is that Gardner had told the General Counsel during pretrial essentially what Rager had testified to at trial; Rager made the statement that Ichan would close the plant in the event of a strike, but he made it only in agreement with the speculation by Yocum. When the Respondent's counsel asked Gardner if Rager had made the statement, Gardner tried the I-don't-remember dodge. But when he saw that the General Counsel wanted the same testimony, no matter what he had said (or not said) during pretrial, Gardner testified that his notes were correct. Of course, the notes were correct only as far as they went; Gardner's notes did not state who made the plant closing statement first. Although Rager had already testified that Yocum had first made the statement about Ichan's closing the plant, the General Counsel did not ask Gardner if Yocum made the statement first or Rager made it first. The General Counsel did not ask the question because he apparently knew that Gardner would admit that Rager had made the statement only in echo of Yocum, which is why the General Counsel did not call Gardner in the first place. Also, if Yocum had not made the statement first, English would not have stated on cross-examination that he could not recall if it was Yocum or Rager who did so. Because of my observation of English, and because of various conflicts at other points in his testimony, and because he also tried the I-don't-remember dodge about something that he assuredly would have remembered, I believe that English did remember, clearly, that it was Yocum who made the statement first. I therefore find that Yocum first stated that Ichan would close the plant in the event of a strike, and then Rager responded that Ichan "could" do so.

I further do not credit English's testimony that at the July 9 bargaining session Rager stated that "We will continue to negotiate until I raise my big ugly hand, and say, 'We are at impasse.'" Rager credibly denied that he used the word "impasse" at the bargaining table. Moreover, if any such a thing had happened, English, an experienced negotiator, and Gardner, the Union's recording secretary probably because he is supposed to be a competent note-taker, would have made notes on the point. Also, if such a dramatic, image provoking statement had been made, Yocum and the other members of the Union's bargaining committee would have remembered it and would have so testified.

Bargaining session 8, July 16. At this session, the Respondent reduced its June 26 proposals to reduce wages, for the first year of a 5-year contract, from $1.50 to $1.35 per hour for current employees and from $5.75 to $5.50 for employees hired after August 2. The Respondent further proposed a reduction of $5.50 per hour for direct-labor employees when doing indirect-labor work, rather than the $5.75 reduction for such work that the Respondent had proposed on June 26. For the second year, rather than no general wage increase, the Respondent proposed a 10-cent-per-hour increase for all employees and continued with its proposal for a 15-cent-per-hour general wage increase for all employees in the third through fifth years of its 5-year proposal. The Respondent listed no other changes to its June 26 economic proposals.

Bargaining session 9, July 17. At this session the Union withdrew several of its July 8 economic proposals, including the proposal for a 5-percent general wage increase and a 15-cent base wage increase for incentive employees on top of that. The Union proposed instead a 30-cent-per-hour increase for all employees for the first year of the successor contract, 30 cents for the second year, and 40 cents for the third year. The Union also withdrew its July 8 proposals for a 7.5-percent increase to the SRP, a sixth week of vacation, and increases in dental and eye care. The Union's submission continued to reject the Respondent's proposed two-tier wage structure, wage reductions, and all other economic proposals that the Respondent had made, including the Respondent's proposals for modification of the health insurance plan, termination of pension-credit accruals after August 3, and elimination of the 2000 pension plan's early-retirement supplements. As a "Union Insurance Counter[proposal]," the Union added to its July 17 proposal the statement: "Willing to look at cost containment options in existing plan(s); i.e., three-tier prescription plan, deductibles, etc., (Need cost of plans and plan descriptions.)" The Union proposed a 10-cent increase in employer contributions to the employees' 401(k) accounts (down from the 8-percent proposal of July 8) and continued its proposals for a neutrality agreement.

Bargaining session 10, July 23. English testified that during the morning session he addressed the health insurance issue. English noted that under the 2000 contract the unit employees had not paid any part of the premiums, and he asked Rager: "Suppose we offer to pay 8%, would that help?" Rager replied, "Yeah, we are looking for contributions," but the conversation went no further.

During the afternoon session, the Union submitted a counterproposal on wages that included a two-tier wage structure and wage reductions, but it also called for progressive restoration of the reductions through the life of the Union's proposed 3-year agreement. More specifically, the Union proposed no increase for the first year, a "$500 lump sum" for the second, and a 25-cent wage increase for the third. The Union proposed a decrease of $5.50 in wage rates for all employees hired after August 2, but $1-per-hour raises for such employees every 180 days. The Union further proposed, for post-August 2 new-hires, a wage cut of $1 per hour for direct-labor employees while doing indirect-labor work. (The Union, at this point, was proposing no reduction for current direct-labor employees while doing indirect-labor work.)

English further testified that, during another discussion of pensions and health insurance:

> Gary said that the insurance agreement expires on November 30th, 2003, and the pension agreement expires on December 31st, 2003 and, you know, if the contract's ratified, they would honor . . . those dates.

If English made a response to this remark, the General Counsel did not ask what it was. Rager testified that at the July 23 meeting there was extensive discussion of the Respondent's proposal to eliminate one of the health insurance carriers that had been provided and also about the contribution rates that the Respondent was demanding. Although the Respondent's attorney elicited testimony by Rager that, during these discussions, the Union made no objection about when the Respondent's proposals on health insurance would become effective, Rager was not asked if there was discussion of when the health insurance plan then in effect would terminate, and he was not asked if there was discussion about the termination date of the current pension plan that the Respondent was then proposing.

Bargaining session 11, July 24. The Union submitted a "Counter Insurance Proposal" which called for (1) employee contributions of 8 percent of premiums, for same coverage as that of the 2003 insurance agreement (not the salaried employees' coverage), deducted weekly. (2) only annual adjustments to employee contributions, (3) approval of the Union before any changes made in benefit levels, (4) elimination of "United Health Care" (as the Respondent had proposed) but grandfather in current employees, and (5) elimination of retiree healthcare only for employees who are hired after August 3. On cross-examination, English acknowledged that the Union was then proposing that its proposed changes to the insurance program take effect on ratification of the contract. The Union further proposed to continue with the prior sickness and accident benefits ($331 per week for 39 weeks). Finally, as a new proposal, the Union asked that employees be reimbursed 50 percent of the annual health insurance premium if they opted out of the Respondent's plan (which employees might do if covered by a spouse's plan). On the issue of pensions, the Union proposed that accruals of credit cease accruing only for employees hired after August 2 (not for all current and future employees, as the Respondent proposed) and that early-retirement supplements be eliminated only for such new employees.

The Respondent submitted another economic proposal on July 24, again specifying that all changes were to be effective on August 3 (including its proposed pension and health insurance provision changes). The Respondent proposed that, instead of the cuts of $1.50 or $1.35 per hour which it had previously proposed, wages for current employees would be cut $1.20 per hour. The Respondent returned to its proposal that all the unit employees would receive 15-cent-per-hour wage increases for the second through fifth years of a 5-year contract. The Respondent persisted in its proposal to cut $5.50 per hour on the rates of future employees, but it proposed a cut of $4.75 per hour for direct-labor employees when doing indirect-labor work (down from cut of $5.50 as proposed on July 16, and $5.75 on June 26). The Respondent further reproposed that the unit employees have the same health insurance plan as the salaried employees and that changes in premium and benefit levels of the salaried employees' plan would also be imposed on the unit employees. (Additionally, the Respondent's proposal stated that, at current levels, single employee coverage would require 25-percent employee contribution, and family coverage would require 32-percent contribution.) The Respondent again proposed to discontinue all future pension-plan service accruals and to eliminate early-retirement supplements. The Respondent also modified its June 26 proposal to terminate health insurance for current employees at the end of any month of layoff to propose such termination at the end of the month following the month of layoff.

The Union then countered with a wage proposal for current employees of no changes in the first and second years of a 3-year contract (i.e., dropping the proposal for a $500 lump-sum payment in the second year), but continuing with its proposal for a wage increase of 25 cents per hour during the third year. The Union further proposed a $6 per hour reduction for new employees (i.e., even greater than the Respondent's proposed $5.50 reduction), but with restoration at the rate of 50 cents per hour every 180 days (rather than $1 as it had proposed on July 23). The Union rejected the Respondent's proposal that the unit employees be placed in the salaried employees' plan but further proposed that employees contribute to their current health insurance plans at the rate of $7 per week for individual coverage and $20 per week for family coverage. The Union then reduced its proposal that employees who opt out of the Respondent's insurance plan be reimbursed 50 percent of the premium to reimbursement at 15 percent of the premium. The Union continued to insist on the retention of health insurance for laid-off employees for 6 months after the date of the layoff.

Bargaining session 12, July 25. At this session, the Respondent submitted another economic proposal, again effective August 3, but this time for a period of "[t]hree years, six

months." For the first year, the Respondent proposed a wage reduction of $1.05 per hour for all current employees, and $6 for all employees hired after August 2. The Respondent proposed 20-cent-per-hour wage increases for each of the following years of the successor contract for current employees and 40 cents for new-hires. The Respondent further proposed, "Direct-labor employees, while on indirect-labor, will receive a wage reduction of $2.75 per hour (attendance at safety & team meetings will be exempt)." This was down from the last proposed reduction of $4.75 for such employees' work.

The Respondent's July 25 proposal contained several changes to its insurance proposals. The Respondent continued to propose an effective date of August 3, but it added that, as well as placing production and maintenance employees under the salaried employees' plan, the Respondent would have the right to change the plan unilaterally as long as the benefits "will be substantially the same as currently offered to the non-bargaining unit employees." The Respondent further proposed that employee contributions for single coverage would be $7 per week through December 31, and $13 per week thereafter; contributions for family coverage would be $22.50 per week through December 31, and $45 per week thereafter. (English testified that these amounts worked out to be the same as called for by the Respondent's July 24 proposals that employees pay "Approx. 25% of premium" for single coverage, and "Approx. 32% of premium" for family coverage.) The Respondent further proposed that, after August 3, 2006, contributions of the production and maintenance employees would be increased along with those of salaried employees, with a limit of "10% of the current contribution." The Respondent further proposed increases on prescription copays from $8 to $15. The Respondent also proposed to keep the sickness and accident benefit at $331 per week, for 26 weeks. The further Respondent proposed eliminating only 1 of the 11 paid holidays, as opposed to 2 in its previous proposal.

At the July 25 bargaining session, the Union rejected the Respondent's proposal to decrease base-rate wages of current employees by $1.05 for the first year of a successor contract, but it proposed a decrease of 50 cents for the first year, and it accepted the Respondent's proposals for raises of 20 cents per hour per year for the following years. The Union continued to propose that wages of new-hires be reduced by $6, and it dropped its proposal that such reductions be restored at the rate of 50 cents every 180 days, but it proposed 40-cent wage increases per year for new employees in subsequent years, as the Respondent had proposed earlier in the session.

The Union continued to reject the Respondent's proposal to place the production and maintenance employees under the salaried employees' plan, and it proposed that the healthcare plan in effect on that date be continued. Specifically, the Union proposed: "Change language to read 'The benefit plan is the same or better and clarify that the plan is the one in effect as of 7/25/03.'" The Union further rejected the Respondent's proposal that employees pay $13 and $45 (individual and family) per week for health insurance after December 31 and proposed that employee contributions would be $10 and $25 (individual and family) per week to continue the current healthcare plan. The Union also proposed to limit any increases in employee contributions to 3 percent. The Union further continued to reject the Respondent's proposal to deny health insurance to future retirees, but did propose that future retirees would "share the cost at 50%." The Union rejected the Respondent's proposal to discontinue future pension service accruals for all employees, but it further proposed to "Cap pension accrual at 30 years for current employees. (Grandfather employees who are currently over 30 years.) New hires, rehires have no pension accrual rights."[12] The Union further proposed to eliminate pension supplements for employees hired after August 3. The Union further continued in its proposal for a neutrality agreement. The Union continued its proposal for a 10-cent-per hour increase in the Respondent's contribution to the employees' 401(k) accounts. The Union also proposed to delete references to a fifth week of vacation, thus accepting the Respondent's June 26 proposal on that point.

Then the Respondent submitted its "Final Economic Proposal," calling for a 3-year contract with a first-year wage reduction of 60 cents per hour for all current employees (down from the $1.05 reduction that the Respondent proposed earlier in the meeting) and a wage reduction of $6 per hour for all employees hired after August 3. The Respondent proposed no wage increases or cuts in the second or third years. In addition to proposing discontinuance of future pension service credit and elimination of the supplements to the pension plan, in both cases still proposed to be effective also on August 3, the Respondent proposed for the first time: "Grandfather employees with 30 yrs. or more pension service credit as of December 1, 2004. (Pension accruals will continue and retiree medical options will continue through December 31, 2004, for those employees only.)"[13] The proposal continued in the Respondent's original proposal to "terminate" the 2000 insurance agreement on August 3, rather than its express termination date of November 30. Rager testified that he told the Union that: "There is nothing left." English told Rager not to "bet" on the Respondent's offer being accepted by the membership.

The Union's first ratification vote. The Union scheduled a meeting for vote on ratification of the Respondent's final economic proposal for August 3. On July 29, English wrote Rager that, should the proposal be rejected, the negotiations should resume and the 2000 contract should be extended for up to 2 years while the parties negotiated, with only the requirement of 48 hours' notice of strike or lockout (the 48-hour notice provision). By letter dated July 30, Rager replied that the Respondent was hopeful that the membership would ratify its final proposal, but Rager added:

> If, however, the membership chooses to reject our final offer, please be assured the Company would be interested in promptly meeting with you to determine what the controlling factors were for our proposal's rejection.

Rager closed by stating that the Respondent was not interested in any long-term extension of the 2000 contract, but

[12] Parentheses are original.
[13] Parentheses are original.

proposed continuing to work on a day-to-day basis under the 2000 contract with the 48-hour notice provision.

English testified that after receiving Rager's July 30 letter, he called Rager and stated that the letter had caused confusion among the Union's bargaining-committee members because it looked like, if the Company's last offer was rejected, they would have another "bite at the apple." English replied that he would send another letter. Then English and Rager discussed how tiring the negotiations had been. Further according to English, Rager said during that discussion that: "I got my marching orders, I have to get you to impasse, and implement." Rager flatly denied this testimony by English; he acknowledged that the word "impasse" was used, but only in reference to a discussion of the fact that impasse had been declared by the Respondent in the Huntington negotiations that were also then ongoing. Rager further denied that implementation of the Respondent's final offer was mentioned in the telephone call, and he denied that getting to impasse was part of his "marching orders." English generally impressed me unfavorably, and his "ugly hand" testimony especially appears to be the product of an overly biased imagination. Because of this, and because Rager was credible in his denial, I credit Rager and find that he did not then tell English that his "marching orders" included getting the Union to impasse so that the Respondent could implement its last proposals. (As discussed below, Rager did not deny referring to his "marching orders" in a subsequent conversation with English.)

By letter dated August 1, English agreed to Rager's July 30 proposal to continue working on a day-to-day basis.

The 2000 contract expired at 11:59 p.m., August 2. On August 3, the membership rejected the Respondent's final offer by a vote of 275 to 22. On cross-examination, English denied telling the membership at the August 3 ratification meeting about Rager's July 30 offer to meet again with the Union in case ratification failed. English testified that that offer was discussed among the membership, but that was not the reason for the rejection; the reason for the rejection was all of the concessions that the Respondent was demanding.

English called Rager and left a message about the August 3 membership rejection and asked for further negotiations. By letter dated August 5, Rager replied:

> In my letter of July 30, we had indicated that we were willing to meet promptly following a rejection of our final offer to learn whether there were parts of our final offer that could be adjusted so as to result in an agreement for an new contract. We had, however, previously made it clear that we would entertain only a realignment of the economic proposals that would result in the same savings to the Company or some minor modification of contract language.

Rager continued in the August 5 letter that he, the Respondent's plant manager, Daniel Neimond, and the federal mediator who had attended the July 25 bargaining session had attempted to get English back to the bargaining table, but that English had stated that he could not meet until August 13. Rager stated that that delay was unacceptable because it would be tantamount to a "significantly longer extension" of the 2000 contract than that to which the Respondent was willing to agree. Rager then stated:

> Further, we must assume that this delay means that the parties are too far apart to expect that meaningful negotiations can occur and/or that the Union will not or cannot provide us with any basis to conclude that an agreement as outlined above is attainable. Accordingly, unless a meeting can be set for this week, we intend to implement our final offer.

Rager closed by listing multiple telephone numbers where he could be reached to schedule further bargaining sessions. English testified that he canceled several commitments with other parties and arranged to meet with the Respondent for bargaining on August 7.

Bargaining session 13, August 7. The parties first made statements to the federal mediator. According to English, Rager stated that the Respondent was seeking concessions in order to reduce the price of tank cars by $5000. English further testified: "I just said that I thought they moved on [trivial] issues, and surface bargaining, and the real intent was to get us to impasse, and implement." English testified that Rager did not respond.[14]

The parties then exchanged proposals. The Union proposed a 50-cent wage reduction upon the effective date of the comprehensive successor contract, and no subsequent increases, for the period of a 3-year contract. The Union further proposed a reduction of $1 per hour on all indirect-labor jobs performed by all direct-labor employees (not just for new direct-labor employees who did indirect-labor work, as it had proposed on July 23), but the Union also proposed negotiation of additional jobs to be exempted from that reduction or any reduction that the Respondent might propose for such work. (Again, at the time, the Respondent was proposing a $2.75 reduction for indirect-labor jobs, with few exceptions). On health insurance, the Union rejected the Respondent's proposal that employee contributions for single coverage would be $7 per week through December 31, and $13 per week thereafter and that contributions for family coverage would be $22.50 per week through December 31, and $45 per week thereafter. The Union proposed, "for the term of the agreement" $7 per week for individual insurance coverage and $22.50 for family. This, of course, was a lesser employee contribution than the Union had proposed on July 25, $10 per week for individual and $25 per week for family health insurance coverage.[15] Although the Union had, on

[14] It is to be noted that English only testified that he stated to the mediator that he "thought" that the Respondent was only trying to get to where it could claim impasse so that it could implement. English did not testify that he told the mediator that Rager had admitted such in their July 30 telephone conversation (or at any other time). This factor fortifies my above finding that Rager had not told English that getting the Union to impasse was part of his "marching orders."

[15] On brief, p. 25, the Respondent contends that, by its August 7 proposal, the Union agreed to accept the salaried employees' plan, as the Respondent was proposing. The Union's August 7 proposal does drop the term "in effect on 7/25/03" that it had used in previous insurance proposals, but it is clear that the Union did not mean to

July 25, proposed that pension accrual for employees would stop at 30 years, it proposed on this date that, for full pensions, "Lower 30 years of service & out to 25 years of service & out" (presumably for current employees only). (Again, under the 2000 contract, employees could earn greater pensions by having over 30 years pension service credits; the Union was responding to the Respondent's proposal to freeze all pension service credits where they were.) In the section of its proposal that was headed "Pensions," the Union recited: "(Conservative estimate of replacing 40 additional people with two-tier workers will more than make up for the smaller wage reductions/insurance contribution.)"[16] (Because this statement was placed in the pension section of the proposal, the Union apparently meant additionally to argue that its tentative agreements to the establishment of a two-tier system would save the Respondent money on pensions, as well, although there was no testimony in that regard.) In its August 7 submission, the Union further proposed to increase the severance allowance for employees from 1 week's pay for each year of seniority with a limit of 8 weeks' benefit (as had been specified in the 2000 contract and as the Union had previously proposed) to 1 week's pay per year with no limit. The Union further continued in its proposal for a neutrality agreement.

The Respondent then submitted its "Best and Final Economic Proposal." For "Term of the Agreement," the Respondent proposed 3 years from alternative dates, either "August 11, 2003" or "from date of ratification." Those proposed alternative dates, however, did not apply to health insurance and accruals of pension service credit. For insurance, the Respondent proposed that, effective September 1 and continuing through December 31, for individual coverage, employees contribute $7 per week and contribute $13 per week thereafter; for family coverage, the Respondent proposed employees contribute $22.50 per week effective September 1 and continuing through December 31, and contribute $45 per week thereafter. The Respondent continued in its June 26 proposal that the 2000 insurance agreement "terminate pursuant to its own terms" on August 2. The Respondent resubmitted its proposal for certain medical options to grandfather employees who had 30 years pension service credit as of December 1, 2004, and it continued its proposal that the pension supplements be eliminated. For pensions, the Respondent proposed that discontinuance of service accruals begin on December 1, 2003, as opposed to discontinuance upon the effective date of a new comprehensive contract as it had previously proposed (and as opposed to a date after the express termination date of the 2000 pension agreement, December 31, 2003).

For the remainder of the Respondent's Best and Final Economic Proposal (i.e., those terms that the Respondent proposed to be effective from either August 11 or the date of ratification), the Respondent added some indirect-labor jobs that would be exempt from its proposed $2.75 reduction. The Respondent further proposed alternative reductions, 55-cent-per-hour reduction for all wages, instead of 60 cents, or $2.50 reduction in indirect-labor rates, instead of $2.75. The Respondent continued in its proposal to eliminate pension-plan supplements for disability and other early retirements upon the effective date of any successor contract (again, as opposed to a date after the express termination date of the 2000 pension agreement, December 31, 2003). The Respondent continued in all of its other proposals that were contained in its July 25 proposals.

The Union agreed to none of those proposals. After conferring with Wynkoop, Rager then made "amendments" to its Best and Final Economic Proposal. As summarized in a confirming letter dated August 11, those amendments were: (1) a reduction of $2 per week in each of the insurance contributions that the Respondent had proposed earlier on August 7; (2) employee contributions to health insurance premiums would begin October 1, rather than September 1; and (3) employees who had earned 5 weeks vacation by August 2 would receive the vacation pay for all of those weeks, but they would have to work the 5th such week. The Respondent further proposed a new effective date of the successor contract as August 16.

Rager testified that, on August 7, after presenting the Best and Final Economic Proposal and its amendments,[17] he told the Union that the Respondent had no more to offer, and:

> I presented it to them as our best and final offer, adding the word "best" to the proposal, with the contingency that it be taken to the membership for ratification. I explained that the only thing left, that I could possibly do, would be to remove something from pile A to pile B, as long as it didn't have any cost impact.
>
> I was asked, "What does that mean?"
>
> And I said, "Well, if you wanted to give up another holiday, that's worth so many cents, and we can reduce, then, the labor"—or "the wage reduction by whatever equivalent is of the cost of that holiday."
>
> The response I got is, "I thought that's what you meant."

Rager further testified that English stated that the Union would take the Respondent's offer to a ratification vote, but the committee would do so without recommendation for acceptance or rejection. On cross-examination, Union President Yocum admitted that, at the end of the August 7 bargaining session, Rager stated that the Respondent "had no more room, was not going to make any further offers."

On August 14, English secured from the Respondent's headquarters the age information on all of the unit employees. (On cross-examination, English acknowledged that he had not previously sought this information.) English sent the

accept the Respondent's proposal, as Rager well understood. If the Union had accepted the Respondent's proposal, it would have been a major change in position and would have caused at least some discussion at the bargaining table. Rager, however, testified that the Union's August 7 proposal represented no real change, and neither Rager or English testified to any such discussions.

[16] Parentheses are original.

[17] The Respondent further agreed to renew letters issued during the 2000 negotiations to the effect that it would not build tank cars at any other facility or seek further reductions in wages or benefits, letters that the Respondent had proposed not renewing since the beginning of the 2003 negotiations. The Respondent did submit the renewal letters by the end of the August 7 session.

information to the USWA's pension trust fund and asked whether the group could participate in that fund. The reply was that it could, if there were 70- to 90-cent-per-hour contributions for each employee.

The Union's second ratification vote. On August 15, the Union's membership rejected the Respondent's Best and Final Economic Proposal, as amended, by a vote of 167 to 113. By letter of the same date, English informed Rager of the rejection but stated that "the Union believes we are not at impasse" and requested further negotiations. (English did not state in the letter why he believed the parties were not at impasse.) Rager was out of town, but he heard about the rejection and English's letter from Neimond. Rager called English on August 16.

According to English, in the August 16 telephone call, he asked that the Respondent not implement and continue bargaining, but:

> [Rager] said, "I got to"—I got my marching orders, I got to implement."And I said, "Gary, we are not at impasse. I have some other proposals, I want to make."I need some information on the healthcare, but I have proposals I want to make . . . on wages, healthcare and pensions."—And he said, "Bob, I can't do it, I got my marching orders, you know, I got to implement."

English added that Rager said the implementation would be on August 21. On cross-examination, English acknowledged that Rager also said that the Union had gotten all that it "could possibly get in negotiations."

Rager testified that in the August 16 telephone call he told English "that we had nothing further to offer; that they [negotiations] were finished." Further according to Rager:

> He mentioned something about they had additional proposals to make to us, in regards to health and welfare, and pension thoughts, and I advised him that it was too late; that we were finished. And [I asked] why didn't he make proposals along those lines, you know, sometime prior to now.
>
> And [I further stated] that we weren't willing to continue extending the agreement, and that we would give him until midnight on August the 21st, before implementing our best and final offer.

Rager testified that English did not reply to his question of why the Union had not made such proposals before. Rager did not deny making the "marching orders" statement in the August 16 telephone call.

English testified that the Union did not suggest the USWA pension plan earlier in negotiations because the 2000 defined benefit plan was a better plan and the Union did not want to give up on keeping it until it appeared that it had to. English did not, however, deny Rager's testimony that he gave Rager no reason for his not mentioning the USWA plan earlier.

On August 18, by fax, the Union submitted to the Respondent a USWA form that that body uses to request information from employers about their existing health-and-welfare benefits. An introductory instruction on the form is: "All information must be submitted 60 days prior to contract expiration date." After demanding extensive "Census Information," the form states: "The Steelworkers Fund can include any non-USWA represented employees. We will need to see all of the above information for those employees as well." Then follow two more pages of information requests. English testified that he submitted the request because he wished to secure bids for an insurance program that the Union could submit to the Respondent in further bargaining.

By (faxed) letter to Rager dated August 18, English again stated that the Union did not believe that the parties were at impasse (again not stating why) and asked for negotiation meetings on August 19 and 20. By (faxed) letter to English also dated August 18, Rager insisted that the parties were at impasse and "we do not see any useful purpose in meeting again." Rager stated that, although the Respondent would not implement its final offer until August 21, it would not, as the Union had previously requested, extend the 2000 agreement. Rager further called the Union's request for health and welfare information to be "disingenuous" because, although the parties had been negotiating for "over 2 or 3 months" without the Union's making such a request, it did so then "on the eve of our implementation." Rager did state that, if the Union really wanted to talk about converting the unit employees' health and welfare coverage from the Respondent's plan to the Union's plan, the Respondent would be willing to negotiate over the issue, but only after its August 21 implementation.

On August 19, English sent a letter to Rager objecting to the Respondent's proposed implementation and stated that the Union was "prepared" to make new contract offers on wage reductions and pension matters and that the Union would make other offers once it received the health and welfare information that it had requested. English further noted that the second rejection of the membership was much closer than the first (reciting the two tallies) and that: "We are making progress and negotiations should continue." By letter dated August 20, Rager replied, again insisting that the parties were at impasse, and he stated that the Respondent would not delay the implementation beyond August 21.

Implementation. The Respondent did implement its August 7 proposals (as amended) on August 21, including its proposal to terminate the 2000 insurance agreement and its proposals to alter the 2000 pension agreement by discontinuing the disability and other early-retirement provisions at that point and by discontinuing accruals of pension service credits as of December 1. On December 5 the Respondent supplied information that the Union had requested on August 18.

Rager testified that from 1985 until 2000, pension and insurance agreements were effective on "[g]enerally, the date of ratification, or the 1st of the month thereafter." Rager did not testify as to what the termination dates of pension and insurance agreements had been ("generally" or otherwise). On cross-examination, Rager conceded the (obvious) facts that there was a cost savings for the Respondent by virtue of its termination of the 2000 insurance agreement before November 30, and he conceded that there was a cost savings for the Respondent by virtue of its termination of the 2000 pension agreement before December 31.

III. ANALYSIS AND CONCLUSIONS

The most important issue to the parties is the lawfulness of the Respondent's August 21 unilateral implementation of its last offer. As stated by the Board in *Taft Broadcasting Co*., 163 NLRB 475, 478 (1967), affd. sub nom. *Television Artists AFTRA, Kansas City Local v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968):

> An employer violates his duty to bargain if, when negotiations are sought or are in progress, he unilaterally institutes changes in existing terms and conditions of employment.[5] On the other hand, after bargaining to an impasse, that is, after good-faith negotiations have exhausted the prospects of concluding an agreement, an employer does not violate the Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals.[6]

[5]/ *N.L.R.B. v. Benne Katz,* etc., d/b/a *Williamsburg Steel Products Co.*, 369 U.S. 736.

[6]/ *N.L.R.B. v. Intracoastal Terminal, Inc., et al.*, 286 F.2d 954 (C.A. 5).

That is, in the absence of a good-faith impasse[18] an employer may not take unilateral actions that affect the terms and conditions of employment of employees who are represented by a union, whether those actions are within the reasonable contemplation of its last proposals or not. In this case, it is not disputed that the Respondent did implement its last proposals, and the ultimate question is whether the parties had reached impasse before it did so.

Impasse is most often a difficult thing to discern, but the Union, relying on the gravamen of paragraph 12(d) of the complaint, suggests that in this case there is a short answer to the question. As previously quoted in full, paragraph 12(d) alleges that the Respondent "[I]nsisted as a condition of reaching any collective-bargaining agreement on demands which violated Section 8(d) of the Act." By this, the complaint is referring to the Respondent's insistence during the 2003 negotiations that the effective termination date of the 2000 insurance agreement be modified so that that agreement would terminate on August 3 (or whatever later date that the new successor comprehensive contract might become effective) instead of November 30 as the express terms of that agreement provided, and the complaint is referring to the Respondent's insistence that the effective termination date of the 2000 pension agreement be modified so that that agreement would also terminate on August 3 instead of December 31 as the express terms of that agreement provided.

In arguing that paragraph 12(d) of the complaint is supported by the evidence, the General Counsel cites the provision of Section 8(d)(4) which requires the parties to continue collective-bargaining agreements in effect "until the expiration date of such contract," but the General Counsel cites no case authority for the proposition that insisting on an accelerated termination date of an agreement violates Section 8(a)(5). The Union, citing only *Quality House of Graphics, Inc*., 336 NLRB 497 (2001), argues that, not only did the Respondent's insistence on modifications of the termination dates of the pension and insurance agreements violate Section 8(a)(5), that insistence permeated the bargaining to the extent that it made a good faith impasse impossible. Although the General Counsel contends that the Respondent unlawfully insisted to impasse on the nonmandatory terms of the modifications of the 2000 insurance and pension agreements, he does not argue that such insistence contributed to the breakdown of negotiations. If the Union is correct, there is a short answer to this case—the Respondent insisted on nonmandatory terms, and that insistence made a valid impasse impossible, so a violation by the Respondent's implementation of its last proposals is automatically established.

In *Quality House of Graphics*, supra, the Board found that during negotiations for a successor contract the employer had insisted on a provision that individual participation in a voluntary union pension-fund checkoff was not a prerequisite to an employee's status as a member in good standing with the union. The Board found that the subject of union membership was not a mandatory subject of bargaining and accordingly found a violation in the employer's insistence. The Board further found that such insistence permeated the bargaining, and it concluded that the insistence made the finding of a good-faith impasse impossible. The Board therefore found that subsequent unilateral actions by the employer were themselves unlawful. In that case, however, the Board premised its holdings, in part, on the fact that the union had consistently objected to the employer's insistence during negotiations on the provisions relating to the union's funds and membership at 336 NLRB 508, the administrative law judge noted that the employer's insistence was "despite the Union's repeated objections." The Board adopted this finding, and it further made clear that its order was premised on union objections during bargaining by specifically stating in its order that the employer was thereafter required to "bargain . . . without insisting to impasse unlawfully over contributions to the Inter-Local Pension Fund, a nonmandatory subject of bargaining, *over the Union's objections*, and as a condition of reaching agreement on successor collective-bargaining agreements" . . . The emphasis by italics is added, but the Board's setting off the emphasized phrase by commas makes it unquestionably clear that a union's objection is necessary before insistence, even on nonmandatory terms, will be held to be unlawful.

I agree with the General Counsel and the Union that the expiration dates of the 2000 insurance and pension agreements were nonmandatory subjects of bargaining because of the provisions of Section 8(d), and I would find that, had the Union objected to the Respondent's insistence on changing those provisions, a violation would properly be found on the basis of the allegation of paragraph 12(d) of the complaint. The Union, however, cites no case, and I have found no case, which holds that insistence on a nonmandatory subject of bargaining, where the opposite party does not object to that insistence, violates Section 8(a)(5). Moreover, contrary to the

[18] Good-faith impasse, of course, is actually a redundant term because there can be no impasse, or deadlock, upon the occurrence of which a party may take unilateral action unless that party has been negotiating in good faith.

implicit contention of the General Counsel, the literal wording of Section 8(d)(4) is no such authority. The Act necessarily assumes that a bargaining position that is taken without objection is not unlawful. In this case, the Union did not object to the Respondent's proposing, and reproposing, modifications to the expiration dates of the 2000 insurance and pension agreements. In fact, English acknowledged that the Union's proposals, themselves, were to be effective with the new successor contract (and, by implication, not delayed until after the expiration of the 2000 pension and insurance agreements). At best, the Union made no response to the Respondent's proposals on pension and insurance other than to counterpropose "current language" on both topics. Moreover, on brief neither the General Counsel nor the Charging Party point to anything that would indicate that the Respondent's insistence on modifying the termination dates of the pension and insurance agreements in fact interfered with the progress of bargaining, by delaying the bargaining, by preventing the Union from making other proposals, or otherwise. And English did not testify that the Respondent's proposals for early modifications of the pension and insurance agreements caused any notice or commentary during the membership meetings in which all of the Respondent's proposals were rejected. Even if there was such evidence, English did not testify that he ever told Rager that the Respondent's proposals to modify the termination dates of the 2000 pension and insurance agreements had anything to do with the rejections by the membership. I shall therefore not only reject the Charging Party's contention that the Respondent's conduct in insisting on modifications of the termination dates of the 2000 pension and insurance agreements made impossible an impasse that would license the Respondent's unilateral actions, I shall further recommend dismissal of paragraph 12(d) of the complaint itself.

There being no short answer to the issue of impasse, the case must be analyzed under traditional tests. As the Board further stated in *Taft Broadcasting*:

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

Another factor that is considered is the parties' demonstrated flexibility and willingness to compromise in an effort to reach agreement. See, e.g., *Wycoff Steel*, 303 NLRB 517, 523 (1991). After considering all of these factors, the Board will still not find that an impasse existed at a given time unless there is "no realistic possibility that continuation of discussion at that time would have been fruitful." *AFTRA v. NLRB*, 395 F.2d at 628. Or, as stated with more imagery, "both parties must believe they are at the end of their rope." *PRC Recording Co*., 280 NLRB 615, 635 (1986), enfd. 836 F.2d 289 (7th Cir. 1987). Impasse being a defense to the allegation of unlawful unilateral actions, it must be proved by the party asserting it, the Respondent.[19]

The Respondent contends that the existence of impasse by August 21 is shown by the facts that: (1) there were multiple areas of significant disagreement on which it had no intention of changing its position; (2) the Union had rejected its positions on the basis of 2 membership votes without tendering any meaningful compromises; (3) the Union had actually tendered regressive proposals; and (4) the Union continued to insist on the nonmandatory proposal of a neutrality agreement. The Respondent contends that all of these factors made ultimate agreement on a successor contract so improbable that, without further movement by the Union, further bargaining would have been useless. The General Counsel and the Charging Party contend that there was no impasse as demonstrated by the facts that: (1) the parties had made, and were making, substantial progress in negotiations when the Respondent broke them off; (2) such progress was demonstrated by the fact that membership's margin of rejection decreased between the August 3 and August 15 votes; (3) the Union was offering to continue working while negotiations continued; (4) any deadlock was not a sustained one which would indicate the futility of bargaining; and (5) a Federal mediator had been utilized by the parties. The General Counsel further contends that, moreover, an impasse may not ever be found when information requests have not been fulfilled, as the Respondent had not fulfilled the Union's August 19 information request before it terminated bargaining.

The parties were apart on several significant issues when the Respondent declared impasse on August 16: (1) The Respondent was proposing a 60-cent reduction in base wages for all current employees (those hired before August 3, or the effective date of the successor contract), but the Union was proposing only a 50-cent reduction. (2) The Respondent was proposing a $6 base wage reduction for new employees (those hired after August 2, or the effective date of the successor contract), with no subsequent increases; while the Union was also proposing an initial $6 reduction, it was also proposing 40-cent subsequent annual wage increases for new employees. (3) The Respondent was proposing, in addition, a $2.75 reduction of (or "penalty" on) direct-labor employees' wages when performing indirect-labor work, but the Union was proposing a reduction of only $1. (4) The parties still had several differences on which jobs would be exempt from the indirect-labor reduction. (5) The Respondent was proposing elimination of one paid holiday, but the Union was insisting on retaining all 11 holidays that the 2000 contract had provided. (6) The Union was insisting on a neutrality agreement, and the Respondent was adamantly rejecting such. (7) The Respondent was insisting that, even beginning before the 2000 insurance agreement expired, and certainly after January 1, 2004, the unit employees come under the salaried employees' insurance program and that they pay the rates of that program; although the Union did agree that employees would make some contributions to their current insurance program, the contributions that it

[19] *Sacramento Union*, 291 NLRB 552, 556 (1988).

proposed for family coverage after January 1, 2004, were about half of what the Respondent was proposing, and the Union refused to agree that the unit employees would ever come under the salaried employees' program. (8) The Respondent was proposing to end insurance for laid off employees at the end of the month following the month of layoff, but the Union continued to propose to keep the 2000 contract's provision of retention of health insurance for 6 months' after layoff.[20] (9) The Respondent was proposing to eliminate all medical insurance for retirees, but the Union was insisting on continuing the coverage, albeit with retirees paying 50 percent of premiums. (10) The Respondent was insisting that, even before the 2000 pension agreement expired, accruals of service credits be discontinued, but the Union proposed to continue the 2000 pension agreement's provisions until that agreement expired on December 31 and that, thereafter, all current employees' accruals would continue to a maximum of 30 years. (11) The Respondent proposed to eliminate all early retirement supplements to the pension plan, and the Union proposed to retain them all. (12) The Union was proposing a 10-cent-per-hour increase in the Respondent's contribution to the employees' 401(k) accounts, and the Respondent was proposing no such increases. (13) The Union was proposing to reduce the length of service required for full retirement from 30 years to 25 years, and the Respondent was not agreeing to that. (14) The Union was proposing to increase the 2000 contract's severance allowance benefit of one week's pay per year of seniority, with a limit of 8 weeks, to 1 week's pay per year of seniority with no limit, but the Respondent was proposing to eliminate severance pay altogether. (15) The Respondent had agreed to continue sickness and accident benefits at the rate of $331 per week, but it was still insisting on reducing the maximum duration of the benefit from 39 weeks to 26 weeks.

It is also true, however, as the General Counsel and the Charging Party point out, that the contrasting positions on several of these issues reflected some movement by one or both parties. (1) As base wage rates for current employees, the Respondent on June 26 proposed an immediate reduction of $1.50 per hour, with 15-cent annual increases thereafter. The Respondent reduced the proposed reduction to $1.35 on July 16, to $1.20 on July 24, then to $1.05 early in the July 25 meeting, and then to 60 cents later on July 25. The Respondent continued the proposals for 15-cent annual wage increases in its July 16 and July 24 proposals, but it proposed no increases in its July 25 proposal, and it did not improve on that proposal at the last bargaining session on August 7. The Union had proposed annual 7-percent base wage increases at the first bargaining session on June 11. It reduced its proposal to 5 percent on June 26. On July 23 it proposed no wage increases for the first year of the successor contract, a $500 lump-sum payment for the second, and a 25-cent-per-hour increase for the third. On July 24, the Union proposed no increases for 2 years but continued to propose a 25-cent increase for the third. On July 25, the Union proposed an immediate decrease in base wages of 50 cents, but proposed 20-cent wage increases for each year thereafter. Then, on August 7, the Union proposed the 50-cent reduction, but without any subsequent wage increases for current employees. (2) As base wage rates for new employees, the Respondent proposed on June 26 a $5.75-per-hour reduction. On July 16, the Respondent proposed a $5.50 reduction. On July 25, the Respondent first proposed first-year reductions of $6, but 40-cent wage increases for each year for 3 years. Later on July 25, in its Best and Final Economic Proposal, the Respondent proposed $6 reductions for new employees with no subsequent increases. The Union originally proposed no decreases for new employees, but on July 23, it proposed a reduction of $5.50 per hour immediately, but $1-per-hour increases each year thereafter. Then on July 24, the Union proposed a $6 decrease followed by 50-cent wage increases every 180 days. And on July 25, the Union proposed a $6-per-hour decrease for new employees followed by 40-cent annual wage increases. (3) As the reduction (or "penalty") for direct-labor employees when doing indirect-labor work, the Respondent proposed $5.75 on June 26, $5.50 on July 16, $4.75 on July 24, and $2.75 on July 25. The Union initially resisted lower wages for any direct-labor employees who were doing indirect-labor work. Then on July 23, it proposed a $1 reduction for new employees, and on August 7, it proposed that reduction for all employees. (4) On the issue of healthcare premiums, the Respondent insisted from June 26 through July 24 on employee contributions of $13 per week for single coverage and $45 per week for family coverage. On July 25, the Respondent proposed that employee contributions for single coverage would be $7 per week through December 31, and $13 per week thereafter and that contributions for family coverage would be $22.50 per week through December 31, and $45 per week thereafter. On August 7, the Respondent proposed lowering each of the July 25 figures by $2. (5) The Respondent never varied from its June 26 proposal that pension accruals immediately cease. The Union at first resisted any change, but on July 24 it proposed that new employees would be without pension accruals, and on July 25 it proposed to stop accruals for current employees at 30 years. (6) The Respondent's June 26 proposal was to eliminate 2 of 11 holidays, but it reduced that demand to elimination of only one holiday on July 25. (7) The Respondent proposed on June 26 to terminate health insurance for current employees at the end of any month of layoff, but on July 24, it proposed such termination at the end of the month following the month of layoff.

These seven areas of movement reflect good faith by both parties, but I find that their results fall far short of negating the significance of the 15 areas of differences that demonstrate impasse, especially because no movement was attempted by either side after the second rejection of the Respondent's proposals by the union membership.

In arguing that no impasse existed on August 21 when the Respondent implemented its last proposals, the General Counsel relies heavily on *D.C. Liquor Wholesalers*, 292

[20] At one point English testified that the Union reduced its proposal for retention of health insurance to 4 months after layoff; however, that testimony was not borne out by the proposals that are in evidence, and English acknowledged on cross-examination that he could find no reference to such modification of the Union's position in his bargaining notes.

NLRB 1234 (1989), enfd. sub nom. *Teamsters Local 639 v. NLRB*, 924 F.2d 1078 (D.C. Cir. 1991). In that case, no impasse was found, but the Board noted at 1235:

> At the time the Respondents declared that an impasse existed, the Union had barely had enough time to digest the news that they desired a wage cut, much less to determine if such an idea would be acceptable to its membership. . . . The Respondents gave the Union no meaningful opportunity to explore, evaluate, and respond to their offer before they aborted the negotiation process.

Similarly, in *Larsdale, Inc*., 310 NLRB 1317, 1318 (1993), also heavily relied upon by the General Counsel, the Board noted: "Further, the Respondent's declaration of impasse prevented the Union from having the opportunity to evaluate the health insurance and pension information it had just received that day from the Respondent, thereby precluding the possibility that the Union might have made further movement on those subjects at a subsequent session."

In this case, of course, the Respondent laid out essentially all of its demanded concessions at the initial bargaining session on June 11, and it promptly responded to the Union's June 12 information request. The Union not only had the time, it took the time to explore and evaluate and respond to the Respondent's offers. The Union responded to every one of the Respondent's proposals, and it twice presented its responses, as well as the Respondent's proposals, to the membership. The membership rejected the Respondent's proposals and sent the Union back to obtain more. The Union returned to the bargaining table after the August 3 vote to make some movement toward the Respondent's positions (dropping its demand for 40-cent annual wage increases for current employees and a $1 reduction for indirect-labor work when done by direct-labor employees), but it regressively increased its demands in other respects; to wit: (1) it demanded an increased severance benefit; (2) it demanded a reduction in the longevity requirement for full pensions (25 years instead of 30); and (3) it proposed a lower insurance contribution than it had proposed on July 25. And the Union continued to rigidly adhered to its proposal for a neutrality agreement. Although the General Counsel and the Charging Party cite cases that found that no impasse existed where at least some progress had been made before the employer declared impasse, or a union offered to meet further, or a mediator had been involved, all of which circumstances appear in this case, in none of those cases had the union increased its demands after rejections by the membership that it represented. Also, in none of the cases cited by the General Counsel and the Charging Party did the union persist in insisting on the nonmandatory term of a neutrality agreement.[21]

English testified that on August 16, when Rager told him that the Respondent intended to implement its last proposals, he insisted that the parties were not at impasse and that the Union intended to make proposals "on wages, healthcare and pensions." And English followed with letters to the same effect. However, in his testimony English did not, and the General Counsel and the Charging Party on brief do not, make any suggestion of why, if English had been serious about making proposals on wages and pensions, he did not do so before August 21. The General Counsel and the Charging Party do argue that the Union had a reason for not making additional proposals on healthcare; they argue that English could not do so because the Respondent did not immediately respond to English's August 19 request for information on that topic. And on brief, the General Counsel argues that impasse can never be declared when there is an information request that has not been fulfilled.

As authority for the proposition that no impasse can be reached while any information request remains unsatisfied, the General Counsel cites only *Decker Coal Co.*, 301 NLRB 729 (1991). In so doing, however, the General Counsel ignores the Board's comment at footnote 2 of that case that: "We find it unnecessary to rely on the judge's reasoning to the extent it may be read to suggest that in no event can there be impasse where information requests are outstanding but we agree on the particular facts of this case that no such impasse was established." That is, there is no per se rule that an unanswered information request always defeats the defense of impasse. Some rule of reasonableness necessarily applies. In this case, the Union's information request was introduced by the demand that "All information must be submitted 60 days prior to contract expiration date." The tacit admission in this demand is that the Union realizes that the immense topic of health insurance is one to be addressed early in negotiations, not just after extensive bargaining, expiration of a contract and rejection of an employer's proposals. That is, if a union really wants to make a proposal on the issue, it will make such a request before an existing contract expires. Further on the point of reason, it is to be noted that neither the General Counsel nor the Charging Party suggest that the requested information would have broken the deadlock that existed after the membership's second rejection of the Respondent's last offer.[22] I therefore agree with the Respondent that the Union's August 18 information request was purely tactical[23] and that the Respondent's delay in furnishing that information is therefore neither evidence of an intent to frus-

[21] Although I do not agree with the Respondent that neutrality is an "illegal," or prohibited, subject of bargaining, I do agree that the Union's neutrality proposal was nonmandatory because it did not concern the terms and conditions of employment of the unit employees. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958). On brief, the General Counsel does not mention the Union's neutrality demand; the Charging Party only states that the Respondent could have refused to discuss it. The Respondent did so, and it rejected the proposal, but the Union continued to insist on it.

[22] In *Community General Hospital of Sullivan County*, 303 NLRB 383 (1991), also cited by the General Counsel on the point but in which case an impasse was found, the Board rejected a similar contention noting that the union that made a similarly belated request for information but had failed to contend "that the furnishing of the requested information would have broken the deadlock in the negotiations."

[23] That the August 18 request was submitted solely for purposes of delay, and not in good faith, is further demonstrated by the fact that, at that late date, the Union was requesting the information not only for the unit employees but for nonrepresented employees.

trate agreement or a violation of itself. Accordingly, I shall recommend that paragraph 24 of the complaint be dismissed.

For much the same reasoning, I further conclude that English's August 16 protestations that the Union had meaningful proposals to make are without foundation. If the Union had had meaningful proposals to make, on health insurance as well as wages and pensions, it could have made them and then asked for further negotiations. The Union, however, did no such thing. The reason it did no such thing, I find, is that it was at the end of its rope.[24] The Union apparently felt bound by wishes of its membership not to grant further concessions, and it apparently felt further bound by wishes of the membership even to regress on some of the concessions that it had already made. The Union therefore had no further (nonregressive) proposals to offer to the Respondent. And the Respondent did not want to offer anything else to the Union.[25]

Finally in regard to the General Counsel's and the Charging Party's arguments about the bargaining, it is true that the second membership rejection of the Respondent's proposals was by a narrower margin of votes than the first, but that fact does not logically attain the significance that the General Counsel and the Charging Party would assign to it. The August 15 rejection was still a clear rejection, and the Respondent was not required to return to the bargaining table for an indefinite number of times for no better reason than the speculation that the margins of rejections might progressively narrow and might even finally disappear. The speculative nature of English's suggestion that a satisfactory agreement could be reached, without any suggestion of why that might be so, is more than apparent when one considers the fact that the Union had, at the last bargaining session, adduced regressive proposals and continued in its nonmandatory proposal of a neutrality agreement which the Respondent had adamantly rejected from the start.

I therefore find that, although some progress had been made before the membership's second rejection of the Respondent's proposals, the parties were at impasse on August 21. The Respondent's economic positions were the essence of hard bargaining, and not bad-faith bargaining. And the Union's unwillingness to accept the proposals which that bargaining posture had produced left the parties at impasse. Accordingly, I conclude that the Respondent was therefore privileged to implement its last offer to the Union, and it did not violate Section 8(a)(5) by doing so, except, of course, to the extent that such implementation would conflict with the terms of agreements that had not expired at the time of implementation and which the Union had not agreed to modify; to wit, the 2003 pension and insurance agreements.

The 2000 insurance agreement did not expire by its terms until November 30 and the 2000 pension agreement did not expire by its terms until December 31. Nevertheless, the Respondent unilaterally, and without consent of the Union, abrogated the insurance agreement by making its last insurance proposals effective on November 1, and it abrogated the pension agreement by making its last pension proposals effective on December 1. Absent agreement, Section 8(d)(4) of the Act requires the parties to "continue in full force and effect, without resorting to strike of lockout, all of the terms and conditions of the existing contract . . . until the expiration date of such contract. . . ." Although the Union did engage in negotiations on the subjects of insurance and pensions during the 2003 negotiations, it never agreed to modify the termination dates of the 2000 insurance or pension agreements. The Respondent's modifications of the terms of those agreements on August 21 therefore violated Section 8(a)(5) and (1) of the Act, as I find and conclude.[26]

Finally, I have found above that at the July 9 bargaining session Yocum first stated that the owner would close the plant in the event of a strike, and then Rager agreed by saying that the owner "could" do so. Although Rager was doing no more than parroting Yocum, he nevertheless did make the statement in the presence of employees that plant closure could result from the employees' engaging in a strike. The Board has specifically held that a threat to close a plant if employees engage in union activities is a per se violation of Section 8(a)(1) because any threat of plant closure reasonably tends to coerce employees in the exercise of their rights under the Act.[27] I therefore conclude that, by Rager's threatening that the owner could close the plant if the employees went on strike, the Respondent violated Section 8(a)(1), as alleged.

CONCLUSIONS OF LAW

1. The Respondent, ACF Industries, LLC, of Milton, Pennsylvania, 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 is the collective-bargaining representative of the employees in the following unit of employees, which unit is appropriate for bargaining under Section 9(a) of the Act:

> All full-time and regular part-time production and maintenance employees employed by the Employer at its Milton, Pennsylvania, facility; excluding office clerical employees, foremen, assistant foremen, inspectors, salaried or office employees, and guards, professional employees and supervisors as defined in the Act.

4. By threatening employees with plant closure if they engaged in a strike, the Respondent has violated Section 8(a)(1).

5. By unilaterally imposing modifications of the 2000 pension agreement between the Respondent and the Union, and

[24] *Larsdale, Inc*., supra.

[25] Id.

[26] The Respondent moves that the issues of its unilateral actions of modification of the pension agreement and its termination of the insurance agreement be deferred to arbitration under the principles of *Collyer Insulated Wire*, 192 NLRB 837 (1971). The Board has held, however, that deferral is inappropriate absent a claim and finding that the contract's terms at least arguably authorized the employer's unilateral action. *Den-Ral, Inc*., 315 NLRB 538, 545 (1994), enfd. 115 F.3d 1235 (6th Cir. 1997); see also *Integrated Health Services, Inc*., 336 NLRB 575, 579 (2001) to the same effect. The Respondent makes no such claim herein.

[27] *Mid-South Drywall Co.,* 339 NLRB 480, 481 fn. 6 (2003).

by prematurely terminating the 2000 insurance agreement between the Respondent and the Union, both of which agreements covered the employees in the above unit and neither of which agreements had expired by their terms at the time the Respondent imposed the modifications and termination, the Respondent has violated Section 8(a)(5).

6. The Respondent has not otherwise violated the Act as alleged in the complaint.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative actions that are designed to effectuate the policies of the Act. The Respondent must be required to post an appropriate notice to all unit employees. The Respondent must also be required to reimburse the unit employees for any and all losses they incurred by virtue of the Respondent's unlawful unilateral changes in employees' terms and conditions of employment as contained in the 2000 health insurance and pension agreements, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). This requirement shall include reimbursing employees for any medical or dental bills that they have paid directly to health care providers that the contractual policies would have covered, as well as any premiums that they may have paid to third-party insurance companies to continue medical or dental coverage in the absence of the Respondent's required contributions to and participation in the insurance plans that were provided by the 2000 insurance agreement. Further, the Respondent shall be ordered to reimburse employees for any contributions they themselves may have made for the maintenance of the pension funds after the Respondent unlawfully discontinued the contract that had required employer contributions to those funds. The Respondent shall also be required to reimburse any retiree whose benefits were reduced or denied by the Respondent's modifications of the 2000 pension agreement. All payments to funds, unit employees and retirees shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Moreover, the Respondent shall be required to refrain from making any modifications in the 2000 insurance and pension agreements unless and until the Respondent either reaches agreement with the Union respecting proposed changes or properly implements its proposals following a valid impasse in bargaining.[28]

On these findings of fact and conclusions of law and on the entire record, I therefore issue the following recommended[29]

ORDER

The Respondent, ACF Industries, LLC, of Milton, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with plant closure if they engage in a strike or other union activity on behalf of United Steelworkers of America, AFL–CIO, CLC (the Union).

(b) Prematurely modifying or terminating contractual agreements with the Union without its consent.

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

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

(a) Rescind, upon request by the Union, its unlawful unilateral modification of the 2000 pension agreement with the Union.

(b) Rescind, upon request by the Union, its unlawful unilateral termination of the 2000 health insurance agreement with the Union.

(c) Make whole all employees and retirees for any losses they may have suffered as a result of the Respondent's unlawful unilateral modification of the 2000 pension agreement with the Union and its unlawful unilateral termination of the 2000 health insurance agreement with the Union, with such payments to be computed in the manner set forth in the remedy section of this decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Milton, Pennsylvania, and mail to retirees who were covered by the 2000 pension agreement between the Respondent and the Union and who retired on or after December 1, 2003, copies of the attached notice marked "Appendix."[30] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. 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

[28] *NLRB v. Katz*, 369 U.S. 736 (1962). Because the Respondent has been found to have committed only specific unlawful unilateral actions under Section 8(a)(5), however, it is not appropriate to issue a general order to bargain. *Arvinmeritor, Inc.*, 340 NLRB 1035 fn. 2 (2003).

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

[30] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

of the notice to all current employees and to former employees employed by the Respondent at any time since July 9, 2003, the date of the unfair labor practice found herein.

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