

American Standard Companies, Inc., American Standard Inc., d/b/a American Standard and Glass, Molders, Pottery, Plastics & Allied Workers International Union, AFL-CIO, CLC, and its Local Union No. 7A. Cases 8-CA-33352, 8-CA-33477, 8-CA-33551, 8-CA-33641, 8-CA-34284, 8-CA-34372, and 8-CA-34809

May 30, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAMBER AND MEMBER LIEBMAN

On September 18, 2006, Administrative Law Judge Jane Vandeventer issued the attached decision.¹ The Respondent, General Counsel, and Charging Party each filed exceptions and a supporting brief, an answering brief, and a reply brief.² The General Counsel filed a motion to correct the transcript,³ as well as a motion to strike a portion of the Respondent's brief in support of its exceptions. Regarding the latter motion, the Charging Party filed a supporting brief and the Respondent filed a brief in opposition.⁴

The National Labor Relations 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,⁵ and conclusions as modified⁶ and to adopt the rec-

ommended Order as modified below.⁷ The General Counsel excepted to the judge's failure to award extraordinary remedies, as requested. We agree, for the reasons discussed by the judge, that the Board's traditional remedies are sufficient to address the unfair labor practices found.

This case primarily involves the parties' bargaining for a successor collective-bargaining agreement in April 2002 and subsequent events related to that bargaining. We agree, for the reasons discussed by the judge, that the Respondent committed numerous unfair labor practices in this timeframe.⁸ In doing so, we reject the Respondent's argument that it has already remedied several of these violations as part of a set-aside settlement agreement.⁹ Because the settlement agreement has been set aside, the notices posted pursuant thereto are of no effect and the Respondent should be ordered to post appropriate notices as a result of the Decision entered herein. *General Printing Co.*, 263 NLRB 591, 594 (1982).

The major issue in this case is whether the parties reached a successor agreement in the late hours of April 30, and the early morning hours of May 1 (2002). The

new attendance policy and an accompanying incentive award program in January 2003. We find that this was an inadvertent error. The judge indicated that the Respondent unlawfully implemented its new attendance policy as part of its final offer, but, in fact, the Respondent unilaterally implemented its attendance policy and accompanying incentive award program several months after. Thus, we have modified the conclusions of law, Order, and notice to reflect this as an independent violation.

⁷ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

⁸ Because we agree with the judge's findings that the Respondent created the impression that employees' union activities were under surveillance in numerous instances at the plant during the negotiations, we find it unnecessary to adopt the judge's findings that the Respondent additionally created the impression of surveillance in three meetings held during April 24 to 30 (2002), because such findings would be duplicative and would not materially affect the remedy.

Similarly, because we agree with the judge that the Respondent committed several violations of Sec. 8(a)(1) prior to the employees' vote on the Respondent's final offer, we need not pass on the judge's failure to find that this same conduct, in the aggregate, also violated Sec. 8(a)(5) by undermining the Union because such a finding would be cumulative and would not materially affect the remedy.

⁹ Chairman Schaumber notes that, as to certain 8(a)(1) and (5) findings, the Respondent excepts solely on the basis that it had already fully and adequately remedied these violations. He adopts the judge's findings of these violations in light of the Respondent's limited exception, particularly the 8(a)(1) violation the judge found for the Respondent's disparaging and undermining the Union.

¹ In sec. II,E,3 of her decision, the judge incorrectly states that Larry Costello, the Respondent's corporate vice president of human resources, did not testify. We correct this error in the judge's decision.

² The Respondent requested oral argument. We deny this request, as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

³ The motion is unopposed and is granted.

⁴ The General Counsel moves to strike portions of the Respondent's brief in which the Respondent relies on evidence that the judge excluded from the record. We deny the motion in light of our conclusion that we would reach the same result regardless of whether the judge erred by refusing to allow the evidence.

⁵ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent specifically excepts only to the judge's findings that it violated the Act by refusing to continue negotiations with the Union in the absence of an impasse or an agreement, by falsely asserting that an agreement had been reached and unilaterally implementing the terms of its bargaining proposal in the absence of an impasse, by unilaterally changing the wages of Demand Flow employees without notice to the Union, and by threatening to sue employees based on their union activities. The Respondent also excepts to the judge's decision to exclude evidence involving the private mediator. The Respondent additionally excepts to the judge's remedying several violations that were addressed in a prior settlement agreement that was subsequently set aside, discussed *infra*.

⁶ The General Counsel excepted to the judge's failure to find that the Respondent violated Sec. 8(a)(5) when it unilaterally implemented a

judge found, and we agree, that the parties had not reached agreement or impasse, and that consequently the Respondent violated Section 8(a)(5) on May 1, by abandoning negotiations.¹⁰ At the hearing, the judge prohibited the parties from introducing various pieces of evidence involving a private mediator employed by the parties during the late stages of their negotiations. The Respondent contends that the judge erred in this evidentiary ruling, and that it was precluded from introducing evidence that would have established that the parties reached agreement on a successor contract. We need not reach the issue, as the parties' subsequent conduct—when the mediator was not present—establishes that the parties had not agreed on a successor contract.

In the late hours of April 30 (2002), after a month of protracted bargaining, the Union, through the mediator, indicated that it would agree to the Respondent's most-recent economic proposal, but that, in exchange, the Respondent would need to agree to some specific economic changes as well as to the resolution of the many outstanding noneconomic issues. Around midnight (when the parties' then-operative collective-bargaining agreement was scheduled to expire), the Respondent, through the mediator, apparently agreed to some of the specific changes requested by the Union, but the Respondent did not address the noneconomic issues. After the Union called a brief strike, the parties agreed to continue negotiating over the outstanding noneconomic issues with two teams of two representatives each. The mediator went to bed and was no longer involved after this point.

At approximately 1 a.m. on May 1 (2002), these teams began negotiating over an outstanding overtime provision. The parties agreed on some points, while agreeing to come back to other issues. At about 2 a.m., the parties began discussing an outstanding job bidding provision. Around 3:30 a.m., the parties agreed to break and reconvene at 10 a.m. While the Union was prepared to continue negotiating at that time, the Respondent, through its attorney, announced that the Respondent had only agreed to review—but not negotiate—the open noneconomic items, and that the parties had agreed on a successor contract.

We agree with the judge's conclusion that the parties' conduct in the early hours of May 1 (2002), establishes

¹⁰ We find it unnecessary to pass on whether the Respondent also violated Sec. 8(a)(5) by allegedly selecting a bargaining representative who was unable to meaningfully negotiate over noneconomic issues, as any such finding would not materially affect the remedy. Similarly, because we agree with the judge that the Respondent violated Sec. 8(a)(1) by threatening to sue union officers individually, we find it unnecessary to decide whether this same conduct violated Sec. 8(a)(5) because such a finding would be cumulative and not materially affect the remedy.

that there was no "meeting of the minds" on a successor agreement. The parties agreed to continue negotiating over the outstanding noneconomic issues, and the parties in fact did so in the early morning hours of May 1, when the mediator was no longer present. Evidence regarding the mediator that the judge refused to allow would not change our conclusion that the Respondent violated Section 8(a)(5) when it refused to continue negotiations in the absence of impasse or agreement on May 1 (2002), and its related actions after this time.¹¹

AMENDED CONCLUSION OF LAW

We substitute the following for Conclusion of Law 3

"3. By refusing to continue negotiations with the Union in the absence of an impasse or an agreement, by falsely asserting that an agreement had been reached and unilaterally implementing the terms of its bargaining proposal in the absence of an impasse, by dealing directly with employees and bypassing the union, by unilaterally polling employees about working hours, by unilaterally implementing prize, incentive, and bonus programs without notice to the Union or affording the Union an opportunity to bargain, by unilaterally implementing an attendance policy and an incentive award program without notice to the Union or affording the Union an opportunity to bargain, by unilaterally implementing changes in clean-up times and disciplining two employees based on the change, by failing to provide relevant information requested by the Union, and by unilaterally changing the wages of demand flow employees without notice to the Union or affording the Union an opportunity to bargain, Respondent has violated Section 8(a)(5) and (1) of the Act."

¹¹ We agree with the judge that the Respondent committed several 8(a)(1) and (5) violations after it unlawfully implemented the terms of its final offer. However, we find it unnecessary to decide whether, during this same period, Mo Heshmati implicitly threatened to move unit work or whether Larry Costello threatened plant closure or the futility of utilizing the Board's processes because these additional violations would be duplicative of other 8(a)(1) violations and would not materially affect the remedy. Similarly, in adopting the judge's conclusion that the Respondent violated Sec. 8(a)(5) by polling employees regarding their work schedules, we do not pass on whether it also violated Sec. 8(a)(5) by selecting nonsteward employees to conduct the poll because the additional finding would not materially affect the remedy. Further, in adopting the judge's conclusion that the Respondent violated Sec. 8(a)(5) by unilaterally changing the clean-up time allotted to employees in the spray department and disciplining employees Vini Gaietto and Richard Mizen, we find it unnecessary to pass on whether the discipline also violated Sec. 8(a)(3) and (4); and, in adopting the judge's conclusion that the Respondent violated Sec. 8(a)(5) by failing to bargain over the decision and effects of abolishing the Demand Flow wages, we find it unnecessary to decide whether the Respondent also violated Sec. 8(a)(3) by the same conduct. In both instances, any additional findings would not materially affect the remedy.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, American Standard, Tiffin, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

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

“(b) Refusing to continue negotiations with the Union in the absence of an impasse or an agreement, falsely asserting that an agreement had been reached and unilaterally implementing the terms of its bargaining proposal in the absence of an impasse, dealing directly with employees and bypassing the union, unilaterally polling employees about working hours, unilaterally implementing prize, incentive, and bonus programs without notice to the Union or affording the Union an opportunity to bargain, unilaterally implementing an attendance policy and an incentive award program without notice to the Union or affording the Union an opportunity to bargain, unilaterally implementing changes in clean-up times and disciplining two employees based on the change, failing to provide relevant information requested by the Union, and unilaterally changing the wages of demand flow employees without notice to the Union or affording the Union an opportunity to bargain.”

2. Substitute the following for paragraph 2(b).

“(b) Rescind, upon the Union’s request, the changes in terms and conditions of employment made unilaterally from May 7, 2002, through August 11, 2003.”

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

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 interrogate you about your union membership, affiliation, activities, or sympathies.

WE WILL NOT threaten you with loss of jobs or other unspecified reprisals because of your union activities.

WE WILL NOT threaten you with discharge or plant closure because of your union activities.

WE WILL NOT threaten you with a lawsuit because of your union activities.

WE WILL NOT request you to report on the union or protected activities of other employees.

WE WILL NOT give you the impression that your union or protected activities and those of other employees are under surveillance by us.

WE WILL NOT instruct you to stop engaging in the protected activity of writing letters to newspapers about your wages, hours, or working conditions.

WE WILL NOT solicit your grievances and imply that we will remedy them.

WE WILL NOT coercively question you about your union activities.

WE WILL NOT solicit your opinions about open bargaining issues during negotiations.

WE WILL NOT disparage the Union or try to bypass the Union and deal directly with you.

WE WILL NOT refuse to continue negotiating with the Union in the absence of an impasse or an agreement.

WE WILL NOT refuse to bargain with the Union by falsely asserting that an agreement has been reached on a collective-bargaining agreement with the Union in the following appropriate bargaining unit:

All production and maintenance employees at Respondent’s Tiffin, Ohio facility, excluding all supervisors, engineers and time study men, plant production men, office employees, salaried employees, confidential employees, product development modelers.

WE WILL NOT refuse to bargain with the Union by unilaterally imposing our bargaining proposal and all its terms and conditions of employment on you in the absence of an impasse in bargaining.

WE WILL NOT deal directly with you and bypass the Union by polling you concerning working hours and shifts.

WE WILL NOT refuse to bargain with the Union by unilaterally implementing a new attendance policy and incentive award program without notice to the Union and without affording the Union the opportunity to bargain about them.

WE WILL NOT refuse to bargain with the Union by unilaterally implementing prizes, incentives, or bonus programs without notice to the Union and without affording the Union the opportunity to bargain about them.

WE WILL NOT refuse to bargain with the Union by unilaterally implementing changes in clean-up times, and by disciplining employees under that change.

WE WILL NOT refuse to bargain with the Union by failing and delaying providing the Union with information necessary to its carrying out of its duty to represent you.

WE WILL NOT refuse to bargain with the Union by unilaterally changing the wages of demand flow employees without notice to the Union and without affording the Union an opportunity to bargain about it.

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

WE WILL, upon request, bargain collectively with the Union in the unit set forth above.

WE WILL send letters to employees Vincent Gaietto and Richard Mizen stating that the discipline they received concerning clean-up times has already been removed from our records and that it will not be used against them.

WE WILL provide the Union with the information it requested in its letters dated in June 2003.

WE WILL, upon the Union's request, rescind the changes in terms and conditions of employment we made from May 7, 2002, through August 11, 2003.

WE WILL make whole, with interest, all employees in the bargaining unit for any loss of earnings or other benefits they may have suffered as a result of our unlawful changes in terms and conditions of employment.

AMERICAN STANDARD COMPANIES, INC.,
AMERICAN STANDARD, INC. D/B/A AMERICAN
STANDARD

Karen N. Neilsen, Esq., for the General Counsel.
G. Ross Bridgman and David A. Campbell, Esqs., for the Respondent.

Ross P. Andrews, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

JANE VANDEVENTER, Administrative Law Judge. This case was tried on approximately 22 days, beginning on July 23, 2003, and ending on September 29, 2005, in Tiffin, Ohio. The complaint alleges Respondent violated Section 8(a)(1), (3), and (5) of the Act by conduct occurring from January 2002, through August 2003. The complaint allegations are dealt with in detail below. The Respondent filed an answer and amended answers denying the essential allegations in the complaint. After the conclusion of the hearing, the Charging Party and Respondent filed briefs which I have read.¹

¹ Counsel for the General Counsel filed her brief 2 business days after the deadline for filing briefs, which deadline had been extended on two occasions. No permission or additional time was sought for late filing of the brief. Respondent filed a motion to strike the brief of the

I. PROCEDURAL HISTORY

A. Background

The first charge in this proceeding was filed in May 2002. On July 23, 2003, the trial of the approximately six consolidated cases was opened in Tiffin, Ohio. After 3 days of negotiations, a settlement of this large case was agreed, and on July 29, 2003, I approved a trilateral informal settlement agreement.

B. Procedural Issues

Apparently, compliance issues arose among the parties subsequently, and ultimately motions were made to set aside the informal settlement agreement. All parties were agreed in moving to set aside the settlement agreement. On March 29, 2005, the trial herein was resumed. I granted the motion of all parties to set aside the informal settlement agreement. Later in the proceedings, I granted the motion to consolidate Case 8–CA–34809 with the six cases already before me, as it involved the same parties as well as allegations relating in time and subject matter to the six consolidated cases.

C. Remedial Issues

In the complaint, the General Counsel has requested extraordinary remedies such as reimbursement by Respondent of the Charging Party's and the General Counsel's costs of litigation, including accounting services, the reading of the notice to employees by a high ranking corporate official, and the mailing of the notice to former employees.

Respondent, for its part, has moved that if violations of Section 8(a)(1) of the Act are found, as alleged in the complaint, its posting of a notice to employees on those violations be waived, since Respondent did post a notice during the fall of 2003 pursuant to the informal settlement agreement.

Based on the testimony of the witnesses, including particularly my observation of their demeanor while testifying, the documentary evidence, and the entire record, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Delaware corporation with an office and place of business in Tiffin, Ohio, where it is engaged in the manufacture of vitreous china plumbing fixtures. During a representative 1-year period, Respondent sold and shipped from its Tiffin, Ohio facility goods valued in excess of \$50,000 di-

General Counsel because of this violation of the Board's rules, specifically Sec. 102.111(b). The procedural rules which govern formal proceedings before the Board are meant to be taken seriously, and should be well known to all practitioners. They should likewise be applied consistently to all practitioners. As noted in Respondent's motion, there was no affidavit setting forth reasons for the late filing attached to the General Counsel's later-filed motion to accept the brief. I find that good cause for late filing of the General Counsel's brief has not been shown. Counsel for the General Counsel takes the position that "sanctions" should be imposed on counsel. The appropriate sanction for late filing of a brief without permission or excuse is to strike the brief. I therefore grant Respondent's motion to strike the General Counsel's brief. In view of this ruling, it is unnecessary to rule on Respondent's further motion to submit a reply brief.

rectly to points outside the State of Ohio. Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

II. UNFAIR LABOR PRACTICES

A. Background

The Union has represented the employees of Respondent for over 60 years, since approximately 1945.² There is no record of any Board findings of unfair labor practices by the Respondent at the Tiffin plant before this case. As of 2002, in nearly 60 years, there had been very few strikes, and only one of any appreciable duration.

During the period involved herein, Respondent manufactured at its Tiffin plant large ceramic sinks, toilet bowls, toilet tanks, industrial and hospital sinks, and similar products. The plant is essentially a pottery, with various departments responsible for pouring clay or “slip” into molds to create products called “greenware,” firing the greenware in huge kilns, glazing the fired pieces, firing the pieces once again, and packing and shipping the finished products. In 2002, the Tiffin facility was the only plant of Respondent making these products in the United States.

In 2001, a new plant manager, John Carlberg, and a new human resources director, Stan Savukas, began work at the Tiffin plant. Also during 2001, the Union elected a new president, Ron Fatzinger. The collective-bargaining agreement in effect had been negotiated in 1997, and was scheduled to expire on April 30, 2002. At some places in the record, this agreement was referred to as the “red book.”

B. Unilateral Change Allegation: Safety Glasses Policy

1. Facts

In November 2001, Respondent’s safety director, Duane Deboo, talked with the Union’s relatively new president, Ron Fatzinger, about Respondent’s proposed new policy regarding safety glasses. Respondent would require all employees to wear safety glasses, including employees who wore prescription lenses. There is no dispute that this discussion took place. Ron Fatzinger states that Deboo did not make clear that Respondent’s plan would not cover the entire cost of prescription safety glasses in all cases, for example, if the employee chose a more expensive frame. Deboo, in his testimony, could not recall whether this particular point was covered in his conversation with Fatzinger or not.

The Union did not request additional discussions nor did it request bargaining about the safety glasses policy. The new safety glass policy went into effect in January 2002. Employees procured prescription safety glasses as instructed. In the

case of a number of employees, Respondent did not pay for the entire cost of their safety glasses, and so the employees themselves paid for part of the cost of the glasses.

At trial, Respondent took the position that the new policy permitted employees to wear plain-lens safety glasses called “visitor glasses” over their ordinary prescription glasses, and therefore avoid incurring the cost of getting prescription-lens safety glasses. Evidence of this practice was ambiguous. The evidence was far from clear that employees knew of this exception to the prescription safety glass policy.

2. Discussion and analysis

There is no dispute that the subject of the change was a mandatory subject of bargaining. Likewise, there is no dispute that Respondent informed the Union of the impending policy change and gave the Union at least a summary of what the policy change would mean. The Union did not request further discussions or bargaining. Therefore, Respondent implemented the policy change lawfully. The fact that one of the aspects of the plan—the fact that employees might have to pay part of the cost of the glasses depending on the style they purchased—was not adequately understood by the Union does not relieve the Union of the obligation to request bargaining.

It is well settled that an employer which gives the employees’ representative adequate notice of a contemplated change in wages, hours, or working conditions has fulfilled its bargaining obligation. It is then up to the union to request bargaining on the subject if the union desires to make modifications in the proposal. If the union does not do so, the employer may implement the proposed change legally. *TXU Electric Co.*, 343 NLRB 1404 (2004); *Bell Atlantic Corp.*, 336 NLRB 1076 (2001).

C. Meeting of the Minds

1. Initial negotiations

Negotiations for a successor contract to the 1997–2002 agreement began in early April 2002.³ Respondent’s bargaining committee consisted of John Carlberg, Stan Savukas, Dan Pieffer, controller, and Leonard Simmons, production manager. Kathy Flewelling⁴ attended the sessions in order to take notes for Respondent’s committee. At some of the negotiating sessions, especially toward the end of April, Kathy Hartvickson, Respondent’s corporate director of human resources, and Mo Heshmati, corporate vice president, were present and acted as part of the bargaining committee. A representative of Respondent’s corporate benefits department, John Collins, attended a few sessions in late April in order to assist in presenting Respondent’s benefits proposal, but he was not a part of the committee. The Union’s bargaining committee consisted of Ron Fatzinger, president; Jerry Haver, vice president; Craig Goshe, recording secretary; Vincent (Vinnie) Gaietto, statistician; Paul Elcher, guard; and Lloyd Nolan, international representative. In addition, Jamey Baker and Jeremy Hill attended the negotiations as observers. The parties agreed to begin with non-economic issues such as overtime procedures, job bidding pro-

² It is undisputed that the Charging Party Union represents the employees of Respondent in the following appropriate unit:

All production and maintenance employees at Respondent’s Tiffin, Ohio facility, excluding all supervisors, engineers, and time study men, plant production men, office employees, salaried employees, confidential employees, product development modelers.

³ All dates hereinafter are in 2002, unless otherwise specified.

⁴ By the time of the hearing, Kathy Flewelling had married, and used her married name, Chambers.

cedures, union security, and the like. Noneconomic issues were sometimes referred to in the record as “language issues.” The parties further agreed to proceed to economic issues such as pay and medical insurance after dealing with the noneconomic issues.

Respondent’s objective in the negotiations was to change the contract dramatically, according to Respondent’s witnesses Carlberg and Savukas. Respondent proposed the complete elimination of many jointly agreed plant rules and practices which had been negotiated over the years. Among employees, there was widespread sentiment that they were working excessive overtime and had far too few days off. The Union wished to negotiate some solution to this problem as well as try to speed up dealing with grievances, which had stacked up over the preceding year.

Initially, each party presented its first bargaining proposal, confined to noneconomic issues. Over the course of the next few weeks, some issues were agreed to, were put into written form, and were initiated by each party.

By the third week of April, the bargaining had still not progressed beyond the noneconomic issues. On April 23, the Union informed the Respondent that they did not think Respondent was being serious about the negotiations, and if things did not change, there would be a strike after the expiration of the contract on April 30. The Union requested a Federal mediator be called in to assist the parties. Upon finding that no Federal mediator was available on an immediate basis, the next day Respondent proposed, and the Union agreed to use a private mediator whom Respondent had used during other negotiations. Beginning on about April 26, the mediator joined the bargaining and began to assist the parties. Hartvickson was present as part of Respondent’s committee from April 26, through the end of negotiations on May 1.

2. The final week

On April 27, Respondent added attorney Desmond Massey to its bargaining committee. Massey introduced himself to the union committee by saying that he was there only to deal with economic issues. During a lengthy presentation, he also outlined his background, other negotiations he had participated in, and Respondent’s need for change and flexibility, including doing away with piecework, and all or most of the past practices developed by the Union and Respondent over the course of their bargaining relationship. He testified that he had negotiated economic issues for Respondent at others of Respondent’s facilities.

On April 27, however, the parties were still discussing noneconomic issues.⁵ During that day, Respondent proposed a scheme whereby the parties would review old past practice agreements and addenda, and try to streamline or eliminate them, with impasses going before an arbitrator. The Union appeared to be willing to agree to such a procedure, but its counterproposal contained significantly simpler language. In response to the Union’s counterproposal, Massey loudly told the Union that they were “pissing in the wind,” and “picking

⁵ There had been one exception, i.e., presentation of Respondent’s medical insurance proposal by John Collins. No agreement on medical insurance had been reached, however.

flyshit out of pepper.” No agreement was reached on this procedure.

Later that day, the parties were reviewing the noneconomic proposals, with a view to pinpointing which items were still outstanding. During this review, Massey got angry and announced that negotiations of noneconomic issues were at an end. Massey insisted that the parties leave noneconomic issues for a time. Massey stated that Respondent’s final offer on noneconomic issues was on the table, but that if and when the parties could agree on economic issues, Respondent was willing to “revisit” noneconomic issues. The Union submitted a counteroffer which listed all the noneconomic or “language” issues which were still open. Massey testified that he said there would be no more negotiation on the noneconomic issues, but no other witness recalled this statement. Several witnesses, including Respondent witnesses, did recall that Massey stated willingness to revisit the noneconomic issues once the parties had agreed on economic issues. I therefore discredit Massey’s testimony on this point.⁶ I find that Respondent did show willingness to come back to noneconomic issues at the conclusion of economic issues.

For the remaining days of April, the parties discussed their widely different economic proposals. Respondent proposed elimination of piecework, and of the incentive “quarters” paid to demand flow employees, among other changes. Its proposal contained a comprehensive wage classification scheme for the entire plant which significantly altered the status quo. Respondent’s medical insurance proposal included a contribution from employees. The Union proposed some improvements to wages and benefits, but did not want a complete overhaul of the pay system which was in place.

3. April 30 and May 1

By April 30, the parties had not reached many agreements on economic issues. Heshmati was present at most of the joint bargaining sessions on that day. At one point, he angrily told the Union that their proposals would break Respondent. By approximately 10 o’clock in the evening, outstanding economic issues included Respondent’s proposed wage classification system, the new medical insurance plan, and the open noneconomic or language issues. There were approximately 37 of these noneconomic issues. Respondent’s bargaining notes reflect the statement, “if we have a tentative agreement on outstanding issues, may be inclined to revisit non-economics.”

The parties broke into separate caucuses at about 10 o’clock, and went into separate rooms.⁷ After some discussion among

⁶ In all particulars wherein Massey’s testimony conflicts with that of other credited witnesses, I have discredited his testimony. Massey was a strikingly unconvincing witness, evincing bluster and aggression in his demeanor, failing to listen carefully to questions, and testifying inconsistently in several instances. At one point he denied an opprobrious comment attributed to him, stating that such offensive language was not in his vocabulary, but in the next breath, admitted a far more offensive and scurrilous remark he made during the same meeting.

⁷ The findings concerning the events of April 30 and May 1, during the remainder of the bargaining sessions are taken largely from the testimony of witnesses on the union negotiating committee, Fatzinger, V. Gaietto, Haver, and Baker. I credit the testimony of each of these witnesses, all of whom testified in a careful and detailed manner. The

the union committee, and their realization that the strike deadline was at midnight, the committee members put together a counteroffer. At about 11 o'clock, the Union proposed to agree to the overall wage classification system, with the caveat that several specific jobs, such as "bench hustler" were reassigned to different classifications within the system, accept the medical insurance, provided there was a cap on the employees' contributions in the 3d year of the contract, a proposal to deal with outstanding grievances, a full-time paid union representative, and proposed all the language issues were to be resolved. The union committee asked the mediator to convey its offer to Respondent.⁸ While the union committee waited for a response, Vinnie Gaietto worked at his computer listing the specific noneconomic language issues that remained to be resolved.

As time passed, and no response was received, Fatzinger made several calls to the union hall to advise the union members to continue their preparations for a strike and for picketing in support of the strike. The second of these calls occurred at

demeanor of each of them showed that he was serious in his attitude and was attempting to do his best to recall the events he was being asked about. The Respondent's witnesses who testified, Hartvicksen, Carlberg, and Massey, displayed large areas of lack of recollection of the detailed events of the evening. In addition, their testimony was conclusory about crucial events, and glossed over important areas without any detail. I find their testimony unworthy of reliance where there are differences from the testimony of the four witnesses named above. Savukas was not in the Respondent's caucus during the evening hours, but was performing calculations to aid the caucus.

One prominent member of Respondent's team, Mo Heshmati, did not testify, and no explanation was given for his failure to do so. In fact, the last hearing day was scheduled specifically to accommodate Heshmati's busy travel schedule at his job at the time of the hearing. However, one prominent member of the union committee, Lloyd Nolan, also did not testify. The only explanation provided was that he had retired, and was no longer employed by the International Union. Given that each party lacked the testimony of one prominent member of the team, both without explanation, I find that it would be inappropriate to draw adverse inferences in either case. I therefore decline to draw adverse inferences either because of the lack of testimony from Heshmati or because of the lack of testimony from Nolan.

⁸ Respondent sought to introduce both the testimony of the mediator and a written notation allegedly made by him. I ruled that the mediator's evidence was not admissible for several reasons, some of them noted on the record. They include the strong public policy against compromising the neutrality of mediators, so as to allow them to continue to fulfill their function of mediating and settling disputes, free of the shadow of being called as a witness in subsequent litigation. While the mediator in the instant case was a private mediator, rather than a mediator from the FMCS, the same policy considerations and the concept of protection of the mediation process apply to a private mediator. In addition, the parties to the negotiations are fully capable of testifying to the events that occurred. They are, in fact, the only ones whose testimony will show whether a "meeting of the minds" occurred. Mediator testimony on these same points might be considered to be more "authoritative" because of his ostensibly neutral status, thus making him either an expert or a super witness. Either result would be detrimental to the trial process. In this case, the purpose of calling the mediator to testify was, among other things, to question him on the ultimate issue for the Board, i.e., the existence of a contract arising from the subject negotiations. This would be improper under the rules of evidence, and is an additional reason for excluding his testimony. *Tomlinson of High Point*, 74 NLRB 681 (1947).

approximately 11:45 p.m. Some minutes later, the mediator returned with a response from Respondent, but the response did not address all the job classification changes, gave no response to the proposal of a cap on the medical insurance contribution, and gave no response to the Union's demand that the language issues be resolved. The other proposals made by the Union were apparently agreed to by Respondent. None of these agreed points were reduced to writing, nor initialed by the parties.

According to Respondent's witnesses, they were surprised when the mediator returned with the Union's response, as they thought they had addressed all the issues. How Respondent's committee got confused is not clear. Respondent's committee then made a phone call to their corporate headquarters to get final approval for the medical insurance contribution cap. By this time, midnight had passed, without either party specifically requesting an extension of time for negotiations or an extension of the contract through a time certain or the conclusion of negotiations.

In the union caucus room, Fatzinger called the union hall and advised the members there that they were on strike and to deploy the pickets to their assigned areas. At some point within about 15 minutes after midnight, the mediator returned with Respondent's answer, which agreed to the medical insurance cap and the one job reclassification in the wage scheme, but did not agree to continue negotiation of the noneconomic language issues. None of these agreed points were reduced to writing nor initialed by the parties. All the union committee members who testified stated that Fatzinger displayed anger at the failure of the negotiations by sweeping his papers off the table. The union committee then gathered their papers and began to leave the hotel building where negotiations were being held, and to go to the parking lot.

As Fatzinger returned from the parking lot into the building to get more of his papers, Hartvickson and other members of Respondent's committee were standing inside, as was the mediator. Hartvickson pleaded with Fatzinger to stop the strike. Massey stated that he had never heard of a union going out on strike over language issues. The mediator cursed and called the union committee stupid. Fatzinger replied that they didn't understand how important those language issues were to the employees, that they had been working 12 hours a day, 7 days a week, and they never saw their families. Fatzinger proceeded up the stairs towards the union caucus room. Before he reached the room, Simmons stopped him and said that they would all lose their jobs if there was a strike, because the plant would be shut down. Fatzinger continued to the caucus room, where he and Nolan talked over the possibility of extending the current contract until negotiations could be concluded. They agreed to meet with the Respondent committee and went to the lobby to do so. Fatzinger and Nolan met with Massey and Hartvickson and told them the Union was willing to extend the current contract (called in testimony, "extending the clock") in order to finish negotiating the open language items. Hartvickson nodded affirmatively, thanked them, and hugged Fatzinger. It was suggested that the remaining items might be dealt with more efficiently by a subcommittee of two committee members from each team. Fatzinger and Hartvickson agreed to this procedure.

Respondent chose Carlberg and Savukas for its subcommittee, and the Union chose Vinnie Gaietto and Jerry Haver. The Union called off the strike.

At about 1 a.m. on May 1, the subcommittee began work on the remaining noneconomic language issues. The record evidence reveals that the union subcommittee was instructed to agree, modify, or withdraw its language proposals, in order to try to secure quick agreement to a few of the most important language issues in return for dropping others. Respondent's committee was instructed by Heshmati that it didn't have to agree to anything, but to give the Union a few things, according to Savukas' testimony. The subcommittees met and began to go through the open noneconomic issues. They began with overtime, and were able to agree on a few parts of the overtime section, and agreed to leave others open. After approximately an hour progress on the overtime language issues slowed, and the parties moved on to the job bidding proposals. They continued to deal with language issues in the job bidding proposal for approximately another hour or so.

In the meantime, Fatzinger was called on the phone and asked to come to Respondent's caucus room alone, once apparently to discuss what point the parties had reached in their negotiations. Fatzinger testified that he felt uncomfortable being without his committee, and left the caucus room. The second time he went to Respondent's caucus room in response to Respondent's summons, he was presented with a piece of paper which, as well as Fatzinger could recall, stated that the parties had reached agreement on economic issues, and that a contract was set to go into effect within 24 hours of the signing of the proffered document. Fatzinger was asked to sign this paper. Fatzinger testified that he did not understand the statement presented to him, and was leery of being tricked into stating that there was an agreement, when in his mind, an agreement was still in the process of being negotiated by the subcommittee. Fatzinger declined to sign the document, and left the caucus room.

The subcommittee was able to arrive at agreement on certain parts of the job bidding proposal, but when the parties disagreed about a particular item, Savukas suggested a break. It was then about 3 or 3:30 a.m. A few minutes later, Fatzinger suggested to the four subcommittee negotiators that they get some sleep and resume negotiations in the morning. Fatzinger suggested 1 p.m., but Carlberg countered with a morning meeting, and it was agreed that the four subcommittee negotiators would resume their work at 10 a.m. the same day.

At about 9 a.m., Heshmati visited Respondent's plant, and met with the office staff, who had arrived ready to go to work in the plant in the event of a strike. He told the employees that Carlberg and Savukas were not there because they had been up late the night before negotiating. Heshmati said that negotiations were going to continue that day, as no settlement had been reached. Witness Elizabeth Cleveland testified without contradiction that Heshmati said nothing about a contract having been reached.⁹

⁹ Not only did Cleveland testify without contradiction, but she was a particularly impressive witness. She had voluntarily resigned her em-

At the hotel where negotiations took place, the union committee arrived by 10 a.m., but had to wait for some time before any Respondent committee members appeared. About 30 minutes later, however, Massey and Hartvickson entered the main negotiating room. Massey stated that there had been some kind of misunderstanding the evening before, and that Respondent had agreed only to "review" the open noneconomic issues, not to "negotiate" them. Nolan became angry, and stated that he knew the difference between negotiate and review. The union committee said they were ready to resume negotiations. Massey stated that agreement on a contract had been reached. Nolan and Fatzinger both stated that no contract had been reached. Massey reasserted that one had been reached. The union committee withdrew to a caucus. After discussing the surprising claim that a contract had been agreed to, the union committee was at a loss for a response, but decided to put forth some alternative proposals to Respondent. The union committee returned to the two-person Respondent committee and proposed as one alternative that the parties simply renew the 1997-2002 collective-bargaining agreement for another 3 years. If Respondent did not want to accept that option, the Union stated that it would take Respondent's last proposal to the membership to see if the employees would accept it. In response to Massey's question whether the union committee would recommend its acceptance, Fatzinger responded that they would not recommend and would not oppose it. Hartvickson asked what would happen if the employees rejected the Respondent's last proposal, and Nolan said that the Union would give Respondent an "orderly shutdown," toward a strike. After taking a caucus in their turn, Respondent's committee returned. Massey stated that Respondent still took the position that there was a contract. Nolan said there was no contract, and referred to the four-person subcommittee which had been negotiating the remaining language issues. Massey argued back, raising his voice, and stated that Respondent was a "corporate gorilla," and that the Union was a "pissant." Massey told the union committee that if the Union went on strike, Respondent would sue "each and every one of you" as well as the International Union for a million dollars a day.

Ultimately, Respondent agreed to the Union's second proposal to submit Respondent's last proposal to the employees for a vote. The vote was scheduled for the following day. Respondent campaigned in favor of its last proposal. Respondent released news to a local radio station about the middle of the day on May 1, stating that an agreement had been reached between Respondent and the Union.

Beginning on May 2, Respondent announced to employees that there was a contract, and urged them to vote in favor of it. The employees voted against Respondent's last proposal by a large margin. Despite this rejection by the employees, and despite subsequent requests by the Union to return to negotiations, Respondent implemented its last proposal on May 7.

There is no evidence that Respondent claimed during the April 30 to May 7 period that there was an impasse in negotiations.

employment from Respondent soon after the events she testified about, and was a neutral believable witness.

4. Discussion and analysis

The first question which must be addressed is whether there was indeed an agreement on a collective-bargaining agreement at any time on the night of April 30, through the morning of May 1. I found above that the Union's last proposal which was sent to Respondent included as one of its points that the noneconomic or language issues be resolved. There is no evidence that Respondent gave the Union back any response to this particular point in its two responses, one shortly before midnight, and the other approximately a quarter of an hour after midnight. Therefore, the issue of the unresolved language proposals had clearly not been settled. Whether Respondent's committee realized or did not realize that there was one significant issue which was not settled at 12:15 a.m. on May 1, is not significant. Within a short time thereafter, the Union's actions in calling a strike and leaving the hotel, as well as Fatzinger's statements to Respondent's committee, informed Respondent's committee clearly that there was an issue still outstanding, and that issue was the language proposals.

Respondent's conduct after hearing that a strike had been called, and hearing Fatzinger's remarks showed that it understood by 12:30 or 1 a.m. that there was more bargaining to do if a strike were to be averted. Respondent agreed to sit down again to try to resolve the remaining language issues. Both sides tried to speed the process by paring down the negotiating team for the language issues. When several hours of continued bargaining did not resolve all the language issues, the parties agreed to continue negotiations at 10 a.m., some 7 hours later. It is eminently clear that negotiations were still going on; they were certainly not concluded, not considering that another session had been agreed upon. No written and initialed agreements embodying the four or five points which had been agreed between the parties at midnight or shortly thereafter had been drawn up, as had been the parties' practice heretofore. This is strong evidence of the absence of an agreement, of a meeting of the minds, in the early hours of May 1, when the parties took a break to get some sleep. *Crittenton Hospital*, 343 NLRB 717, 718 (2004). Cf. *Branch Cheese*, 307 NLRB 239 (1992).

Some hours later, at some time after 10 a.m., it was Respondent that refused to continue with the examination of the remaining language issues, and the attempt to resolve them. Up until this time, both parties had behaved as if negotiations were going to continue. Heshmati had announced as much in the plant at around 9 a.m. Respondent's about face in announcing at about 10:30 or 11 a.m. that a contract already existed and had been agreed to must indeed have been surprising to the union committee. It would be as surprising to any reader of the record evidence herein. There is no evidence in this record that the parties agreed to *all* the terms of a collective-bargaining agreement. It is clear Board law that an agreement must be complete in order to show that there has been a "meeting of the minds" necessary to the formation of a contract. Mutual agreement on "all material terms" is an essential element of a binding contract. The fact that the Union had been willing to strike over the failure of agreement on the noneconomic language issues—and the fact that they involved mandatory subjects of bargaining such as overtime and job bidding procedures—clearly establish that the unresolved issues were indeed

substantial and material issues. *Sheridan Manor Nursing Home*, 329 NLRB 476, 478 (1999); *Henry Bierce Co.*, 307 NLRB 633, 628–629 (1992).

Respondent contended at trial that its negotiators agreed to "discuss" the unresolved noneconomic issues, but that its negotiators did not mean bargain or negotiate about them. There is no credible evidence in this record that Respondent made clear to the Union *at that time* that it was using the word "discuss" in such a specialized sense, rather than its ordinary meaning. The Union therefore was entitled to apprehend Respondent's intention to discuss or talk about the unresolved issues as an agreement to continue bargaining about them. In addition, Respondent's conduct at the time indicated that it was bargaining or negotiating about the unresolved issues. It designated a bargaining subcommittee consisting of the two local managers, Carlberg and Savukas, to sit down with a two-member union subcommittee at a table. Heshmati instructed Respondent's negotiators to "give" on some issues. This conduct looks exactly like bargaining, and I find that it was bargaining. I reject Respondent's late-raised contentions that it did not agree to continue bargaining, that it used the word "discuss" only, and that "discuss" meant something other than its ordinary meaning.

Respondent's other late-raised defense, that an impasse had been reached by the early hours of May 1, is without merit. The parties had agreed to continue negotiating at 10 a.m. on May 1. The subcommittee had not even finished going through all the noneconomic issues, much less come to final positions on them. Each side "reserved" on some items. This is ordinarily understood to mean that the parties mean to come back to those items, not that they are at their final positions. In addition, no person on Respondent's negotiating committee used the word "impasse" on the morning of May 1. Instead, Massey and the other members insisted that there was a "contract," not an impasse. The record evidence can simply not be contorted into a shape that would support Respondent's argument that an impasse existed on May 1. The Union showed that it was ready to continue coming up with offers and alternative proposals even in the face of Respondent's impudent claim that a contract had been reached the preceding night, as shown by the Union's offers to continue the previous contract in effect, or to submit the Respondent's last proposal to the employees for a vote. These facts, taken together, preclude a finding of impasse. *Grinnell Fire Protection Systems Co.*, 328 NLRB 585, 586 (1999), *enfd.* 236 F.3d 187 (4th Cir. 2000), *cert. denied* 534 U.S. 818 (2001).

It is immaterial whether Respondent acted out of honest error, and believed that there had been agreement around midnight, or whether it knew full well that there had been no agreement, and had simply decided to attempt to foist its last proposal on the Union under the guise of a purported agreement. The lack of a meeting of the minds, the lack of a contract, would be the same, and Respondent's violation of its duty to bargain would be the same. However, if Respondent had been acting in good faith, Respondent should have returned to the bargaining table once its last proposal had been rejected.

Respondent's abandonment of negotiations when no agreement had been reached and no impasse had been reached is a

violation of its duty to bargain in good faith, and violated Section 8(a)(5) of the Act. Likewise, its implementation of its last proposal in the absence of agreement or impasse also violated Section 8(a)(5) of the Act. *NLRB v. Katz*, 369 U.S. 736 (1962); *Grinnell Fire Protection Systems Co.*, supra at 586; *American Automatic Sprinkler Systems*, 323 NLRB 920, 937–938 (1997).

D. Allegations of 8(a)(1) Conduct

1. Before May 1

Employee James Uhrik testified that in mid-April, Agent John Kesler,¹⁰ a modeler (designer) for Respondent, approached him and asked him what employees in his department wanted in a contract. Uhrik said they wanted better wages and a good contract. Kesler replied that they would get more money. Within a day or two, Kesler again approached Uhrik and told him that he, Kesler, had been talking with the employees in the “bowl beam” area, and had asked them if they would go on strike, and they had said that they would. Kesler did not testify at the hearing.

About April 24, according to the testimony of Ron Fatzinger, Carlberg called him into his office and asked Fatzinger why he was talking with employees in the plant. Fatzinger replied that he was making sure the stewards communicated to employees that they were to work as usual, and not to have any slow-downs. The two talked about the possibility of a strike the following week, and Fatzinger promised that the employees would conduct an “orderly shut-down” of the plant. Carlberg told Fatzinger that he didn’t “need” the current employees and that if they did go on strike, that Respondent would “shut the plant down.” Carlberg did not address this conversation in his testimony.

¹⁰ Respondent admitted the agency status of John Kesler, Jim Hall, and Dave Kiesel, salaried engineers, analysts, or modelers, in all its answers filed up until August 2005. In August 2005, after the conclusion of the General Counsel’s case, Respondent filed an amended answer in which it denied, for the first time, that these three individuals were agents of Respondent. I decline to allow the amendment, at the late date upon which it was filed, denying the agency of these three individuals. The General Counsel had already rested his case at that time, and more than 3 weeks of trial days had been conducted. I find that the admissions of Respondent that the three-named individuals were agents shall stand. Even if Respondent were to be permitted to amend its answer in this regard at such a late time, I would find that the record evidence shows that the three individuals were indeed agents of Respondent for the purpose of talking to employees, finding out what they intended to do with respect to striking, and finding out how employees were viewing the Union and the negotiations, as well as agents for the purpose of persuading employees to vote in favor of Respondent’s last proposal. The testimony of credited witness Cleveland shows that Carlberg held a series of meetings attended by supervisors, salaried employees, and office employees, in which he instructed them to gather information on the unit employees’ sentiments on the above subjects. He held a meeting on May 1 and 2, among the same people in which he instructed them to explain the Respondent’s last proposal, which he by that time called a contract, and to encourage them to vote in favor of ratifying it. This evidence is plainly sufficient to establish their agency status for the purpose of communicating with employees on these subjects. I so find. See, e.g., *HVAC Mechanical Services*, 333 NLRB 206, 209 (2001).

Witness Elizabeth Cleveland, a former accounting clerk in Respondent’s office, testified that she was called into several meetings during the period April 24 to 30, by John Carlberg, along with other office employees. It is undisputed that Cleveland and several other office employees were not supervisors of Respondent. At the first of these meetings, the attendees were instructed that they would be expected to work in the plant in the event of a strike. At the second of these meetings, on April 26, about 60 supervisory, salaried, and office employees were present. Carlberg made a presentation about how well the Tiffin plant was doing, and told them to go out and tell the bargaining unit employees how well the plant was going to do in the future. Carlberg further told the supervisory, salaried, and office employees that if they heard anything about negotiations or about the union from the employees, they were to be sure to report such comments back to him. At the third meeting a few days later, some such comments were reported to Carlberg. Carlberg did not address these allegations in his testimony.

I find that each of these three undisputed incidents constitutes coercive conduct in violation of Section 8(a)(1) of the Act. The first remarks by Kesler convey to the employee an impression that employees’ union activity, e.g., intentions regarding participating in a strike, were under surveillance by Respondent. See, e.g., *Spartech Corp.*, 344 NLRB 576 (2005); *Jewish Home for the Elderly of Fairfield Co.*, 343 NLRB 1069 (2004); *Wal-Mart Stores*, 340 NLRB 220 (2003); *Flexsteel Industries*, 311 NLRB 257 (1993). The second incident is a threat to close the plant if the employees choose to strike, which is per se coercive. See, e.g., *Contempora Fabrics, Inc.*, 344 NLRB 851, 858 (2005); *Jewish Home for the Elderly of Fairfield Co.*, above. The third incident constitutes a request to employees to survey the union activities of other employees, and to report such activities back to Respondent. *Wal-Mart Stores*, above.

2. May 1 and 2

On the morning of May 1, at about 9 a.m., employee Cleveland was called to a meeting in the plant’s office area where Mo Heshmati addressed her, along with other employees and supervisors. She testified that Heshmati asked the employees and supervisors, “what are the employees saying out on the floor” about the situation involving the union, the strike, and the negotiations. Heshmati did not testify at the hearing,¹¹ nor did any other witness testify about this incident and thus Cleveland’s testimony is un rebutted.

It is clear that Heshmati’s question regarding the union activities and sentiments of employees was coercive with respect to Cleveland and the other nonsupervisory office staff present at the meeting. The meeting was in Respondent’s plant offices, and the question was asked by a high corporate official. It gave employees the impression that employees’ union activities and sentiments were under surveillance by Respondent and requested them to report on the union and protected activities of

¹¹ Respondent’s counsel stated at trial that Heshmati no longer worked for Respondent. The trial date of September 29, 2005, was arranged specifically to conform to Heshmati’s busy schedule so that he could give his testimony on that date. On September 29, however, Respondent did not present Heshmati as a witness, and gave no explanation for his absence.

other employees. Accordingly, I find that Heshmati's statement on May 1, violated Section 8(a)(1) of the Act. See, e.g., *Spartech Corp.*, above; *Wal-Mart Stores*, above; *Flexsteel Industries*, above.

Massey's threat to sue individual union officers and committee members for millions if they chose to go on strike was described above. Such a threat to sue employees for exercising their Section 7 right to strike is an egregious example of coercive conduct. It is a violation of Section 8(a)(1) of the Act. Cf. *Braun Electric Co.*, 324 NLRB 1, 4 (1997).

The Union's vote on Respondent's final offer was scheduled to be held on May 2. It is undisputed that on May 1 and 2, supervisors throughout the plant spoke to their employees and encouraged them to vote in the Union's ratification vote. Tom Bushkuhl, an employee for more than 30 years, testified that admitted supervisor Isadore "Mac" MacLaughlin spoke to him on May 2, about Respondent's economic package, and stated that the raises looked good. Bushkuhl testified that Mac said that whatever he did, "don't let the union tell you how to vote" in the upcoming ratification vote. MacLaughlin testified, but did not recall the specifics of any of his conversations with employees.

Employee Carol Perin testified that on the same date, she attended a meeting of employees at which admitted Supervisor Tim Harold told employees that the contract offered by Respondent was good, and recommended to employees that they vote for Respondent's proposal, which he called a "contract." Perin testified that Harold told the employees that if they did go out on strike, Respondent could "close the doors."

Also on May 2, Jim Hall spoke to employee Tom Plott in the maintenance department. According to the testimony of Plott, Hall asked Plott what he thought of the new "contract." Plott replied that it "sucks" because the money in it is "dirty money" taken from Plott's fellow employees who had been paid piecework. Plott added that the overtime never stops. Hall asked him if he was going to vote on the "contract" that evening. Plott replied that he was, and was going to vote it down. Hall said that he hoped the vote was positive, because if it was not, there was the possibility that "we won't be here after the end of the year, that they will close the doors." Plott also witnessed Hall and engineer Dave Keisel asking employee Delbert Schank if he was going to vote that evening. According to the testimony of Delbert Schank, he replied that he was going to vote against the Respondent's "contract." Hall then asked Delbert Schank three separate times why he wanted to quit. Each time, Delbert Schank replied that he was not quitting and did not intend to quit.¹²

On the same day in Tim Herold's office, Supervisors Tim Herold and Terry Hunter held a meeting of employees in which they talked about the "good points" of Respondent's last offer. Employee Jodi Fisher attended the meeting. According to Fisher's testimony, Herold asked employees how they intended

to vote on the Respondent's contract offer. After some discussion about the merits of the offer, Terry Hunter said that if it was voted down, we would no longer have a plant, we would all be losing our jobs. At another meeting the same day, Tim Herold talked to a different group of employees in engineer John McNamara's office. Employee Donnie Jacobs attended. He testified that, after describing Respondent's offer, Herold encouraged the employees to vote in favor of it. Herold went on to say that if there was a strike, only half the employees would return to work. When an employee asked if the plant would close if there was a strike, Herold replied, yes, but don't take that as a threat. Neither Tim Herold nor Terry Hunter testified.

Also on May 2, Supervisor Jerry Reedy asked employee Bruce Arbogast whether he had voted on Respondent's offer, according to Arbogast's testimony. Reedy refused to answer. A little later, Arbogast was with about 14 employees from his department, the bowl beam department, when Supervisors Ken Hammer and Jerry Reedy came to talk to them about Respondent's offer. Hammer said that if the offer was not ratified by the employees, the Tiffin plant would not be here, because Respondent would make the products in Mexico. Hammer asked the employees which ones had not voted, and to raise their hands if they had not voted. He told them he would give them time off to go and vote. Neither Hammer nor Reedy testified.

Employee Eugene Wise testified that on May 2, he received a message on his telephone answering machine from Supervisor Dale Schwochow. According to Wise, he returned the call, and Schwochow told him that they had worked together a long time, and he would hate to see them lose their jobs, as they had families to support. He added that Wise should "keep an open mind" when he went to vote. Dale Schwochow testified but had no recollection of specific calls.

The approximately nine conversations detailed above were either uncontradicted or were testified to by credited witnesses. In at least four of the conversations, supervisors questioned employees as to whether they intended to vote, whether they had voted, or how they intended to vote. Given the circumstances of the tense end of negotiations, with the Union telling employees that no agreement had been reached, and Respondent claiming that there was an agreed contract, these interrogations were far from casual. The supervisors had been given instructions by Carlberg to describe the Respondent's last offer to employees, and to call it a "contract." The supervisors' repeated questioning of employees as to their votes was clearly coercive inquiry into their union or protected activities. Whether they voted, or how they voted in the union-conducted ratification vote was entirely up to the individual employee, and was a protected activity. Therefore, Respondent's interrogation of employees about this protected activity was a violation of Section 8(a)(1) of the Act. Cf. *Zarcon*, 340 NLRB 1222 (2003); *Rossmore House*, 269 NLRB 1176 (1984).

MacLaughlin's statement to employee Plott regarding the Union is a disparagement or undermining of the Union. Respondent engaged in a course of conduct to undermine and bypass the Union in May and for many months thereafter. This is but one instance of it. Cf. *Armored Transport, Inc.*, 339 NLRB

¹² Both Plott and Delbert Schank were conscientious witnesses who testified carefully and in detail. In contrast, Jim Hall demonstrated a poor recollection in his testimony. Hall admitted to having poor recollection. Where there are differences in their testimony, I credit Plott and Delbert Schank.

374, 376, 378 (2003); *RTP Co.*, 334 NLRB 466, 467 (2001); *Ryan Iron Works*, 332 NLRB 506, 507 (2000); *Royal Motor Sales*, 329 NLRB 760, 832–834 (1999). Hall's repeatedly asking employee Delbert Schank if he was quitting occurred in the context of a conversation among supervisors and employees about Respondent's proffered contract and the ratification vote. The questions were asked after Delbert said that he was going to vote against Respondent's proposal. This conduct has been held by the Board on many occasions to constitute a threat of discharge or loss of job. I find that it was exactly that in the circumstances of this incident. See, e.g., *Hialeah Hospital*, 343 NLRB 391, 393 (2004); *Campbell Electric Co.*, 340 NLRB 825 (2003); *Paper Mart*, 319 NLRB 9, 9 (1995).

On approximately seven occasions during the above meetings or conversations, supervisors or agents of Respondent told employees or groups of employees that if the Respondent's proposal was not accepted by the employees in the vote, or if the employees went on strike, that Respondent would close the plant, there would be no plant, we would lose jobs, or Respondent would make the products in another country. In each of these instances, Respondent threatened employees with plant closure or loss of their jobs unless they exercised their Section 7 rights in the way Respondent wanted them to, i.e., accept the Respondent's offer and not go on strike. These threats are per se coercive and violated Section 8(a)(1) of the Act. See, e.g., *Contempora Fabrics*, above; *Framan Mechanical, Inc.*, 343 NLRB 408, 429 (2004).

E. Direct Dealing Allegations

1. Polling of employees regarding shift changes

It is undisputed that on several occasions in May 2002 and June 2003, supervisors in the glost department individually polled employees on the subject of their preference for an 8-hour shift or a 12-hour shift. It is also undisputed that Respondent did not consult with or bargain with the Union prior to undertaking these polls. The only way the Union learned of the polls at all was if a steward also happened to be an employee in the department which was being polled, or if an employee informed the Union about the polling. Several employees testified that they were asked by supervisors which shift or several alternatives they would prefer. A few days later, supervisors informed employees that a majority of employees had chosen 12-hour shifts over 8-hour shifts, and that schedule would be implemented. During the second poll of employees, Respondent even utilized employees whom it chose, and who were not union stewards, to talk to the employees and solicit their responses to the poll.

Respondent defends by claiming that it had changed employees' shifts in the past without consulting with the Union. There is little evidence in the record of such past instances, certainly not enough to establish a waiver by the Union of its bargaining rights on hours of employees. Here, the use of employees who were not associated with the Union as employee representatives makes obvious Respondent's intention to circumvent the Union. In the circumstances, especially where Respondent had recently unilaterally implemented an entire proposal differing dramatically from the prior contract and where Respondent thereafter continued on a lengthy course of

bypassing the Union and dealing directly with employees, it is impossible to pretend that Respondent's direct polling of employees on such an important matter as work schedules was not a violation of its duty to bargain. It is well settled that work schedules are mandatory subjects of bargaining. *Vincent Industrial Plastics*, 328 NLRB 300 (1999), enfd. 209 F.3d 727 (D.C. Cir. 2000). It is the province of the bargaining representative to deal with the employer on such matters. Therefore, Respondent violated Section 8(a)(5) by dealing directly with employees regarding their work schedules. *Kurziel Iron of Wauseon, Inc.*, 327 NLRB 155 (1998).

2. Mo Heshmati's meetings with employees

In early July, Mo Heshmati met with at least two groups of employees. In one of the meetings, witnesses Janice Carr, Greg Steyer, and Sheryl Hepp were among the employees present. From their testimony, it appears that Heshmati chided the employees for writing letters to the local newspaper discussing the state of negotiations, complaining about working conditions at the plant, and about pay and benefit cuts imposed unilaterally by Respondent. Heshmati told employees that he wanted these letters to stop. In answer to an employee's comment about keeping the Tiffin plant open, Heshmati said that if he could have product made for less money, why wouldn't he go there? He also told the employees that he was there to get the problems solved, and he asked what the employees were dissatisfied about.

At another meeting, about which employee Rene Garcia testified, Heshmati asked the employees for ideas on "turning the plant around." Employees said they had to work too much overtime. Garcia asked when the contract would be resolved. Heshmati said it should be resolved in a few weeks. Heshmati said that he would try to get the issues raised by employees resolved. At several points in the meeting he said that he didn't want to see the community lose these jobs. In a separate conversation with Garcia after the meeting, Heshmati repeated that he didn't want to see the community lose these jobs.

I find that, in the two meetings testified about, Heshmati solicited employee grievances and promised to remedy them, thereby bypassing the Union, dealing directly with employees, and undermining the Union in violation of Section 8(a)(1) and (5) of the Act. I find that Heshmati discouraged protected activities by telling employees to stop the writing of letters to the local newspaper concerning working conditions and the labor dispute between Respondent and the Union. This discouragement of protected activities violated Section 8(a)(1) of the Act. *Dougherty Lumber Co.*, 299 NLRB 295, 298 (1990), enfd. 941 F.2d 1209 (6th Cir. 1991); *Alaska Pulp Corp.*, 296 NLRB 1260, 1261 (1989), enfd. 944 F.2d 909 (9th Cir. 1991). I do not find, as alleged in the complaint, that Heshmati threatened loss of jobs in the first meeting. However, with regard to the meeting about which Garcia testified, I find that Heshmati's repeated references to the loss of jobs amounted to an implied threat of loss of jobs in violation of Section 8(a)(1) of the Act.

3. Larry Costello's meetings with employees

In late July, about July 24 or 25, Larry Costello, Respondent's vice president for human resources, visited the Tiffin plant and held several meetings with groups of employees.

Former employee Jay Radebaugh testified that in a meeting he attended along with about six other employees, Costello told the employees he was having a “skip-level” meeting with them, and asked them to tell him what problems they were having. He said the Tiffin plant was Respondent’s number one priority at the time, and that he knew the employees were overworked and didn’t have the proper equipment. Costello said that he was going to put together a group to train foremen, and send in a team of communicators to talk to employees about their problems. Costello brought up the recent negotiations with the Union. He said that he thought the parties had a deal and the Union had tried to back out of the deal. He said that he would not “renegotiate” the contract, and that if the employees thought the NLRB was the answer, that it would be a long drawn-out process. An employee brought up the elimination of piecework, and another talked about the roof leaking. A third employee said the foremen don’t know what they are doing. Several employees complained about the excessive overtime and the lack of any days off for long periods. Costello told the employees that a new human resources person was arriving soon, and that he was going to look into the problems the employees had mentioned, and “fix” the scheduling problem. Costello did not testify.

In another of Costello’s meetings with employees, employees Jerry Sharp and Matt Gace testified that Costello also solicited employees’ views on problems at the plant, and also said he would fix things, make changes, and improve communications. I find that Costello bypassed and undermined the Union and dealt directly with employees by soliciting employees’ grievances and promising to remedy them. I also find that Costello disparaged the Union by his false characterization of the Union’s conduct. As found above, there was no agreement reached. This conduct violates Section 8(a)(1) and (5) of the Act. I do not find, as alleged in the complaint, that Costello threatened employees with plant closure or with the futility of utilizing the Board’s processes by implying that Respondent would intentionally slow down those processes. Costello’s remark about the NLRB was a simple statement of opinion.

4. Consultants’ meetings with employees

Approximately a week later, in early August, several individuals from a consulting firm employed by Respondent held meetings with different groups of employees. It is not disputed that the employees were from a firm retained by Respondent to hold these meetings and report back to Respondent on the results. Employees Radebaugh and Sykes testified about the meetings they attended. The consultants asked employees what their problems were and wrote down what the employees told them. They said that they were there to hear the problems and tell Respondent about them, and to make the plant “a better place to work.” Employees responded by telling about problems concerning excessive overtime, safety issues, faulty equipment, and the like. I find that by employing consultants to solicit grievances from employees and impliedly promising to remedy them, Respondent bypassed the Union, dealt directly with employees, and undermined the Union, thereby violating Section 8(a)(1) and (5) of the Act.

F. *Dependent Unilateral Change Allegations*

1. Implementation of Respondent’s last proposal

It is undisputed that Respondent implemented the terms of its last contract proposal on May 6, 2002. As found above, there was no agreement upon this proposal, nor was there a bargaining impasse which would permit Respondent to implement its proposal lawfully. It follows, therefore, that Respondent’s implementation of its last proposal was a unilateral act, and violated its duty to bargain. I find that the implementation of Respondent’s last proposal, including all the consequent changes in wages, hours, and working conditions, was a violation of Section 8(a)(5) of the Act.

The Respondent’s implemented proposal is part of the evidence herein, and is referred to at some places in the record as the “white book.” Major changes resulting from Respondent’s unlawful implementation included elimination of piecework payments to certain employees, scheduled declines in wage rates for employees who had worked under a pay system known as demand flow, a new and more stringent attendance policy, and a shorter probationary period for new employees.

2. Clean-up time change and consequent discipline

Vincent Gaietto, an employee of approximately 38 years, was part of the Union’s bargaining committee, as noted above. He worked in the spray department on the day shift in August 2002. According to Gaietto’s uncontradicted testimony, employees in his department spray products in a booth. They normally began to clean up their work areas at 2 or 2:15 in the afternoon. This was departmental practice going back to at least 1997. The shift ended at 3 o’clock. In late July 2002, the Union filed a charge in which Wendell Tinch, the department head, was named as an agent of Respondent in a charge filed by the Union for the first time. About a week later, on August 6, admitted Supervisor Mike Long told Gaietto that he and his co-worker Richard Mizen were to wait until 2:30 p.m. to start their clean-up of their work area. Gaietto asked what the employees were to do if they were not finished their clean-up by quitting time, and the supervisor told them they were to “let it sit.” Gaietto and Mizen did as they were told, and left some clean-up unfinished at 3 p.m. The following day, Gaietto and Mizen were issued disciplinary warnings for not cleaning up their areas completely. Supervisor Long told Gaietto that Wendell Tinch had decided on the discipline. It is undisputed that the discipline was removed from the files of V. Gaietto and Mizen about a year later.

It is undisputed that the change in clean-up times was not announced to the Union ahead of time, nor was it negotiated with the Union. The change could cause employees to have to work overtime, and therefore concerns mandatory subjects of bargaining. The discipline was a consequence of a unilateral change, implemented in violation of Section 8(a)(5). Both the unilateral change in clean-up times, and the imposition of discipline consequent on the change are violations of Section 8(a)(5) of the Act. As the remedy is the same, I find it unnecessary to analyze whether the issuance of discipline by Respondent’s manager, Tinch, soon after he was named for the first time in a Board charge, also violated Section 8(a)(3) and (4). *Kurziel Iron of Wauseon*, above.

3. Prizes, bonuses, and awards

After the implementation of its last bargaining proposal, Respondent also instituted a number of bonus, incentive, and award programs aimed at motivating production in particular departments. At various times from November 2002 through the summer of 2003, Respondent implemented a “reward program” in the lavy¹³ and battery cast work area. Respondent implemented awards to employees which were referred to as the “big burn incentive.” This program was primarily in the glost and kiln area. In addition, supervisors gave out “spot awards,” one time awards based on performance. Lastly, there were prize drawings at the June 2003 picnic outing, a 1-day event held at an amusement park. The prizes and bonuses took the form of money or gift certificates, such as a certificate good for dinner for two at a local restaurant.

It is clear that Respondent did not give notice to the Union of these programs before implementing them. In some cases, Respondent formed employee committees to plan the reward programs. Some employees informed the Union of the existence of the committees, but Respondent itself did not inform the Union of any of them. It is well settled that Respondent’s duty to notify the Union of contemplated changes is not satisfied by the Union’s accidentally finding out about the changes. The Union had no opportunity to request bargaining about the reward programs before Respondent instituted them.

Respondent defends its admittedly unilateral implementation of reward programs on grounds of past practice. Respondent contends that it has given lunchtime pizzas to particular work areas which have performed well.

I find that the award and bonus programs instituted by Respondent during the period in question were mandatory subjects of bargaining. The record evidence does not establish a “clear and unmistakable” waiver of the Union’s right to bargain about these wage supplements given to some employees. The awards were significantly different in amount and in kind to a few slices of pizza. Especially in the context which existed during the period in question, when Respondent bypassed the Union and dealt directly with employees on many occasions, Respondent’s conduct in unilaterally instituting the additional compensation in the form of money awards and gift certificates was clearly another instance of ignoring its obligation to bargain with the Union. Given the mandatory nature of the subject matter, the significant differences from past programs, and the overall conduct of Respondent during the period, I find that the reward programs, including the big burn incentive, the lavy rewards, the spot awards, and the prizes at the plant picnic at Cedar Point were unilaterally implemented by Respondent in violation of its duty to bargain under Section 8(a)(1) and (5). In addition, the use of unilaterally established employee committees to help formulate these programs was another instance of bypassing the Union and dealing directly with employees in violation of Section 8(a)(1) and (5).

¹³ In plant parlance, and in the record herein, “lavy” refers to lavatories or sinks of various kinds.

G. Provision of Information Allegations

Vincent Gaietto testified that it was longstanding practice for Respondent to provide the Union with “payroll exception sheets” which detailed variations in an employee’s pay resulting from an overtime bypass or other pay variation. Gaietto testified that after May 2002, Respondent did not provide all these documents to the Union as it had routinely done in the past. In June 2003, he requested, by letter, the 15 “payroll exception sheets” which the Union did not have. The Union did not receive the requested information until March 2005, when Respondent produced 14 of the 15 sheets in response to a General Counsel subpoena. Gaietto testified that one of the payroll exception sheets has still not been supplied to the Union. Respondent defends its refusal to provide the information on the grounds that it is “confidential” or “picayune.”

It is textbook law that information relating to the wages, hours, or working conditions of bargaining unit employees is presumptively relevant to a representative’s obligation to represent the bargaining unit. Confidentiality may apply to medical records, for example, but it does not apply to pay matters, which are peculiarly within a union’s ambit of responsibility, especially when enforcing a contract. I find that Respondent, by refusing to honor the Union’s request for information, the nearly 2-year delay in providing the information, and the failure with respect to one item, is a violation of Section 8(a)(5) of the Act. *Broadway Volkswagen*, 342 NLRB 1244, 1248 (2004); *Consolidated Coal Co.*, 307 NLRB 69, 72 (1992).

III. ALLEGATION OF UNILATERAL CHANGE: DEMAND FLOW EMPLOYEES—AUGUST 2003

Prior to May 6, approximately 170 employees in the kiln, shuttle kiln, and glost departments worked under a system, called “demand flow,” whereby supervisors had the flexibility to assign employees to different jobs at any time, and the assurance that they were trained for those jobs. Employees learned the jobs of the person in the job “upstream” in the production process from his or her own job, as well as the job “downstream” of his or her own job. Employees could learn to perform more than two additional jobs. For each additional job the employee learned and was qualified to perform, the employee was paid a small hourly premium or pay increment, called “quarters” in the record herein. The system was meant to be efficient, and to respond quickly to customer demand for particular products. In certain departments, there were also a few pilot “cell manufacturing” areas. The cells were intended to perform the entire production process, using a few employees. A month or so before the failed April negotiations, Respondent and the Union had executed a memorandum of agreement concerning these trial “cells.” The cell jobs were by agreement not demand flow jobs, and the employees who worked in the cells did not receive demand flow pay increments.

As of May 6, Respondent stated that there was no more demand flow system and no more demand flow jobs, but the evidence at trial established exhaustively that Respondent continued to assign employees to various jobs in their departments in the same way and with the same frequency it had done before May 6. Employees Ken Nedolast in the kiln department, Jeff Little in glost, Vicki Ryman on the dry line, or tank line, Ed

DuMonte in lavy pack, and Ron Banks on the wet line or bowl line testified without significant contradiction as to how their demand flow jobs functioned both before and after the implementation of Respondent's last proposal on May 7. Despite the fact that their jobs did not change, under the Respondent's implemented proposal, the wages of the demand flow employees were reduced gradually over a year or two.

An anomalous situation arose at the time Respondent agreed to enter the now-defunct informal settlement agreement in late July 2003. Under that agreement, Respondent would have been obligated to restore the wages, hours, and working conditions of the employees as they had been on April 30, 2002. On August 10, 2003, Respondent restored the wages rates of demand flow employees to their *base rates* under the old collective-bargaining agreement, but without any of their pay increments or "quarters." This resulted in the demand flow employees' wages being reduced significantly from their April 30 levels. It is clear from the testimony of Randy Swander, the plant human resources manager, that this decision was made by Respondent alone, without any notice to the Union or any consultation with the Union. Before the now-defunct informal settlement agreement had been set aside, both the General Counsel and the Union informed Respondent that its actions with respect to the demand flow employees were not consistent with the agreement to restore preunfair labor practice wages, as required in the settlement agreement. Respondent takes the position that it has the right to terminate any manufacturing process at any time, regardless, apparently, of the effect on employees' wages.

Whether, as Respondent contends, demand flow is a manufacturing process rather than a compensation scheme, and whether Respondent has the right to change manufacturing methods at any time need not be decided here. The change to demand flow employees' wages which Respondent implemented on August 11, 2003, was, at a minimum, an "effect" about which Respondent clearly had a duty to bargain. Respondent does not have the right to change employees' wages unilaterally without notice to the Union and an opportunity to bargain about those changes. Respondent contends that the wage changes "flowed from" the change it made, i.e., eliminating the demand flow "process." Respondent's argument conveniently ignores the well-established legal principle that the duty to bargain encompasses effects upon employees' wages, even if the action which causes that effect is not encompassed by the duty to bargain. Thus, without any possibility of cavil, Respondent owed the Union notice of its intent to reduce the wages of the demand flow employees in August 2003, and an opportunity to bargain about the change. Since it is clear that Respondent implemented this change in the absence of proper notice and opportunity to bargain, I find that Respondent violated Section 8(a)(1) and (5) of the Act by failing to bargain with the Union over the decision to abolish demand flow wages as well as by failing to bargain over the effects of that decision. *Pan American Grain Co.*, 343 NLRB 318, 318 (2004).

Respondent's claim that it was attempting to abide by the informal settlement agreement is specious. Respondent admittedly decided on the change to demand flow wages on its own, *without consulting* the Union or the General Counsel about whether the change was proper compliance. Such unilateral

buccaneering cannot be seen as a responsible attempt to comply with a settlement agreement, and cannot be insulated from examination on that basis. Respondent also claims that it was only following the expired collective-bargaining agreement's procedures, and that fact somehow protects Respondent's conduct from scrutiny, since the reduction in wages somehow "flows from" the elimination of the demand flow process, and thus the wage "quarters." One flaw in Respondent's logic is that there was *no contract in effect*. It had expired more than a year earlier, and Respondent was obligated to bargain about any changes to wages, hours, or working conditions of employees. Therefore, even if the wage changes flowed from an act which Respondent was privileged to do under the expired contract, that contract no longer privileged the conduct. In addition, as noted above, Respondent was obligated to bargain about any *effects* of its act, i.e., any consequent changes to employees' wages, as well as over the decision. *Pan American Grain Co.*, above.

IV. REMEDIES

It was represented on the record herein that Respondent and the Union entered into a new collective-bargaining agreement effective by its terms from May 1, 2004, through May 4, 2007. Both the General Counsel and the Union concede that monetary remedies for any violations based on unilateral change allegations should be limited to the period from the unilateral change through the date of the new contract, i.e., May 1, 2004.

Respondent filed a motion before trial that it should not be required to post a notice to employees concerning the 8(a)(1) violations alleged in the original consolidated complaint herein, because it posted a notice in August 2003 which remained posted for 60 days. It is clear and unequivocal Board law that posting a notice while there are still outstanding unremedied unfair labor practices does not relieve a respondent of the obligation subsequently to post a notice to remedy the unfair labor practices. In this case, Respondent had recently committed an additional unfair labor practice by violating Section 8(a)(5) with regard to the demand flow employees' unilateral wage change at the time it posted the purported notices. I deny Respondent's motion to be excused from posting a notice to employees.

The General Counsel, in the complaint and during the trial, argued that extraordinary remedies, as outlined above, be ordered herein. In view of the absence of prior unfair labor practices at this facility, and the acceptable working relationship between Respondent and the Union except during the 2001 to 2003 period dealt with herein, I find that such extraordinary remedies are not appropriate, and will order instead the Board's traditional remedies for the unfair labor practices found herein.

CONCLUSIONS OF LAW

1. By threatening employees with discharge, loss of jobs, and plant closure, threatening employees with lawsuits because of their union activities, giving employees the impression that their union activities, and those of other employees are under surveillance, requesting employees to report on the union activities of other employees, soliciting grievances and impliedly promising to remedy them, soliciting employees' opinions on

specific contract issues during bargaining, instructing employees to stop engaging in the protected activity of writing letters to newspapers about their wages, hours, or working conditions, disparaging the union to employees, undermining and bypassing the union, and coercively interrogating employees about their union activities, Respondent has violated Section 8(a)(1) of the Act.

2. The conduct of Respondent in implementing a new safety glasses program, and the alleged statements of Respondent by Larry Costello regarding the NLRB, are not violative of the Act, and the complaint allegations regarding those subjects are dismissed.

3. By refusing to continue negotiations with the Union in the absence of an impasse or an agreement, by falsely asserting that an agreement had been reached and unilaterally implementing the terms of its bargaining proposal in the absence of an impasse, by dealing directly with employees and bypassing the union, by unilaterally polling employees about working hours, by unilaterally implementing prize, incentive, and bonus programs without notice to the Union or affording the Union an opportunity to bargain, by unilaterally implementing changes in clean-up times and disciplining two employees based on the change, by failing to provide relevant information requested by the Union, and by unilaterally changing the wages of demand flow employees without notice to the Union or affording the Union and opportunity to bargain, Respondent has violated Section 8(a)(5) and (1) of the Act.

4. The violations set forth above are unfair labor practices affecting commerce within the meaning of the Act.

THE REMEDY

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

I shall recommend that Respondent be ordered to reimburse employees represented by the Union for any and all losses they incurred by virtue of Respondent's unlawful unilateral changes in employees' terms and conditions of employment from May 7, 2002, through May 1, 2004, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enf. mem. 661 F.2d 940 (9th Cir. 1981). All payments in the nature of benefits to unit employees shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971), and all payments in the nature of backpay to unit employees shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I shall also recommend that Respondent be ordered to remove from the employment records of Vincent Gaietto and Richard Mizen any notations relating to the unlawful discipline against them and to notify them in writing that this has been done.

Because of the complexity of the remedial issues involved in the restoration of the wages, hours, and working conditions as they existed on April 30, 2002, for the period May 7, 2002, through May 1, 2004, I shall recommend that the Regional

Director utilize the services of one of the expert compliance specialists employed by the General Counsel nationally in securing compliance with that portion of the Order.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁴

ORDER

The Respondent, American Standard Companies, Inc., American Standard Inc., d/b/a American Standard, Tiffin, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge, loss of jobs, and plant closure, threatening employees with lawsuits because of their union activities, giving employees the impression that their union activities and those of other employees are under surveillance, requesting employees to report on the union activities of other employees, soliciting grievances and impliedly promising to remedy them, soliciting employees' opinions on specific contract issues during bargaining, instructing employees to stop engaging in the protected activity of writing letters to newspapers about their wages, hours, or working conditions, disparaging the union to employees, undermining and bypassing the union, and coercively interrogating employees about their union activities.

(b) Refusing to continue negotiations with the Union in the absence of an impasse or an agreement, falsely asserting that an agreement had been reached and unilaterally implementing the terms of its bargaining proposal in the absence of an impasse, dealing directly with employees and bypassing the union, unilaterally polling employees about working hours, unilaterally implementing prize, incentive, and bonus programs without notice to the Union or affording the Union an opportunity to bargain, unilaterally implementing changes in clean-up times and disciplining two employees based on the change, failing to provide relevant information requested by the Union, and unilaterally changing the wages of demand flow employees without notice to the Union or affording the Union and opportunity to bargain.

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

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

(a) Upon request, bargain collectively with the Union in the following appropriate unit:

All production and maintenance employees at Respondent's Tiffin, Ohio, facility, excluding all supervisors, engineers and time study men, plant production men, office employees, salaried employees, confidential employees, product development modelers.

¹⁴ 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.

(b) Rescind the changes in terms and conditions of employment made unilaterally from May 7, 2002, through August 11, 2003.

(c) Provide the Union with the information it requested in its letters dated in June 2003.

(d) Make whole, with interest, all employees in the bargaining unit for any loss of earnings or other benefits they may have suffered as a result of our unlawful changes in terms and conditions of employment.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline of Vincent Gaietto and Richard Mizen and within 3 days thereafter notify the employees in writing that this has been done and that the discipline will not be used against them in any way.

(f) 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.

(g) Within 14 days after service by the Region, post at its Tiffin, Ohio location copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 14, 2002.

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