**3-V, Inc. *and* United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union (USW).** Cases 11–CA–20894–1 and 11–CA–20895–1

July 5, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On April 27, 2006, Administrative Law Judge George Carson II issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

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

The judge found that the Respondent violated Section 8(a)(5)and (1) of the Act by unilaterally discontinuing its employees' annual wage increases and by failing to pay its employees a semiannual safety bonus. We reverse, for the reasons set forth below.

## I. FACTS

### *A. Background*

The Respondent, an international corporation with its board of directors located in Italy, manufactures specialty chemicals used by various industries, including textile, paper, and plastic industries, at its facility in Georgetown, South Carolina.

From at least 1995 until 2003, the Respondent granted annual wage increases to hourly employees each summer. During this period, the Respondent's practice was to conduct a wage survey of local employers in the spring and then forward the results and a recommendation regarding a wage increase to the board of directors in Italy. The board of directors would then make the final determination as to the amount of the wage increase. The increase was typically announced in late July or August and was made retroactive to July 1. The raises ranged in amount from two to three percent.

In 1999, the Respondent introduced a safety incentive bonus plan. In 2003, the safety incentive bonus was $15,000 for each 6-month period, payable in January and July. It was divided among the various departments. Employees last received this bonus in January 2005, i.e., it was not paid in July 2005.

### *B. Market Events of 2004*

An essential component in approximately one-third of the Respondent's product lines is glacial acrylic acid, a thickening agent. Because supplies of glacial acrylic acid are limited, the price and availability of this product fluctuate. Prior to 2004, the variance in the price of this product was minor.

Also prior to 2004, the Respondent annually purchased approximately nine million pounds of glacial acrylic acid for use in its product lines. More than half of that glacial acrylic acid was obtained from Celanese Corporation.

In late 2003, Dow Chemical Company acquired Celanese's glacial acrylic acid manufacturing operation and reduced its monthly allocation of the chemical to the Respondent. Beginning in early 2004, the international supply of glacial acrylic acid tightened. As a consequence, one of the Respondent's main suppliers reduced its allocation of this product to the Respondent. On August 13, 2004, Dow Chemical Company informed the Respondent that it would no longer provide it with glacial acrylic acid. This resulted in the reduction, by approximately one half, of the Respondent's glacial acrylic acid supply, thus creating a production crisis resulting in the temporary shutdown of one of the Respondent's plants and the layoff of seven employees. Further, as the global supply of glacial acrylic acid continued to shrink, the Respondent's cost for this product increased from 50 cents per pound to more than $2 per pound on the spot market.

Because of the marked decline in available glacial acrylic acid, and the sharp increase in the Respondent's costs in purchasing it, the Respondent did not grant its employees a wage increase in the summer of 2004.

In September 2004, approximately 70 employees signed a petition asking the Respondent for an explanation as to why a wage increase had not been announced. On October 19, 2004, the Respondent held meetings with all its employees. At the meetings, President John Savoretti told employees about the limited supply of glacial acrylic acid and informed them that wage increases were suspended "until we are able to resolve this situation." In December 2004, the Respondent announced that step increases, which were separate from wage increases, would resume and that the January safety bonuses would be paid, but as a one-time only event.

By the end of 2004 and early 2005, the Respondent had succeeded in reacquiring an adequate supply of glacial acrylic acid, but at a cost that was twice what the Respondent had previously paid. The Respondent was

[1] 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.

unable to recoup the added costs by passing them on to its customers. Indeed, the Respondent lost some of its customers as a result of the small increase that it did impose.

The Respondent's financial problems affected both the employee wage rates and employer contribution levels to the employee profit-sharing plan.[2] Also, the Respondent lost approximately 25 percent of its work force during the period from October 2004 through June 2005 as a result of layoffs, resignations, and the elimination of some positions.

### *C. Instant Case*

In early 2005,[3] the Union initiated a campaign to organize the Respondent's production and maintenance employees. One of the main issues in this organizing campaign was the absence of a 2004 employee wage increase. On March 21, during the election campaign, the Respondent sent employees a letter stating that the Respondent was experiencing "one of the most difficult periods in the history of our plant." The letter stated that the Respondent had made "some very difficult decisions which affected us all," including eliminating a number of salaried positions, temporarily laying off hourly employees, and reassigning employees. The letter then stated that the Respondent had hired new engineers "to build the foundation for long term growth" rather than "using critically limited resources to provide short term raises." The letter ended by stating, "We have seen our company's income drop while our raw materials costs have risen sharply." It asked for employee "support to help us work through the difficulties of this present moment."

Following an election in April, the Union was certified as the employees' bargaining representative on April 28. At the time of this certification, the Respondent's employees had not received a wage increase for almost 2 years.

Bargaining for an initial contract began on June 6. Pursuant to the agreement of the parties, noneconomic issues were the first to be negotiated.

In September, before bargaining over economic terms had commenced, the Union filed the instant unfair labor practice charge alleging that the Respondent violated Section 8(a)(5) and (1) by failing to provide unit employees, effective July 1, with an annual wage increase and with a semiannual safety bonus. At the first bargaining session following the filing of this charge, the Respondent informed the Union that the interruption of the regular supply of glacial acrylic acid "had continued into 2005 and was a continuing source of financial difficulty for the business, that we were still in a recovery cycle and the freeze was still in effect."

The Respondent posted a profit for 2004 based on its performance prior to August 2004. The Respondent did not, however, post a profit for 2005.

In 2005, the Respondent's annual cost for glacial acrylic acid increased by over $4 million dollars. Salaried employees, like the unit employees, did not receive wage increases in 2005. All employees received Christmas bonuses in December 2005 and salaried employees received wage increases in January 2006.

## II. THE JUDGE'S DECISION

The judge found that the annual wage increase was an established term and condition of employment for unit employees, and that the increase was part of the status quo at the time of the Union's election. The judge also found that the Respondent never announced that it was "freezing" wages but, rather, that it had "suspended" pay increases in October 2004 until such time as the supply problem concerning glacial acrylic acid had been resolved. He concluded that this supply problem had been solved by the spring of 2005, based largely upon the Respondent's March 21 letter, which did not cite glacial acrylic acid supply problems among its reasons for not granting wage increases. The judge further found that the grant of the Christmas 2005 bonus to all employees and the wage increase given to salaried employees in January 2006 established that the Respondent was in a position to grant wage increases to unit employees in 2005. Finally, the judge noted that the Union was never informed of the Respondent's intention to abandon its practice of granting a summer wage increase to unit employees. Accordingly, the judge found that the Respondent violated Section 8(a)(5) by failing to grant unit employees the annual wage increase, retroactive to July 1, without notice to and bargaining with the Union.

With regard to the safety bonus, the judge found that the practice of granting the bonus had never been suspended and that the Union and the employees were never informed that the normal bonus payment would not be made in July. Accordingly, he found that the Respondent violated Section 8(a)(5) by failing to pay unit employees the safety bonus in the summer of 2005.

For the following reasons, we disagree with the judge's finding of both violations.

### Analysis

It is well settled that an employer violates Section 8(a)(5) of the Act if, during negotiations for a contract, and without notice to or bargaining with the union, it alters the status quo by unilaterally changing an established term or condition of employment. *Daily News of*

[2] There are no allegations regarding the profit-sharing plan.

[3] All dates hereafter refer to 2005, unless otherwise indicated.

*Los Angeles*, 315 NLRB 1236, 1237 (1994), enf. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997). Consistent with this settled law, the Board has found that an employer engages in unlawful conduct if it unilaterally discontinues its established practice of granting customary wage adjustments, without notice to the union or an opportunity to bargain until impasse. *Lamonts Apparel*, 317 NLRB 286, 288 (1995). An essential inquiry in these unilateral change allegation cases is whether the employer has made a change in the status quo. *Daily News*, 315 NLRB at 1237.

It is clear that, through 2003, the Respondent had a practice of annually surveying wages and granting wage adjustments based on the survey data. We reject the Respondent's argument that the annual wage increase was discretionary and therefore not a term and condition of employment. Such wage increases that are regular and established events constitute terms and conditions of employment, even though the amount of the increase may be discretionary. See *Vico Products Co.*, 336 NLRB 583, 598 (2001), enfd. 333 F.3d 198 (D.C. Cir. 2003).

For reasons stated in the judge's decision, we also reject the Respondent's argument that the Union waived its right to bargain over the wage increase. It is also clear that through 2003 the Respondent had a practice of awarding annual safety bonuses. The critical issue, however, for purposes of analyzing the instant unfair labor practice allegations, is whether the Respondent had effectuated a change in those established practices prior to the Union's selection as representative of the Respondent's employees, such that it was privileged to withhold the wage increase and safety bonus after the Union's certification. We find, contrary to the judge, that the Respondent had, in fact, changed the status quo prior to the Union's election and that the status quo no longer included an annual wage increase or safety bonus. Therefore, the Respondent did not violate the Act by failing to grant either the wage increase or the safety bonus in the summer of 2005.

*A. The Wage Increase*

It is undisputed that, in 2004, the Respondent experienced economic problems. The uncontested facts demonstrate that the Respondent's access to a critical chemical compound, necessary for a significant portion of its production, was substantially curtailed. Its actions in the face of that situation included lawfully foregoing the annual wage adjustment in the summer of 2004. In response to employee inquiries about the lack of increases, the Respondent informed its workforce in October 2004 about its glacial acrylic acid supply problem and indicated that wage increases would not be given until that problem was resolved.

In rejecting this change to the status quo, the judge focused on the fact that, in 2004, the Respondent merely stated that it was "suspend[ing]" these economic benefits, rather than "freezing" them. We do not find this distinction to be legally significant, as the evidence demonstrates that the Respondent clearly communicated its intent to discontinue the annual wage increase until economic conditions improved to the point where a wage increase could once again be given.

Our colleague says that the Respondent eliminated the wage increase *only for 2004*. (Emphasis added.) The facts are to the contrary. The Respondent announced that wage increases would be eliminated "until we are able to resolve this situation," i.e., the limited supply of glacial acrylic acid.

The evidence also demonstrates that the Respondent's financial problems relating to glacial acrylic acid persisted in 2005, and had not been resolved prior to the Union's certification. Although the Respondent was able to obtain an adequate supply of glacial acrylic acid by early 2005, it was at twice the cost that the Respondent had previously paid.

Contrary to the judge, we do not find that the March 21 letter signaled the end of the Respondent's decision to suspend or freeze wages. The letter neither announced that economic conditions had changed or that wage increases would resume. Rather, the letter reaffirmed the Respondent's earlier announced difficulties, noting that its income had dropped at the same time that the cost of its key raw material sharply rose. The letter further stated that Respondent faced "one of the most difficult periods in the history of our plant," and asked employees for their support to help work through "the difficulties of this present moment." These are not the words of an employer indicating that it had turned the corner on its financial crisis. Rather, they are an assertion that the economic situation remained precarious, and that the Respondent was attempting to overcome the difficulties it faced.

We also disagree with the judge that the grant of a Christmas bonus to all employees in 2005 and a wage increase to salaried employees in early 2006 signified that business conditions had improved to the point where the annual wage increase could have been resumed in 2005. As discussed above, the Respondent's financial situation remained precarious throughout 2005. The fact that the Respondent elected to make some payments to employees after the summer of 2005 does not establish that the decision to suspend wage increases, or the reasons for its suspension, had changed.

Finally, there is no evidence that the Respondent ever informed the employees or the Union that it had lifted the

suspension/freeze of the annual wage increase prior to the election. Nor did the Respondent commence the procedure for a wage increase in the spring of 2005. Thus, we find that the annual wage increases had not been restored at the time of the Union's election. The Respondent was therefore justified in continuing in effect the current terms and conditions of employment—i.e., the suspension of annual wage increases—until either an agreement was reached with the Union on any proposed changes, or a bargaining impasse occurred.[4]

Our dissenting colleague acknowledges that the Respondent suffered from a severe economic downturn that predated the Union's arrival. He further concedes that, as a result of that situation, the Respondent suspended general wage increases until the economic situation improved. In our view, it was that suspension which constituted the status quo when the Union came on the scene. Our colleague argues, however, that despite the suspension, the Respondent did not alter the status quo and that the wage program was still in effect at the time that the employees selected the Union. In the alternative, the dissent asserts that the Respondent's decision to resume step increases signaled an end to the suspension, and required the Respondent to perform the annual wage survey and to recommend wage increases in 2005. In addition, the dissent contends that once the Union was selected, the Respondent was additionally required to bargain over whether the downturn was severe enough to require a continued suspension of wage increases.

We disagree. As explained above, the Respondent completely suspended annual wage increases in October 2004, and that suspension became the status quo. Thus, there was no aspect of the suspension that was subject to bargaining with the Union. Rather, as stated above, the Respondent was justified in continuing in effect the current terms and conditions of employment—i.e., the suspension of annual wage increases—until either an agreement was reached with the Union on any proposed changes, or a bargaining impasse occurred.

The fact that the Respondent announced in December of 2004 that unrelated step increases would resume did not alter this suspension. The former were given after an annual wage survey, and were granted across the board to all employees at the same time. The latter were given to individual hourly-paid employees as and when they showed the requisite skills for a pay promotion. Thus, the fact that the latter were paid in January 2005 does not establish that the October 2004 bar on general wage increases was somehow nullified.

[4] *Our Lady of Lourdes Health Center*, 306 NLRB 337 (1992).

Accordingly, we find that the Respondent did not violate Section 8(a)(5) by failing to grant a wage increase to unit employees in the summer of 2005, and we shall dismiss this allegation of the complaint.

*B. The Safety Bonus Program*

We also find that the Respondent did not unlawfully suspend the safety bonus program in the summer of 2005. Prior to the October 2004 meeting with employees, employees had received safety bonuses twice a year, since 1999. In January 2005, prior to the certification of the Union, the Respondent clearly informed employees that the January bonus was to be paid as a "one-time event." Consequently, as with the wage increase issue, the status quo for safety bonuses in July 2005 was that the prior practice of regular semi-annual bonuses was no longer in effect.

Accordingly, we find that the Respondent did not violate Section 8(a)(5) by failing to pay unit employees a safety bonus in July 2005.

ORDER

The complaint is dismissed.

MEMBER WALSH, dissenting.

Contrary to my colleagues, I agree with the judge that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally determining, in 2005, that employees would not receive the annual wage increase and the July semiannual safety bonus. I have no quarrel with my colleagues' recitation of the facts—I disagree only with their interpretation of them. The evidence in this proceeding fully supports finding that the Respondent violated Section 8(a)(5) and (1) of the Act, and the majority errs in dismissing the complaint.

It is well settled that where employees are represented by a union an employer violates the Act by unilaterally implementing changes to an established past practice affecting the terms and conditions of employment without first giving the union notice and an opportunity to bargain. *NLRB v. Katz*, 369 U.S. 736 (1962). "[T]he vice involved in [a unilateral change] is that the employer has changed the existing conditions of employment. It is this change which is prohibited and which forms the basis of the unfair labor practice charge." *Daily News of Los Angeles*, 315 NLRB 1236, 1237 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997) (quoting *NLRB v. Dothan Eagle*, 434 F.2d 93, 98 (5th Cir. 1970)). Thus, the initial inquiry in a case such as this is to identify the status quo ante, i.e., the terms and conditions of employment prior to the alleged change.

In 2004, the Respondent experienced difficulties in obtaining an adequate supply of glacial acrylic acid, a sub-

stance necessary for the production of one-third of the Respondent's product lines. As a result, the Respondent's production costs significantly increased in early 2004. In October 2004, after the Respondent failed to give the employees an annual wage increase, the Respondent announced to employees that it was necessary to suspend "all further pay increases until we are able to resolve this situation."

The majority acknowledges that the Respondent had an established past practice of reviewing, recommending and granting wage increases each year since 1995. Further, the majority agrees that, in 2004, the Respondent's local officials engaged in the review and made a recommendation for an increase; ultimately, however, the Respondent did not grant an increase that year. Nevertheless, the majority finds that the Respondent's October announcement altered the status quo so completely that the Respondent was not required to conduct the wage survey or bargain with the Union over a wage increase in 2005. I disagree: the Respondent's announcement that there would be no increase in 2004 was not a decision to eliminate the practice of granting annual wage increases, but simply a decision that the Respondent could not afford an increase because of its financial situation.

Again, even though no increase was given in 2004, the Respondent did not depart from its established practices of conducting an annual wage survey and recommending a wage increase to the board of directors. Accordingly, the Respondent's wage program remained a term and condition of employment in April 2005, when the employees selected union representation. The Respondent's announcement did not purport to put an end to the program. Rather, the Respondent decided that no increases would be given in 2004 owing to the increased cost of obtaining glacial acrylic acid. Thus, the Respondent did not, as the majority asserts, alter the status quo by completely eliminating the annual wage increase program, but effectively decided only that the wage increase amount for 2004 would be zero.

Under Board law, an employer's duty to bargain over discretionary wage increases is two-fold. As the Board stated in *Oneita Knitting Mills*, 205 NLRB 500 (1973), what is required in such circumstances "is a maintenance of preexisting practices, i.e., the general outline of the program, [and] the implementation of that program (to the extent that discretion has existed in determining the amounts or timing of the increases) [then] becomes a matter as to which the bargaining agent is entitled to be consulted." Id. at 500 fn. 1. Here, then, the Respondent was obligated in 2005 to conduct the annual wage survey and make a wage recommendation to its Board of Directors, as those were fixed elements of the Respondent's wage increase program that were not eliminated by the Respondent's October announcement. Further, once the employees selected the Union, the Respondent was no longer entitled to unilaterally determine the amount of the 2005 wage increase, as this was a discretionary element that the Respondent was now required to bargain about with the Union. Insofar as the Respondent continued to contend that financial constraints dictated that there would be no increase, it could raise that contention in bargaining with the Union. The Respondent, however, had an obligation to address the issue and negotiate with the Union regarding the amount of the increase. By failing to maintain the fixed elements of its wage increase program and failing to bargain over the discretionary aspect, the Respondent violated Section 8(a)(5) and (1) of the Act.

Even if, as the majority asserts, the Respondent completely suspended wage increases in October 2004, the Respondent's October announcement referred to "all further pay increases." But the Respondent resumed step increases in December of that year. The Respondent's decision to resume step increases, without stating that other wage increases remained suspended, signified that the Respondent's directive to suspend "all wage increases" was no longer in effect when the Union was selected as the bargaining representative in April 2005. For all of the foregoing reasons, the judge properly found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to grant a wage increase in 2005 without bargaining with the Union about the discretionary aspects of that decision.

The majority also errs in finding that the Respondent did not violate Section 8(a)(5) and (1) of the Act when it failed to grant employees the semiannual safety bonus that was due in July 2005. As the majority finds, the Respondent had an established past practice of granting a semiannual safety bonus in January and July of each year. This safety bonus was paid in January 2005, but was not paid in July. Between those two dates, the employees voted for union representation. But the Respondent did not bargain with the Union over the decision to discontinue the semi-annual safety bonus.

The majority finds that the Respondent's characterization of the January 2005 safety bonus as a "one-time event" was sufficient to alter the status quo. I disagree. Whatever the Respondent's characterization of the January payment, the fact remains that it was not a one-time event. Rather, the payment was a continuation of the Respondent's established past practice of granting semiannual safety bonuses. Consequently, the Respondent's failure to grant the safety bonus in July was a unilateral change to the employees' terms and conditions of em-

ployment, and therefore was a violation of Section 8(a)(5) and (1) of the Act.

*Jasper C. Brown, Jr., Esq.,* for the General Counsel.
*William H. Floyd, III* and *Justin M. Grow, Esqs.*, for the Respondent.
*Benjamin H. Montgomery,* for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Georgetown, South Carolina, on February 22 and 23, 2006. The complaint issued on December 29, 2005.[1] It alleges that the Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by unilaterally failing to give employees an annual wage increase and failing to pay employees a semi-annual safety bonus on July 1. The Respondent's answer denies that it violated the Act. I find that the Respondent did violate the Act as alleged in the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

Respondent 3-V, Inc. (the Company) is a Delaware corporation engaged in the manufacture and nonretail sale of chemical specialty products at its facility in Georgetown, South Carolina, at which it annually purchases and receives goods and materials valued in excess of $50,000 directly from points outside the State of South Carolina. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union (USW), the Union, is a labor organization within the meaning of Section 2(5) of the Act.

#### II. ALLEGED UNFAIR LABOR PRACTICES

##### *A. Background*

The Company has operated a facility in Georgetown, South Carolina, since the late 1970s. Initially incorporated as VVV Chemical Company, it now operates as 3-V, Inc. It is an international corporation and its board of directors is located in Italy. It manufactures specialty chemicals used by various industries including the textile, paper, and plastic industries. Among the chemicals it produces are compounds that make letter paper whiter and compounds that serve as thickening agents. A component of the chemical products that serve as thickening agents is glacial acrylic acid, which is delivered to the Company's facility in liquid form and which must be maintained within certain temperature limits. The term "glacial" relates to the purity of the acrylic acid which is a petroleum byproduct. Suppliers of glacial acrylic acid are limited, thus the price of the product is subject to fluctuation depending upon various factors including events that interrupt the supply and increased demand for the product.

At least since 1995, until the events that are at issue in this proceeding, the Company has granted an annual wage increase to hourly employees in the summer. Typically, the increase would be announced in late July or early August, retroactive to July 1. In 1995, the employees received a 3-percent increase. Director of Human Resources Gordon Hudson was unable to locate the documents establishing the exact percentage of the increases given in 1996, 1997, and 1998, but the Company stipulated that increases were given in those years. In 1999 a 3-percent across-the-board increase was implemented, in 2000 the increase was 2 percent, in 2001 it was 2.1 percent, in 2002 it was 3 percent, and in 2003 it was 2 percent.

Director of Human Resources Hudson, in late spring, would perform a survey to determine what other employers in the Georgetown area were paying employees and what increases they were giving in order to determine how "we [3-V] stack up with that and what's the comparison there." He would then prepare a proposal that was reviewed locally and then "presented to the Board in Italy for their review and approval." According to Hudson the final approval was "totally discretionary," and the Board "frequently" adjusted the recommendations in the proposal. Hudson did not testify to the significance of the adjustments made by the Board. Until 2004, so far as the record shows, an increase of between 2 and 3 percent was always given. Some employees, including James Mayfield who was hired in 1990, referred to the annual wage adjustment as a "cost of living raise." When Mayfield was hired, Ann Wells was the human resources person. Director Hudson denied that he ever referred to the July raises as cost of living raises and noted that the amounts given did not match the cost-of-living index. Notwithstanding any such correlation, Hudson confirmed that it was "an annual event to review, recommend, seek approval and implement" a wage plan for the hourly employees. Adjustments in the compensation of salaried employees typically occurred in January.

In 1999, the Company introduced a safety incentive bonus plan that was thereafter modified in 2000 and again in 2001. Since 2001, the safety incentive bonus has been fixed at $15,000 per 6-month period with a formula set for dividing the bonus by department. Since its introduction in 2000, the Company, until July 2005, had never failed to pay the safety bonus. Hudson testified that the safety bonus was $30,000, "divided into two $15,000 increments."

In the summer of 2004, Director Hudson had submitted a wage adjustment proposal for approval, but it had not been acted upon by the board of directors as of early August.

##### *B. Events between August and December 31, 2004*

Prior to 2004, the Company received more than half of the approximately 9 million pounds of glacial acrylic acid that it annually used from Celanese Corporation. In late 2003, Dow Chemical Company acquired the component of Celanese that manufactured glacial acrylic acid and began reducing the monthly allocation of the acid to 3-V. The diminution in the supply of glacial acrylic acid was international. Chemical

[1] All dates are in 2005 unless otherwise indicated. The charges were filed on September 27.

Week, in December 2004, reported that producers stated that increased "demand, production glitches, and cutbacks in the industry have tightened the acrylic acid market in the past year." On August 13, 2004, Dow Chemical informed 3-V that it would no longer supply it with glacial acrylic acid. This created a production crisis. The Delta II plant, which produced one of the product lines that used glacial acrylic acid, was shut down and seven employees were laid off. Through extraordinary efforts by top management officials and executives in Italy, the Company was able to obtain sufficient acid to continue operating and, after several weeks, the Delta II plant resumed production.

Glacial acrylic acid had typically sold for about 50 cents a pound. When the supply shrank in 2004, the price increased. The Company's efforts to assure a sufficient supply of the acid, which included purchases on the spot market, required paying a premium price, sometimes as high as $2 a pound. The financial burden resulted in the termination of some salaried employees. On November 15, 2004, the board of directors terminated John Savoretti, who had been hired by the board as president of 3-V in the United States in 2002.

Employees credibly testified to occasions late in 2004 and early in 2005 upon which they had to seek places with controlled temperature in which to store glacial acrylic acid that was being delivered. That testimony confirms that shipments were not being delivered pursuant to a regular schedule but were erratic and dependent upon the Company's success in making deals to obtain the acid from sources other than the regular deliveries from Dow.

The Company made no announcement to employees regarding their anticipated 2004 wage increase in late July or early August. There had also been no announcement to employees of the crisis caused by Dow's cutting off its allocation of glacial acrylic acid in August. In September 2004, approximately 70 employees signed a petition seeking an explanation for the absence of an announcement regarding their anticipated wage increase, which would have been retroactive to July 1, 2004.

On October 19, 2004, President Savoretti, Plant Manager John Cintioni, and Director Hudson met with all employees to explain the situation in which the Company found itself. Four meetings were necessary in order to accommodate the shift schedules of the employees. Both hourly and salaried employees were present at the respective meetings. All witnesses agree that the shortage of glacial acrylic acid was explained and that statements were made relating to the absence of the anticipated annual wage increase.

Director Hudson prepared a summary of the meetings based upon notes taken by his assistant which reports that President Savoretti stated, "At this time it is necessary that we suspend any further pay increases until we are able to resolve this situation."

Employees agree that they were told that their 2004 raise was not immediately forthcoming. James Mayfield recalled that, at the meeting on October 19, 2004, Hudson stated that he "couldn't do anything right then" but that the employees would "still get a raise for 2004 and it'd be retro[active] to July 1st." Although Hudson did not deny making that statement, it proved to be untrue. Employee Randy Thompson recalled that Hudson stated that there were "not going to be any pay raises at all, . . [t]hey were just [going to] quit giving raises at all for that year." Employee Ernest Parsons recalled that Hudson said "that we would have to talk about that [raises] at a later date. And that for now everything was put on hold." Charles Woods recalls that there was "a hold on all the raises."

Hudson testified that President Savoretti informed the employees that the supply problem with regard to glacial acrylic acid called for "drastic steps" and would "involve freezing all the wages and salaries." Manager Kevin Blakely, when asked whether Savoretti spoke with employees about a wage freeze answered that he stated that "all the wages would be frozen until further notice." I do not credit either Hudson or Blakely's recollection of Savoretti's remarks insofar as they report a reference to freezing. The summary prepared by Hudson reports that Savoretti stated that it was necessary to "suspend any further pay increases until we are able to resolve this situation."

Director Hudson testified that the "freeze" affected normal step increases, "any wage improvements," but that "[w]e made two changes in December of '04." Hudson did not specify to whom the pronoun "we" referred. On December 22 and 23, 2004, about a month after the termination of President Savoretti who had announced the suspension of pay increases, the Company held meetings with the employees and announced that step increases would be resumed in January and that it "was communicated" that a "one time payment of $15,000 for a safety bonus for January 2005 would be distributed." Hudson did not identify who approved the foregoing payments or when that approval was given.

Hudson testified that the annual fixed dollar amount of the safety bonus was $30,000, "divided into two $15,000 increments to be distributed in January and in July of the ensuing year. So when it was approved, as part of an economic plan in July of one year, those amounts would be distributed in the following January and the following July."

The record does not reflect the amount of wage increase that Hudson recommended in the summer of 2004. He testified that the proposal he submitted to the board of directors in the summer of 2004 had not been acted upon before the Dow announcement that it was ceasing to provide glacial acrylic acid.

*C. Events in 2005*

Early in 2005, the Union began an organizational campaign at the Company. Campaign issues included the absence of a wage increase since July 2003 as reflected in a leaflet distributed by union proponents in March. The Respondent's brief incorrectly states that the leaflet "castigated the Company for having the freeze." There is no mention of a "freeze" in the leaflet. It complains that the employees had not received a raise "in over 2 years." (In actuality, the period, since July 1, 2003, was 3-1/2 months less than 2 years.)

Even though the absence of a wage increase was a campaign issue, the Company, in a letter to employees dated March 21 from Director Hudson, informed the employees that the Company had hired new engineers "to drive the technologies we know will be needed to diversify our product offerings and avoid repeated perils of this nature." The letter then states that the choice the Company had to make was "using critically lim-

ited resources to provide short term raises or to build the foundation for long term growth and opportunities for us all."

On April 28, the Union was certified as the exclusive collective bargaining representative of the Company's production and maintenance employees.[2] Bargaining began on June 6. At the outset of negotiations, the parties agreed to bargain regarding contractual language before addressing economics. Whether this aspect of the bargaining protocol to which the parties agreed was initially proposed by the Union rather than the Company is immaterial.

International Representative Benjamin Montgomery was aware that employees were complaining that they had not received a raise in almost 2 years, since July 2003. He knew that "some people . . . had gotten some type of a raise," but he was unaware of the basis for the wage increase. He testified that he was not formally aware of a wage freeze, that he "had been told a lot of things" by employees "but with no certainty." The Company did not inform the Union that, following the failure of the Company to grant a wage increase on July 1, 2004, wage increases had been suspended on October 19, 2004, or that wages were frozen. The only document relating to wages that is in evidence was the communication distributed to employees on March 21 which neither referred to a wage freeze nor the statements of former President Savoretti on October 19, 2004, regarding a suspension of pay increases. Following the election and certification of the Union, Montgomery "assumed that the wage increases and other things would continue as their [the employees'] other benefits had."

The Company never stated to the Union that it intended to deviate from the "annual event" of reviewing, recommending, seeking approval and implementing a wage plan for the hourly employees. The Company never informed the Union that the July safety bonus would not be paid. The safety bonus was not paid. No announcement of a wage adjustment retroactive to July 1 was made in July or early August. On September 27, the Union filed the charges herein.

The Union did not inform the Company of its intention to file charges. At the bargaining session on September 30, following the filing of the charges, counsel for the Company, who serves as chief spokesperson, told the Union that the impact from the interruption of the regular supply of glacial acrylic acid had "continued into 2005 and was a continuing source of financial difficulty for the business, that we were still in a recovery cycle and that the freeze was still in effect." So far as credited evidence shows, that statement was the first occasion upon which the Company used the term "freeze."

Hudson testified that the safety bonus was included in the proposal that he submitted in the summer of 2004 and upon which the Board did not act. He did not testify to what actions were taken to permit the announcement in December 2004 that the bonus would be paid in January 2005, nor did he address the approval for the resumption of step increases which was announced contemporaneously with the announcement of payment of the safety bonus.

Executive Vice President of Finance and Administration Enrico Sigismondi admitted that the Company, on the basis of its performance prior to August 2004, posted a profit in 2004. In 2005, the price of glacial acrylic acid averaged about $1 a pound, double the 50-cent-a-pound price for which it had sold early in 2004. The Company uses over 9 million pounds of this product a year, thus the annual cost for this component increased over four million dollars. Sigismondi's uncontradicted testimony is that the Company did not post a profit in 2005, but he acknowledged that the annual independent audit had not been performed.

Employee James Mayfield, when asked whether it was not true that salaried employees had not received an across-the-board wage increase since October 2004 answered, "From what I understand they just got a nice raise." Counsel implicitly admitted the accuracy of that response when he asked Mayfield, "In 2006, correct?" and Mayfield answered, "Right."

So far as this record shows, no compensation plan for hourly employees was prepared or submitted for approval to the Board of Directors in 2005. There was no testimony regarding communications between management at Georgetown and the Board of Directors with regard to the absence of a submission of a compensation plan for hourly employees in 2005. Despite the absence of a profit in 2005, there was no testimony regarding the approval of the wage increase for salaried employees effective in early 2006, nor was there testimony relating to approval of a Christmas bonus given to all employees in December 2005.

Hudson admitted that the Company did not give notice to the Union that there would be no wage increase for hourly employees in the summer of 2005, retroactive to July 1, or that the July 1 safety bonus would not be paid.

### *D. Credibility Considerations*

I cannot credit Director Hudson's testimony that he was unaware of the Company's financial performance in 2004 or 2005. His denial that he had "any financial numbers for the business" when he was the individual responsible for developing the compensation proposal annually submitted to the board of directors for approval defies belief and is contradicted by the testimony of Executive Vice President of Finance and Administration Sigismondi. Sigismondi testified that he talked with the human resources department "regarding the grant of wages and bonuses," that "we sit down together and we discuss the figures" and that Director Hudson "prepares a plan" in conjunction with his, Sigismondi's, office.

The Respondent, in its brief, asserts that there was an "announcement of an indefinite wage freeze," and its arguments are predicated upon that premise. I have not credited Hudson's testimony that Savoretti announced an indefinite wage freeze. Employees recall being told that their 2004 wage increase was "on hold." As reflected in the Company's own document, President Savoretti told the employees, "At this time it is necessary that we *suspend* any further pay increases until we are able *to resolve this situation*." (Emphasis added.)

[2] The appropriate unit is:

> All production and maintenance employees, including warehouse/logistics and plant clerical employees, employed by Respondent at its Georgetown, South Carolina, facility; excluding quality control employees, office clerical employees, technical employees, and guards, professional employees, and supervisors as defined in the Act.

The Respondent's brief consistently uses the term "wage freeze." Although Hudson, in testimony, and Counsel for the Respondent, in questions asked of the witnesses, also consistently used the term "wage freeze," the credited evidence shows that the term "wage freeze" was first used on September 30 when Counsel used it in an attempt to defend the Company's actions after the charges herein were filed.

*E. Analysis and Concluding Findings*

The complaint alleges that the Respondent unilaterally failed to grant "the annual cost of living/wage increase" on July 1 in accord with its past practice and unilaterally failed to pay the safety bonus on July 1. There is conflicting testimony regarding whether the Company ever represented to employees that the annual wage increase was a cost of living adjustment tied to national or regional cost of living figures. Regardless of what any employee might have been told, there is no probative evidence establishing that there was, in fact, such a connection.

Director Hudson admitted that it was "an annual event to review, recommend, seek approval and implement" a wage plan for the hourly employees and that the first step in that process was a survey of area wage practices. The foregoing testimony and uncontradicted evidence of the Respondent's past practice establish that an annual wage increase was a term and condition of employment for hourly employees.

The General Counsel contends that this is a straightforward case in which the Respondent deviated from its past practice without notice to and bargaining with the Union.

The Respondent does not dispute that there was no notice to or bargaining with the Union but contends that it maintained the status quo, that wages and benefits were frozen at the time its bargaining obligation attached on April 28 when the Union was certified and that a unilateral change would have occurred "if it changed the status quo by 'unfreezing' its employees' wages."

Critical to this decision is whether a wage freeze was in effect. Contrary to the Respondent's contention, I find that there was not. The Respondent's brief refers to "[t]he Company's October 2004 announcement of an indefinite wage freeze." There is no credible evidence of any such announcement. The employees were never advised that there was a wage freeze. As Counsel for the General Counsel points out, employees, after having submitted a petition regarding the Respondent's failure to grant a raise in 2004, were, for the first time, told in October by former President Savoretti of the supply problem regarding glacial acrylic acid and that pay increases were suspended "until we are able to resolve this situation." Savoretti's comments were made in the context of an employee petition requesting an explanation regarding the absence of the 2004 increase. No memorandum or other document was ever distributed to employees stating that their wages were frozen or that the suspension of pay increases was indefinite. Savoretti was terminated in November. In December it was announced that step increases were being resumed and that the January safety bonus would be paid. On March 21, the employees were informed that the Respondent had hired new engineers pursuant to its decision to take that action rather than "using critically limited resources to provide short term raises." This discrete action was not placed in the context of a continuation of the suspension of pay increases that former President Savoretti had announced in October.

Thus, as of March 21, 2005, the information provided to employees established that the suspension of pay raises until the situation had been resolved was no longer operative. The Respondent was sufficiently satisfied with its supply of glacial acrylic acid albeit at a higher cost that it had hired new engineers "to build the foundation for long term growth" rather than grant hourly employees "short term raises." No mention was made that the denial of raises was a continuation of the suspension announced by former President Savoretti due to the supply of glacial acrylic acid. A different rationale was given. Although being denied "short term raises," the employees were not informed that the Respondent intended to deviate from its past practice, the "annual event" of a summer wage increase.

The Respondent's brief does not address the letter of March 21 which explains the decision that the Respondent had made with regard to its allocation of "critically limited resources." Although the reference to "short term raises" was not explained in the letter, it certainly could have no meaning other than that no raise for 2004 was going to be given, retroactively or otherwise. The letter does not refer to a "wage freeze," a continuation of a "wage freeze," or an inability to lift a "wage freeze." The absence of "short term raises" is placed in the context of a managerial decision relating to "critically limited resources." It does not place that action in the context of a continuation of the suspension of wage increases announced by former President Savoretti in October. The letter does not inform employees that, although not being given "short term raises," they should not, consistent with the Respondent's past practice, anticipate a raise announcement in July or early August 2005 retroactive to July 1. There was no communication to employees or to the Union that the Respondent was abandoning its past practice of annual wage increases for hourly employees in the summer, retroactive to July 1.

The Board, in *Daily News of Los Angeles*, 315 NLRB 1236 (1994), quoted with approval the language of the Court of Appeals in *NLRB v. Dothan Eagle*, 434 F.2d 93, 98 (5th Cir. 1970):

> The cases make it crystal clear that the vice involved in both the unlawful increase situation and the unlawful refusal to increase situation is that the employer has *changed* the existing conditions of employment. It is this *change* which is prohibited and which forms the basis of the unfair labor practice charge.
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> . . . .
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> In other words, whenever the employer by promises or by a course of conduct has made a particular benefit part of the established wage or compensation system, then he is not at liberty unilaterally to change this benefit either for better or worse during . . . the period of collective bargaining. Both unprecedented parsimony and deviational largess are viewed with a skeptic's eye during . . . bargaining. In those cases where the employer was found guilty of an unfair labor practice for withholding benefits during . . . the process of collective bargaining, the basis of the charge was a finding that the

employer has changed the established structure of compensation. [Emphasis in the original.] Id. at 1237–1238.

The Board, in *Lamonts Apparel*, 317 NLRB 286, 288 (1995), applied the foregoing principle and found a violation of the Act where the respondent "failed to make a recommendation regarding a wage increase based on the data it compiled in its market survey" and discontinued "its customary wage adjustments in October without notice to the Union or an opportunity to bargain to agreement or impasse."

The Union was never told that there was a "wage freeze." Although the Respondent asserts that the status quo was that wage increases were frozen, the probative evidence establishes otherwise. After the employees submitted their petition seeking an explanation for the absence of their 2004 wage increase, they were informed of the glacial acrylic acid supply problem and told by former President Savoretti that pay increases were suspended until the Respondent was "able to resolve this situation." When the situation had been resolved sufficiently to permit the hiring of new engineers, the employees, on March 21, were informed that the Respondent had made a decision to "build the foundation for long term growth" by hiring new engineers rather than providing "short term raises." There was no assertion that this action constituted a continuation of the suspension of pay increases announced by former President Savoretti. It was a discrete event that affected only "short term raises." Neither the employees nor the Union were informed that the Respondent intended to deviate in the summer of 2005 from what Hudson admitted was "an annual event to review, recommend, seek approval and implement" a wage plan for the hourly employees. If the Respondent had acted consistently with that past practice, Hudson would have conducted a survey to determine what increases area employers were giving and to learn how "we [3-V] stack up with that and what's the comparison there," and submitted a proposal to the Board for action that would have been retroactive to July 1. The grant of a wage increase to salaried employees in early 2006 and the gift of a Christmas bonus in 2005 to all employees confirm that profitability did not preclude the grant of monetary benefits to employees.

Neither the employees nor the Union were informed that the suspension of pay increases announced by former President Savoretti in October of 2004 meant that the Respondent was changing its past practice relating to annual wage increases. He did not state that the Respondent was abandoning the "annual event" of submission of a wage plan to the board of directors for approval. The March 21 letter informs the employees of the allocation of limited resources as a discrete event. It does not mention a continuing suspension of pay increases or a wage freeze. At no time was the Union informed that the Respondent intended to abandon its past practice of granting a summer wage increase to hourly employees.

The failure of the Respondent to follow its established protocol regarding wage increases for hourly employees was a unilateral change. The grant of raises to salaried employees in early 2006 establishes that the financial performance of the Respondent did not preclude the granting of a wage increase to hourly employees. Although Hudson testified that the amount of the annual raise set by the board of directors was "totally discretionary" and that the board "frequently" adjusted his recommendations, the Respondent presented no evidence relating to the significance of any adjustments made by the board. In 1995 and from 1999 through 2003, the annual increase was never less than 2 percent and never more than 3 percent. The fact that the amount of any increase was dependent upon the discretion of the board of directors does not negate a bargaining obligation. "[A]n employer that has a practice of granting merit raises that are fixed as to timing but discretionary in amount may not discontinue that practice without bargaining to agreement or impasse with the union." *Harrison Ready Mix Concrete Co.*, 316 NLRB 242 (1995). The foregoing principle is applicable in situations involving across-the-board increases rather than individual merit raises. *McClain E-Z Pack, Inc.*, 342 NLRB 337, 344 (2004). The Respondent, by failing to continue its past practice of granting an annual wage increase to hourly employees retroactive to July 1 without notice to and bargaining with the Union, violated Section 8(a)(5) of the Act.

The Respondent argues that, even if it be found that there was a bargaining obligation, the Union waived its right by failing to request bargaining and by agreeing to address noneconomic issues prior to addressing economic issues at the bargaining table. Board precedent is clear that an agreement to first address noneconomic matters at the bargaining table simply sets the format for negotiations; it did not waive the Union's right to notice prior to discontinuation of a past practice. See *Vico Products Co.*, 336 NLRB 583, 598 (2001); *Central Maine Morning Sentinel*, 295 NLRB 376, 379 (1989).

The Respondent contends that it had no obligation to bargain regarding the safety bonus because of the "wage freeze," because the Union waived its rights by failing to request bargaining and by agreeing to first address economic issues, and because "the safety incentive program was sufficiently discretionary and comparatively nominal so as not to constitute a term and condition of employment." Whether the Respondent intended to suspend safety bonus payments is of no moment. It did not do so. The summary of the October 19, 2004 meeting reports that Savoretti spoke only of suspension of pay increases. Benefits were not mentioned. As discussed above, the Union did not waive its right to bargain, and the Respondent was obligated to bargain before discontinuing this past practice. I reject the contention that the safety bonus was discretionary and "comparatively nominal." The undisputed testimony of Director Hudson is that the annual dollar amount of the safety bonus was fixed at $30,000, "divided into two $15,000 increments to be distributed in January and in July of the ensuing year." The Company did not inform the Union that there had been any deviation from its past practice of paying $30,000 in two $15,000 increments. Although Hudson testified that payment of the January 2005 safety bonus "was communicated" as a one-time event, he did not testify to what approval was sought or given regarding the bonus or that he told employees that they should not expect to receive their July 1 safety bonus payment. The Union was never advised that the payment would not be made. The amount of the bonus was fixed and distributed on the basis of the safety records in the respective departments. Two employees presented check stubs reflecting payment in

January 2005 of $95.09 and $125.40, respectively. Those amounts are not nominal. The July 1 bonus payment was not made to the employees. The Union was not advised that the July payment would not be made. By failing to pay unit employees the $15,000 July 1 safety bonus, the Respondent violated Section 8(a)(5) of the Act.

## CONCLUSION OF LAW

By failing to give notice to and bargain with the Union regarding the amount of its annual employee wage adjustment, unilaterally discontinuing an annual wage increase retroactive to July 1, 2005, and by failing to pay to employees their July 1, 2005 semiannual safety bonus, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

## REMEDY

Having failed to bargain with the Union regarding an annual wage increase retroactive to July 1, 2005, for unit employees, the Respondent must immediately put into effect an across-the-board wage increase retroactive to July 1, 2005, and continue such increase in effect until it negotiates with the Union in good faith to a collective-bargaining agreement or reaches an impasse after bargaining in good faith, and make whole its unit employees for any loss of pay they may have suffered due to its unilateral change in the manner prescribed in *Ogle Protection Services*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I am mindful that the foregoing remedy, like that imposed in *Daily News of Los Angeles*, supra at 1241, will require application of a formula "which will give a close approximation of the amount due." Ibid. I am, as was the Board in *Daily News of Los Angeles*, satisfied that such a formula can be constructed utilizing the survey of area employers about which Director Hudson testified and the factors that informed the decision to grant salaried employees a wage increase in January 2006.[3]

Having failed to pay to employees their semiannual safety bonus on July 1, 2005, the Respondent must make whole its unit employees for any loss of pay they may have suffered due to its unilateral change by paying the safety bonus with interest as set forth in *New Horizons for the Retarded*, supra.

[Recommended Order omitted from publication.]

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[3] The Respondent argues that insofar as a violation of the Act is found that it be ordered to bargain with regard to the amount of any wage increase. In *McClain E-Z Pack, Inc*., supra, the Board modified the recommended order which only required bargaining and ordered that a wage increase be put into effect and the employees made whole. That remedy, like the remedy recommended herein, is consistent with the remedy ordered in *Daily News of Los Angeles*.