

Gulf Refining and Marketing Company, a Division of Gulf Oil Corporation and Gulf Employees Association of New England, Operating and Clerical Employees Divisions. Case 1-CA-13648

September 15, 1978

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS PENELLO
AND TRUESDALE

On May 23, 1978, Administrative Law Judge Norman Zankel issued the attached Decision in this proceeding. Thereafter, the General Counsel and Charging Party each filed exceptions and a supporting brief. Respondent filed answers to both the General Counsel's and Charging Party's exceptions as well as a brief in support of those answers.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions, answers, and briefs and has decided to affirm the rulings, findings,¹ and conclusions² of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

¹ The Charging Party has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

² We agree with the Administrative Law Judge that the existence of ambiguous contractual language warranted an inquiry into relevant bargaining history in order to determine whether the union parties to identical contracts with Respondent had agreed to grant Respondent the unilateral right to alter or terminate the employee discount plan which it did, in fact, terminate on July 31, 1977. We therefore find it unnecessary to consider or rely on the Administrative Law Judge's alternative conclusion that the disputed contract language, on its face, constituted a grant to Respondent of the right to take unilateral action with respect to the discount plan.

DECISION

STATEMENT OF THE CASE

NORMAN ZANKEL, Administrative Law Judge: This case came to hearing before me on February 6 and March 30, 1978, at Boston, Massachusetts.

Upon a charge filed by Gulf Employees Association of New England, Operating and Clerical Employees (hereinafter called the Union, the Operating Division and Clerical Division) by Joseph Finneran on September 21, 1977,¹ a complaint and notice of hearing was issued on November 2, by Robert S. Fuchs, Regional Director for Region 1 of the National Labor Relations Board (hereinafter the Board), against Gulf Refining and Marketing Company, a Division of Gulf Oil Corporation (hereinafter called the Respondent). The complaint was amended on January 4, 1978, and further orally amended at the hearing.

In substance, the complaint alleges that Respondent refused to bargain collectively with the Operating and Clerical Divisions in violation of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (hereinafter the Act) in that Respondent, on or about May 23, unilaterally eliminated employee discounts on purchases of its products and services.

Respondent's timely answer to the complaint, as amended at the hearing, while admitting certain allegations, denies the commission of any unfair labor practice.

All issues were fully litigated at the hearing: all parties were represented by counsel and were afforded full opportunity to examine and cross-examine witnesses, to introduce evidence pertinent to the issues, and to engage in oral argument. The Board's counsel for the General Counsel and counsel for Union presented oral arguments at the hearing. A timely post-hearing brief was received from counsel for the Respondent on April 24, 1978.

Upon the entire record, and from my observation of the witnesses, and their demeanor in the witness chair, and upon substantial, reliable evidence, "considered along with the consistency and inherent probability of testimony" (*Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 496 (1951)), and after due consideration of the oral and written arguments of counsel, I make the following:

FINDINGS AND CONCLUSIONS

I. JURISDICTION

Respondent, a Pennsylvania corporation, has maintained at all times material herein, a division office and place of business at One Presidential Boulevard, Bala Cynwyd, Pennsylvania. Respondent is, and has been, engaged in the manufacture, sale, and distribution of petroleum and related products.

In the course and conduct of its business, Respondent causes, and has caused, large quantities of oil used by it in the manufacture of its products to be purchased and transported in interstate commerce from and through various States of the United States other than Pennsylvania, and from foreign countries, and continuously has caused substantial quantities of petroleum products to be sold and transported in interstate and foreign commerce to States of the United States other than Pennsylvania, and to foreign countries.

¹ All dates are in 1977 unless otherwise stated.

Annually, Respondent receives products at its various facilities which are shipped from points located outside Pennsylvania in excess of \$50,000 in value; and, during the same period of time, Respondent ships products in excess of \$50,000 in value directly from Pennsylvania to points outside that State.

The parties agree, the record reflects, and I find that Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

It is undisputed, the record reflects, and I find that Gulf Employees Association of New England, Operating Division, and Gulf Employees Association of New England, Clerical Division, each is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE PROCEDURAL ISSUE

Immediately after the hearing opened, Respondent moved to dismiss the complaint insofar as it relates to the clerical division. This motion was predicated upon the contention that the clerical division should not be a party to the proceeding because the charge had been signed by Joseph Finneran who is president of the operating division. Respondent's counsel asserted that, because there was no separate charge filed on behalf of the clerical division, that labor organization is not a proper party.

During his argument opposing the motion to dismiss, counsel for the General Counsel asserted that the prehearing administrative investigation proceeded on the premise that both the operating and clerical units were aggrieved parties. This claim was not denied by Respondent's counsel. Additionally, no claim was made that Finneran had not been authorized to file the instant charge. I orally denied the motion to dismiss, and the hearing proceeded upon all allegations within the amended complaint pertaining to both labor organizations.

Respondent's post-hearing brief renews the issue of whether both labor organizations are properly parties herein.

It is well established that a charge may be filed by any person or labor organization (*Brophy Engraving Company*, 94 NLRB 719, 720 (footnote 3) (1951); *McComb Manufacturing Company and Mrs. O. H. Stringer*, 95 NLRB 596, 597 (1951); *Kansas Milling Co. v. N.L.R.B.*, 185 F.2d 413 (C.A. 10, 1950)). There is no limitation on the classes of persons who may file charges (*N.L.R.B. v. Indiana & Michigan Electric Company, et al.*, 318 U.S. 9, 17-18 (1943)). The charge "merely sets in motion the machinery of an inquiry."

Upon all the foregoing, I conclude it is of no consequence that Finneran is affiliated officially only with the operating division and each of the labor organizations involved appropriately is a party herein. Thus, I find Respondent's contentions in support of its motion to dismiss are without merit. Accordingly, I hereby reaffirm my denial of Respondent's motion (see also *Bagley Produce, Inc.*, 208 NLRB 20, 21 (1973)).

IV. THE ALLEGED UNFAIR LABOR PRACTICE

A. The Facts

Since March 4, 1940, the operating division has represented the following Board-certified unit of employees which I find appropriate for purposes of collective bargaining:

All full time and regular part time operating employees employed by Respondent in its New England Marketing Sales Division, excluding clerks, office clerical employees, professional employees, guards and all supervisors as defined in the Act.

Since December 7, 1949, the clerical division has been the certified bargaining representative of the following unit of employees which I find appropriate for purposes of collective bargaining:

All full time and regular part time office and clerical employees employed by Respondent at its sales offices, bulk plants and terminals located at Eastern Avenue, Chelsea, Massachusetts; Lyon Avenue, East Providence, Rhode Island; Danforth Street, Portland, Maine; Maple Street, Brewer, Maine; State Avenue, Tiverton, Rhode Island; and Lake Street, Burlington, Vermont, excluding employees employed in and under the direct supervision of Respondent's Boston Division office, confidential employees, professional employees, guards and all supervisors as defined in the Act.

Subsequent to each of the aforementioned certifications, each labor organization herein negotiated successive collective-bargaining agreements with Respondent on a separate basis. By custom, each such collective-bargaining agreement was comprised of three documents: (a) a basic agreement entitled "Articles of Agreement"; (b) a "side" letter representing the terms of a stock ownership plan; and (c) a "side" letter containing the terms of pension, insurance and other benefit plans (hereinafter the benefit letter). The substantive terms of each of these documents were identical, except where differences were necessitated to reflect their applications to the employees in each of the bargaining units herein.

The most recent collective-bargaining agreement between Respondent and each Union herein is effective from January 1, 1977, through January 31, 1979, and consists of a basic agreement, plus the two side letters discussed above.²

The benefit letters to both labor organizations are dated February 23, 1977. Each of those letters contains the following provision, relevant herein:

5. By making application and complying with Company regulations, employees may secure credit cards for use in the purchase of Company products, discount being allowed on such purchases. Purchases on employees' credit cards are restricted to the personal use of employees and those directly dependent on them for

² Although there is evidence that the operating division's side letter representing the benefit plans was not signed on March 2, 1977, as appears on the document, but instead, sometime in August 1977, no party seriously contests there existed a total collective-bargaining agreement consistent with past practice at the time of the alleged unilateral change.

support. Any abuses will result in the employee forfeiting the privilege. The use of credit cards will continue as at present unless and until the Company sees fit or by law is required to modify or terminate their use generally.

It is conceded that the final full sentence of the above-quoted paragraph effectively grants to Respondent the unilateral right to discontinue the use of credit cards. However, with respect to the subject of the alleged unilateral termination of employee discounts, a major dispute exists between the parties. The General Counsel and Charging Party contend the quoted paragraph does not affect the discount privilege. Respondent claims that the credit card and discount privileges, as a negotiable benefit, are conjunctive.

An employee discount on purchases of its goods and services, including home fuel oil delivered by Respondent has been made available to employees on a corporatewide basis for a long period of time. At the time of the alleged unlawful termination of the discount privilege for the employees in the two bargaining units involved herein, those employees were entitled to a 10-percent discount upon goods and services obtained by use of their Gulf travel credit cards. The 10-percent reduction appeared upon each monthly statement rendered by Respondent. The home fuel oil discount appeared directly upon each delivery slip. Finneran and Joseph E. DeSantis (president of the clerical division) are also employed by Respondent in the respective bargaining units of which each is an officer. Finneran testified that his annual purchases subject to discount equal approximately \$150-200 per year; DeSantis testified that such purchases of his totaled approximately \$150 per year. The credit card used by employees is identical in all respects with those issued by Respondent to the general public, except that it identifies the owner as an employee.

It is undisputed that on May 16 Respondent's high-level corporate officials decided to eliminate the discount privileges for all of Respondent's employees worldwide. According to George R. Burt, Respondent's senior director of human resources, this decision was consistent with what Respondent's officials believed to be a contractual right derived from the language of paragraph 5 in the 1977-79 benefit letter.

According to Fred E. Bates, Respondent's area director for labor relations for its East Coast area, who acted as principal Respondent spokesman during the negotiations which culminated in the 1977-79 collective-bargaining agreements, he was advised of the decision to eliminate the discount privilege on May 20. Immediately, he telephoned DeSantis and Finneran to advise them orally of the decision. Bates told each of them that after July 31 the 10-percent employee discount would no longer be operative. The composite testimony of Bates, DeSantis, and Finneran, each of whom I credit, reveals that, when Bates spoke with DeSantis, DeSantis expressed his "disapproval" of Respondent's decision; that Bates said the decision had been made in accordance with the collective-bargaining agreement; that DeSantis complained that annuitants would suffer; and that no specific negotiations were requested by DeSantis on this issue at that time. Finneran also expressed concern that the annuitants should be protected, commented that the present employees also would be harmed, and

Bates said that the elimination of the discount was a companywide matter emanating directly from corporate headquarters. No request was made by Finneran during this conversation for negotiations on this issue.

On May 20, Respondent issued an announcement to all affected unit employees, advising them that the employee discounts were to be eliminated effective July 31.

By identical letters dated May 23 addressed to DeSantis and Finneran, Bates confirmed their earlier telephone conversations described above and reiterated that the employee discounts would be eliminated effective July 31.

On May 25, DeSantis wrote Bates requesting a wage review meeting. In this letter, DeSantis commented, "[t]his Union would also like to be [sic] put on record our displeasure on the discontinuance of the Employee Discount privileges especially on the impact that it will have on the annuitants, which I'm sure you have received from all over the country."

On July 25, Finneran and DeSantis filed a joint grievance over the elimination of the discounts. The written grievance claims that Respondent "has no right to unilaterally change benefits without mutual consent." Bates wrote DeSantis and Finneran on August 9 and advised them that the benefit letter of February 23 provides that the various benefit plans included in that letter are not subject to arbitration, and therefore Respondent declined the request to arbitrate over the elimination of the discount privileges.

Respondent does not contest the General Counsel's claim that the employee discounts constituted a substantial benefit to the employees and are a mandatory subject for collective bargaining. However, Respondent contends that both labor organizations had waived their right to challenge Respondent's admittedly unilateral action in terminating that benefit during the collective bargaining which took place in late 1974 and early 1975. In the alternative, the Respondent urges that the facts reveal each Union waived its right to bargain over the elimination of the discounts by not having specifically requested such negotiations at any time in 1977.

The following evidence of a bargaining history concerning the discounts and credit cards was adduced, substantially without contradiction. While both DeSantis and Finneran participated in the negotiations of 1974-75, only DeSantis was asked any questions concerning what occurred at that time relevant to the matter in issue herein. During his direct examination, DeSantis said he did not recall the Respondent raising the issue of discounts in previous negotiations but conceded that Respondent "mentioned credit card privileges." DeSantis did not recall whether any reference had then been made to the discounts. However, on cross-examination, he conceded that it was possible that references to discounts were made during those earlier negotiations. Finneran was not asked to relate anything that occurred in earlier negotiations.

Respondent's witnesses who testified as to bargaining history were explicit, sure, and certain in their recall of what occurred during earlier negotiations. Thus, Respondent's area manager of human resources, Carlton R. Cummings, Jr., testified that during the 1974-75 negotiations the Union proposed that the discount percentage be increased and that Respondent also submitted a proposal on the discounts. According to Cummings, he explicitly told the ne-

gotiators for both the operating division and clerical division that Respondent's proposal was intended to make it clear that Respondent desired to reserve to itself the privilege of increasing, modifying, or eliminating the discount, although Respondent then had no present intention of altering that benefit in any way. Both Cummings and Stanley Arabis (employed by Respondent as advisor-labor relations from June 1974 until May 1976) testified that Respondent's proposal for discounts in 1974 was in the following written language:

By making application and complying with Company regulations, employees may secure credit cards for use in the purchase of Company products, discounts being allowed on such purchases. Purchases on employees' credit cards are restricted to the personal use of employees and those directly dependent on them for support. Any abuses will result in the employee forfeiting the privilege. The use of credit cards and discount privileges will continue as at present, unless and until the Company sees fit or by law, is required to modify or terminate the use of the discount privilege or the use of the credit cards generally.

The Respondent gave these identical proposals on credit cards and discounts to the operating division and to the clerical division (see Resp. Exhs. 2 and 3).

According to Cummings and Arabis, each of the labor organizations agreed that the 1975-77 collective-bargaining agreement would contain the language as proposed by Respondent, as quoted immediately above. However, when the side letters representing the benefit plans were issued under Cummings' signature on April 9, 1975 (Resp. Exh. 1 and G.C. Exh. 15), the phrases "and discount privileges" together with, "the use of the discount privilege" which are contained within Respondent's proposal which it asserts was agreed to, were absent.

Bates' uncontradicted testimony is that during the negotiations for the 1977-79 collective-bargaining agreement, there was no extensive discussion concerning the discount with either labor organization. His testimony reveals that the parties simply agreed that the provisions of the 1975-77 agreement regarding the various benefit plans would be continued in the 1977-79 agreement. As noted, at the beginning of the narration of facts herein, the 1977-79 benefit letter, in paragraph 5, contains language identical to that of 1975-77, omitting the references to the discount privileges which are contained within Respondent's proposals for the 1975-77 agreement.

Respondent offered Bates and Arabis to account for these omissions. Thus, Bates testified that the language of the 1977-79 provision is identical to that of the 1975-77 benefit letter because he had delegated the duty of typing the 1977 benefit letter to his secretary and had instructed her to copy the language of the earlier letter. She apparently did so with complete accuracy. Arabis testified that the 1975-77 benefit letter was typed among a flurry of activity during a period when he had fallen behind in paperwork and his secretary had been typing late hours at night without supervision. Arabis also testified that he had not observed the omitted references to the discounts when the 1975-77 benefit letter was issued. On cross-examination, Arabis provided testimony fully consistent in all respects

with that given during direct examination. Additionally, Arabis insisted that the final oral agreement between the parties during the negotiations for the 1975-77 contract provided for the adoption of Respondent's proposed credit card and discount language.

The General Counsel characterizes the omission of the phrases concerning the discount as "mysterious," while Respondent claims it resulted merely from a typographical error in 1975, an error which was compounded by an accurate copying in 1977 of the 1975 language. I must somewhat concur in the General Counsel's observation because it seems more than mere coincidence that a "typographical" error would occur in such an extensive manner as to cause the elimination, in their entirety, of the crucial and rather lengthy phrases "and discount privileges" and "the use of the discount privileges." Under ordinary circumstances, I would declare Respondent's explanations incredible. However, in the totality of the circumstances before me, and without crediting the explanations as to the omitted language, I nonetheless, do place credence upon Cummings' and Arabis' testimony that the Unions agreed to Respondent's proposal *as it had been presented*. Similarly, I accept Bates' testimony that the parties agreed to continue the previous contract language into the 1977-79 contract. These credibility resolutions are based upon DeSantis' vague and equivocal recollection of the 1975-77 negotiations, the failure of Finneran to testify at all on that subject, the precision with which the Respondent's witnesses narrated what had occurred during the earlier negotiations, the corroborating documentary evidence, and the absence of any effort to rebut or contradict the evidence presented during the presentation of Respondent's case-in-chief regarding what had occurred during the 1975-77 negotiations.

B. Analysis

It requires little analysis and no exhaustive discussion to conclude that the employee discount herein constitutes such a term and condition of employment as to render it a mandatory bargaining subject. As indicated, the evidence reveals that the discount privilege had been enjoyed by employees for at least 2 decades prior to the events herein. Additionally, the parties bargained about the discounts, and it is clear that the discounts possessed a monetary value. All this supports a conclusion that the discounts came to be a regular term of employment. (*Central Illinois Public Service Company*, 139 NLRB 1407 (1962), enf'd. 324 F.2d 916 (C.A. 7, 1963); *Inland Steel Company v. N.L.R.B.*, 170 F.2d 247 (C.A. 7, 1948), cert. denied 336 U.S. 60; *W. W. Cross and Company, Inc. v. N.L.R.B.*, 174 F.2d 875 (C.A. 1, 1949); *Western Massachusetts Electric Company*, 228 NLRB 607 (1977)).

Thus, I conclude that Respondent, at all times relevant, had an obligation to bargain with the operating and clerical divisions in the unit found appropriate.

Because it is admitted that Respondent unilaterally decided to discontinue the discounts, and thereafter implemented that decision, I find that within the statutory period of limitations, Respondent unilaterally terminated the discounts.

The General Counsel and the Charging Party have urged that resolution of the issue before me, once having found an

obligation to bargain and unilateral action by Respondent, depends solely upon reference to paragraph 5 of the 1977-79 benefit letter which, on its face, permits unilateral action only with regard to credit cards—but not to discounts. This position precludes recourse to the oral testimony and supporting documentary evidence of the negotiations for 1975-77 contract and the circumstances of preparation of the attendant side letters.

I view the pivotal issue before me to require a determination of what is meant by the language of paragraph 5 as contained in the 1977 benefit side letter. To adopt the General Counsel's contentions would have the inhibiting effect of preventing me from considering the full context from which the 1977-79 agreement evolved. I consider this patently prejudicial to a fair resolution of the parties' rights. Without giving probative weight to the bargaining history, there can be no effective assurance of the enforceability of the written contract. In *N.L.R.B. v. Strong, d/b/a Strong Roofing & Insulating Co.*, 393 U.S. 357, 361 (1969), the Supreme Court observed that the Board may, "if necessary to adjudicate an unfair labor practice, interpret and give effect to the terms of a collective bargaining contract," citing *N.L.R.B. v. C & C Plywood Corp.*, 385 U.S. 421 (1967). I conceive it my responsibility, then, to inquire into all relevant circumstances surrounding the negotiation of paragraph 5 of the 1977-79 benefit letter. Additionally, the Supreme Court observed that a collective-bargaining agreement is not to be viewed as an ordinary contract and commented, "We think special heed should be given to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve." *United Steel Workers of America v. American Manufacturing Co.*, 363 U.S. 564, 567 (1960).

While the General Counsel agreed that the bargaining history herein was relevant, he urged that I give no great weight to it. However, "[w]hen an agreement may be expected to speak on a subject but does not, its silence imports ambiguity on that subject" (*International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW), et al. v. White Motor Corporation*, 505 F.2d 1193, 1199 (C.A. 8, 1974), cert. denied 421 U.S. 43. Even a portion of the disputed paragraph 5, conceded to constitute part of the 1977-79 collective-bargaining agreement, refers to the discounts, stating, "employees may secure credit cards for use in the purchase of Company products, *discount being allowed on such purchases.*" I view the existence of this language to militate an inquiry into all relevant circumstances surrounding the discount, especially where later language in that paragraph explicitly refers to the discontinuation of the credit card privilege. The absence of provision for termination of the discount privilege reveals the ambiguity of the entire paragraph 5.

Also, rules of contract law justify reliance upon the bargaining history to resolve the issue herein. Thus, I conclude that the language of paragraph 5 contains a latent ambiguity. Although, arguably, that paragraph contains ostensibly clear and unambiguous language, the latent ambiguity arises from the extraneous and collateral facts which appear on this record. For example, Bates, without contradiction, testified that paragraph 5 of the 1975-77 benefit letter was incorporated, without extensive discussion, into the 1977-79 contract; and the language of the 1975-77 agreement is

claimed to contain a mistake from that which was actually negotiated between the parties. These facts, in my opinion, compel further investigation into the full circumstances of negotiations. Such extrinsic evidence is permitted to resolve latent ambiguities (*Williston on Contracts*, 3d ed., Vol. 4, § 627).

Upon all the foregoing, I conclude that the credited evidence and supporting documents demonstrate that the parties agreed to grant Respondent the right to unilaterally alter and even terminate the discount plan, and that each subsequent agreement on that subject matter was intended to contain the same provision, and I so find.

If my reliance upon the evidence of bargaining history regarding the disputed clause is deemed an unacceptable means of resolving the issues herein, then I conclude that logical analysis dictates an identical result.

The General Counsel contends that use of credit cards and the grant of discounts are separable benefits. The only evidence to support this claim is that which indicates home fuel oil purchases are discounted directly upon the delivery bill without the use of the credit card. As previously noted, Respondent contends that these two benefits are interdependent. Respondent argues that the credit card was an effective means for administration of the discount privilege because the prescribed purchases for which discounts were made available could readily be traced. In this context, I place little significance upon the failure of home fuel purchases to require no credit card. This is so because the evidence reveals that discounts on such purchases were granted only in situations where the fuel was Respondent's product and delivered by its vehicles. Thus, no additional identification that the product purchased was appropriate for discount was necessary.

As described above, paragraph 5 of the 1977 benefit letter (which all parties agree comprises a portion of an effective collective-bargaining agreement) contains the following sentence.

By making application and complying with Company regulations, employees may secure credit cards for use in the purchase of Company products, *discount being allowed on such purchases.* [Emphasis supplied.]

Throughout these proceedings, the General Counsel and Charging Party have contended that the plain meaning of the words within the disputed paragraph should govern a resolution of the issues. Utilizing this standard, I agree with the General Counsel that the sentence quoted immediately above is susceptible of an interpretation that the credit card and discount privileges are not mutually dependent, for the emphasized phrase (when read together with the remaining words of that sentence) suggests that credit cards may be used without a discount being provided by Respondent. Thus, were the emphasized phrase eliminated totally from the sentence, the credit card privilege would remain in existence.

Despite my observations in the preceding paragraph, I nonetheless perceive validity to Respondent's contention that, in all the surrounding circumstances, the credit card and discount benefits are interrelated. This is so because I conclude that the sentence under consideration is implicitly ambiguous and superfluous. That is, in a situation where (as herein), it has been demonstrated that the credit card issued

to employees is no different from that issued to the general public except for the employee identification, there appears no need to make the subject of credit cards a matter for collective bargaining. I conclude that it is the discount privilege which attaches significance to the credit card privilege as one by which the parties have included the credit card as a bargainable matter.

This conclusion is logical. The proliferate issuance and use of credit cards to obtain goods and services is undeniably a mainstay of our present-day economic milieu. Virtually anyone with minimal qualifications can readily obtain numerous credit cards from a variety of sources. The record herein reflects that new employees of Respondent are regularly given a credit card application. The completion of this application, its approval by Respondent, and subsequent use by any employee, however, confers no benefit upon the employee that is unavailable to the general public, except to the extent that the employee discount is granted. Thus, within a collective-bargaining framework, the availability of the discount privilege is what renders the credit card a subject to be encompassed by collective-bargaining negotiations. Without the discount, the credit card use by an employee possesses no intrinsic value. Accordingly, I am persuaded by Respondent's argument that the credit card is merely the mechanical device by which the value of the discount privilege can be measured and policed. Given the irrefutable general fact that credit card privileges customarily may be revoked at the option of the issuing authority, the exculpatory language contained in paragraph 5 of the 1977-79 benefit letter surely has application to the discount privileges. Thus, I conclude that language permitting termination or modification reasonably must apply to discounts, otherwise, such language is but surplus.

Accordingly, I find that the credit card and discount privileges are interwoven when viewed within the peculiar circumstances of the case at bar, and that the omission of the express reference to the discount privilege in paragraph 5 of the 1977 (and 1975) benefit letters (irrespective of the cause of such omission) does not detract from an interpretation that the parties contracted to grant Respondent a unilateral right to terminate the discount program.

In sum, I find the evidence reveals the parties contracted (during their negotiations for a 1975-77 contract) to afford Respondent the unilateral right to terminate the discount privilege; that, by some mistake, the 1975-77 benefit letter did not contain the explicit language which comprised the parties' agreement at the bargaining table; and that no evidence has been presented of an agreement on credit cards and discounts other than that which was made during the

1975-77 negotiations, despite the continued omission of the reference to discounts in the 1977-79 benefit letter.

Upon all the foregoing, I find that the General Counsel has not sustained his burden of proving by a preponderance of evidence that Respondent has refused to bargain by unilaterally terminating the discount privilege on July 31, 1977.³

Upon the basis of the foregoing findings of fact and the entire record in this proceeding, I make the following:

CONCLUSIONS OF LAW

1. Gulf Refining and Marketing Company, A Division of Gulf Oil Corporation is and, at all times material herein, has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Gulf Employees Association of New England, Office Employees Division is and, at all times material herein, has been a labor organization within the meaning of Section 2(5) of the Act.

3. Gulf Employees Association of New England, Operating Division is and, at all times material herein, has been a labor organization within the meaning of Section 2(5) of the Act.

4. The Respondent has not committed any of the unfair labor practices alleged in the complaint.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER⁴

The complaint herein is dismissed in its entirety.

³ In reaching the above conclusions, I have carefully studied all the factual and legal references supplied by counsel for the General Counsel and the Charging Party, but find such authorities either inapposite on the facts or not inconsistent with the conclusions reached herein.

Additionally, I am fully cognizant of the Charging Parties' contention that some evidence exists that, pursuant to Respondent's continuing obligation to bargain, both labor organizations may have requested negotiations on discounts some time after the May 20 announcement of its termination. I acknowledge my findings herein may establish a basis for bargaining over the effects of the discount's termination. Inasmuch as the complaint does not allege a violation by the failure to undertake "effects" bargaining, because I do not consider such potential violation was fully litigated, and because (in any event) I would find no clear request to engage in such bargaining was made, no findings are made upon such a theory.

⁴ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.