

**Weather Tec Corporation and International Chemical Workers Union, Local 97**, Cases 32-CA-63 and 32-CA-72 (formerly 20-CA-11070 and 20-CA-11197)

September 29, 1978

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS  
AND MURPHY

On January 20, 1978, Administrative Law Judge Henry S. Sahm issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief and Respondent filed an answering brief.

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 and briefs and has decided to affirm the Administrative Law Judge's rulings, findings, and conclusions to the extent consistent herewith.

We agree with the Administrative Law Judge's conclusion that Respondent did not commit any unfair labor practices before the strike that began January 30, 1976.<sup>1</sup> At its inception, therefore, the strike was not an unfair labor practice strike. The Administrative Law Judge further found that the strike was an unwarranted walkout that did not attain the stature of an economic strike. We find merit in the General Counsel's exception to this finding.

Section 7 of the Act guarantees employees the right to "engage in . . . concerted activities for the purpose of mutual aid or protection." Here, the strike's commencement followed 12 bargaining sessions through which Respondent and the Union failed to reach agreement on a contract. On January 28, the day after the last prestrike bargaining session, the employees unanimously voted to strike. In our view, there is no question but that Respondent's employees thereby engaged in concerted activity for "mutual aid or protection" within the meaning of Section 7 of the Act.

The employees who struck Respondent on January 30 were therefore economic strikers.<sup>2</sup> Upon their unconditional offer to return to work, they were entitled to immediate reinstatement to jobs not held by permanent replacements, unless Respondent could estab-

lish a legitimate and substantial business justification for not reinstating them.<sup>3</sup>

The record demonstrates that the striking employees, through their collective-bargaining representative, unconditionally offered to return to work on February 8,<sup>4</sup> a fact not mentioned by the Administrative Law Judge. It is also undisputed that, although Respondent began to hire some replacements for the strikers during the week following the strike's commencement, jobs were available on February 8. Probative in this vein is the testimony of Respondent's general manager, Terry Amaro. According to Amaro, not only were there job openings on February 8, but all of the striking employees could have been returned to work within a week to 10 days.<sup>5</sup> Notwithstanding the availability of jobs on February 8, Respondent would not consider the Union's offer and failed to reinstate any strikers.<sup>6</sup> Against this background, we find that Respondent's refusal to reinstate strikers on February 8 tended to prolong the strike and thereby converted it into an unfair labor practice strike. The striking employees, who had unconditionally offered to return to work, thereby became discriminatees, and Respondent's failure to reinstate them violated Section 8(a)(3) and (1) of the Act.<sup>7</sup>

Respondent maintains that it did not have to return the strikers to work because it had a substantial and legitimate business reason for not doing so. In support of this claim, Respondent essentially expresses concern that if the employees were returned to work they might have gone out on strike again and Re-

<sup>3</sup> *The Laidlaw Corporation*, 171 NLRB 1366, 1370 (1968).

<sup>4</sup> On this date, Respondent and the Union held their first bargaining session since the strike's commencement. Present for Respondent were Attorneys Robert Coyle and Lowell Carruth, along with Company Negotiators General Manager Amaro, President Duckworth, Frank Dye, and Respondent's owner, George Pearce. Present for the Union were Eddy Turner, the Union's chief negotiator until this meeting; Local 97's president, Alsup; the four members of the employees' negotiating committee, Doris Freund, Edna Smith, Gayle Weber, and Bill Harris; and Jerome Levine, an official of the International Union who replaced Turner as the Union's chief negotiator at this meeting.

After a private caucus of the union bargaining committee, Levine asked to speak privately with Attorney Coyle. During his private conversation with Coyle, Levine offered to return the strikers to work.

<sup>5</sup> Amaro explained that in addition to filling openings that were left by the strikers Respondent was also attempting to fill openings created by replacements hired during the strike who quit and got other jobs. According to Amaro, on some days there were as many as 26 people absent. Amaro added that Respondent did not reach its full employee complement of 80 to 90 production employees until 3 or 4 weeks before the date he testified (August 24).

<sup>6</sup> On February 3, the Union filed an unfair labor practice charge against Respondent alleging violations of Sec. 8(a)(5) and (1) of the Act. During the same conversation in which Levine offered to return the strikers to work, he also offered to drop the charge in an effort to resume negotiations on the contract. Respondent Attorney Coyle told Levine that the Union's offers could not be considered until Respondent knew more about the charge.

<sup>7</sup> See, e.g., *Howard Manufacturing Company, Inc.*, 227 NLRB 1858, 1865 (1977); *Flowers Baking Company, Inc., and Ideal Baking Company, Inc.*, 169 NLRB 738, 749 (1968); *Rental Uniform Service*, 167 NLRB 190, 197 (1967).

<sup>1</sup> Unless otherwise indicated, all dates herein refer to 1976.

<sup>2</sup> About 65 employees went on strike. Apparently, one or two employees did not go out on strike and five or six others abandoned the strike and resumed work 10 days to 2 weeks after the strike began.

spondent might not have been able to get replacements a second time.<sup>8</sup> In our judgment, Respondent's speculative concern does not qualify as a substantial and legitimate business reason that could preclude the strikers' Section 7 right to reinstatement. Any other conclusion would diminish the right to strike guaranteed by Section 13 of the Act.

Respondent exacerbated its unlawful failure to reinstate the strikers on February 8 by subsequently informing the Union that it would only agree to accept "applications for employment" from the striking employees. By a letter from Jerome Levine, dated May 7, the Union repeated its earlier oral offer "to unconditionally return to work."<sup>9</sup> In response, also by letter dated May 7, Respondent informed the Union that "Weather Tec will accept applications from any person who decides he or she wants to work at Weather Tec. This has been its position since January 30, 1976." That Respondent intended to treat strikers as new employees was evidenced by another letter to the Union, dated July 2. In pertinent part, the letter stated: "Subsequent to the February 8, 1976 meeting, Weather Tec Management has repeatedly indicated that it would accept applications for employment and would employ any qualified person, including striking employees, if said person would simply make an application at the Weather Tec office."<sup>10</sup> Inasmuch as the right of strikers to reinstatement cannot be conditioned on the filing of applications for employment as new employees, Respondent's insistence that striking employees file such applications as new employees further prolonged the strike and also violated Section 8(a)(3) and (1) of the Act.

Regarding the allegations that Respondent unilaterally changed its "notification and docking procedures" and its "coffee policy" without first notifying and bargaining with the Union, we agree with the Administrative Law Judge's conclusion that an 8(a)(5) violation was not established. However, we disavow his rationale for that conclusion. Our dismissal of these allegations is based solely on our judgment that, in the circumstances of this case, neither action constituted a "material, substantial, and a sig-

nificant" change from prior practice affecting a term or condition of employment.<sup>11</sup>

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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

3. The employees who went on strike on or about January 30 were engaged in a protected concerted activity within the meaning of Section 7 of the Act.

4. By failing to reinstate strikers upon their unconditional offer to return to work on February 8 when jobs were admittedly available, Respondent converted the economic strike into an unfair labor practice strike. By later imposing a condition on striker reinstatement, Respondent further prolonged the strike.

5. By the foregoing conduct, Respondent discriminated in regard to the strikers' hire and tenure of employment, thereby discouraging membership in the Union in violation of Section 8(a)(3) and (1) of the Act.

#### THE REMEDY

Having found that Respondent engaged in certain unfair labor practices in violation of Section 8(a)(3) and (1) of the Act, we shall order that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It having been found that the strike which began on January 30 was prolonged by Respondent's unfair labor practices, the strikers were entitled to reinstatement when they unconditionally offered to return to work on February 8, subject to the availability of their jobs.<sup>12</sup> The record evidences that Respondent unqualifiedly offered reinstatement to the strikers on July 30<sup>13</sup> and that by August 24 all of the strikers had

<sup>8</sup> As General Manager Amaro testified regarding the Union's offer to return the strikers to work:

Now from a business standpoint did I have job openings and could we have put the people back to work: Yes, within a reasonable period of time. But there was consideration on our part . . . that Mr. Levine would return the people to work and perhaps five or six days later go out on strike again. And we were concerned with the fact that we had exhausted all of our efforts to get employees to work at the plant during the strike and we did not believe we could do that again.

<sup>9</sup> This letter was received by Respondent's attorney, Lowell Carruth.

<sup>10</sup> In a similar vein, the letter further stated that "at a negotiating session held on May 24, 1976, wherein Arthur Woods and Eddie Turner, representing the Union, met with Robert E. Coyle and Lowell T. Carruth, representing Management, it was again stated . . . that Weather Tec would accept applications and employ any striking employee that desired to make an application. . . ."

<sup>11</sup> See *Peerless Food Products, Inc.*, 236 NLRB 161 (1978); *Bureau of National Affairs, Inc.*, 235 NLRB 8 (1978); *Rust Craft Broadcasting of New York, Inc.*, 225 NLRB 327 (1976).

We also note that at the October 13, 1975, bargaining session, shortly after Respondent's modification of its coffee policy was implemented, the change in the coffee policy was discussed. Although the Union then had the opportunity to request that this change be put on the bargaining table for further discussion, it did not do so. Nor did the Union request that Respondent revert to prior policy.

<sup>12</sup> We note that Respondent stated at the hearing that it could have returned all 65 striking employees to work within a week to 10 days after the February 8 offer.

<sup>13</sup> In its July 2 letter to the Union, Respondent expressed acceptance of the Union's initial February 8 offer that all employees would return to work and that the unfair labor practice charges would be dropped. By letter of July 12, the Union replied that it could no longer agree to drop the charges because the complaint had since issued. The Union, however, repeated its offer, ini-

either returned to work at Respondent, secured employment elsewhere, or not sought reinstatement.<sup>14</sup> Under these circumstances, Respondent is not obligated to renew its offer of reinstatement. Respondent is required by the Act, however, to make whole the strikers for any loss of earnings they may have suffered by reason of Respondent's earlier refusals to reinstate them. We shall therefore order Respondent to pay each of the strikers a sum of money equal to that which he or she normally would have earned as wages from February 8, 1976, the date of their unconditional offer to return to work, or the date next thereafter when jobs were available, to the date of Respondent's offer of reinstatement, less their net earnings during such period, with backpay and interest thereon computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950); *Florida Steel Corporation*, 231 NLRB 651 (1977). (See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).)

### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Weather Tec Corporation, Fresno, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in the International Chemical Workers Union, Local 97, or any other labor organization, by unlawfully failing or refusing to reinstate or otherwise discriminating against its employees because they have engaged in protected strike or other concerted activity for their mutual aid or protection or because they have engaged in union activity.

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

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Make whole those employees who went out on strike on January 30, 1976, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying,

tially "made orally on February 8, 1976, and in writing on May 7, 1976, to unconditionally return to work . . ." In a letter to the Union, dated July 30, Respondent stated that "at this time we are offering, without any condition or equivocation, to put back to work any or all of the striking employees immediately."

<sup>14</sup> Of the approximately 65 employees who went on strike, 27 returned to work at Respondent following Respondent's July 30 offer of reinstatement. As previously indicated, five or six other striking employees had abandoned the strike and resumed work within 10 days to 2 weeks after the strike began on January 30. The remaining strikers had not sought reinstatement with Respondent as of August 24.

all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Fresno, California, place of business copies of the attached notice marked "Appendix."<sup>15</sup> Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

CHAIRMAN FANNING, concurring in part and dissenting in part:

My colleagues adopt the Administrative Law Judge's Decision dismissing the 8(a)(5) allegation based upon bad-faith bargaining and the independent 8(a)(1) allegations incident to the early stages of bargaining. To that extent I disagree with their decision.

The complaint alleges that Respondent unlawfully promised employees benefits if they would abandon their union support, told employees it would not sign a contract with the Union, threatened to cease its operations and sell its business unless the Union agreed to its contract, and threatened employees that the business would be sold if the employees persisted in union representation. These 8(a)(1) allegations are based upon the October 13 bargaining session and three "encounters" between prounion employees and management officials that occurred at the Arms Restaurant, the Holiday Inn, and the Airport marina during the first few months of negotiations in the fall of 1975.

The record suggests that the Administrative Law Judge's disposition of the allegations concerning the above meetings away from the plant are suspect. The Administrative Law Judge made no reference at all to the testimony concerning the 8(a)(1) facet of the October 13 negotiating session. He credited Respondent's witnesses and discredited Doris Freund, who was present on each of the three occasions. Freund was a lead person who had been with the company for 4 years at the time of the strike, and a member of the union negotiating committee. She was discredited

<sup>15</sup> In the event that this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

by the Administrative Law Judge, who in a general discussion about credibility emphasized that his credibility findings were "in no way based exclusively on demeanor evidence as that was only one factor" and that careful consideration had been given to surrounding circumstances and plausibility, as well as inconsistency of individual witnesses' testimony when collated with substantial uncontroverted evidence and demonstrable facts. (See par. 5 in the section entitled "*Resolutions of Fact and Credibility*" in the Administrative Law Judge's Decision.) In my view of the Administrative Law Judge's treatment of the evidence, consideration of surrounding circumstances and plausibility are singularly lacking. He failed to note that the three instances occurred during the early months of negotiations—September, October, and December—and, as discussed below, that on October 13 Respondent had taken a firm stand in negotiations against raising present wages. Instead, the Administrative Law Judge stated that there was an informal relationship between the employees and President Duckworth, Negotiator Amaro, and Owner Pearce so that it would seem "rather captious to find" a violation of Section 8(a)(1) despite the fact that "they may have discussed working conditions in restaurants, cocktail lounges and the plant . . . or that any useful purpose would be served by issuing a cease-and-desist order on them." He ignored corroborated testimony that the September meeting at the Arms Restaurant was called by persons clothed with managerial authority—Georgeses and McLain—for the ostensible purpose of discussing quality control and production with lead persons like Freund and Chandler. The Administrative Law Judge found that Freund's account of the meeting was uncorroborated, when in fact Chandler—whom the Administrative Law Judge mistakenly placed as present at the December incident at the Airport Marina—did corroborate Freund on the Georgeses and McLain statements that the Union would do the employees no good, that they would be better off without the Union, and that Owner Pearce would sell the company as he had done at Bakersfield after the Union came in. Nor did he take note of the fact that Georgeses recalled very little of what was said or what he said himself, or that both Georgeses and McLain admitted that low wages were a subject of discussion.

The October "meeting" at the Holiday Inn was not scheduled. The employees attending had come from a union meeting that evening. The Administrative Law Judge was in error in finding that Freund did not identify the three employees who accompanied her, Pam Lopez, Leonard Olivieri, and Brian Rhodes; and he made no mention at all of Lopez' testimony that substantially corroborated the conversation the four employees had with President Duckworth and Chief

Engineer Malcolm. Freund testified that she brought up the warning buzzer system and the change in coffee arrangements;<sup>16</sup> Duckworth defended the former change and said he knew nothing about the latter, but the employees should rely on Malcolm to solve their problems.<sup>17</sup>

The testimony offered in support of the 8(a)(1) allegations has, to me, an inherent ring of truth in the context of the early stages of bargaining, when Respondent was attempting to discourage the employees in their efforts to achieve a contract. The testimony of Freund, Chandler, and Lopez seems uncontrived, Respondent's denials unpersuasive. In the context of employee concern about plant changes apparently aimed at employees since the Union won the election, as well as their concern about wages, about which Respondent was concededly aware, I would not adopt these credibility findings of the Administrative Law Judge that so clearly reflect confusion as to the testimony. Instead I would find a violation of Section 8(a)(1) based on Respondent's efforts to have the employees abandon their support of the union by implied promise of benefits and by threats that the business would be sold if they persisted in their attempt to bargain for a contract.<sup>18</sup>

Indicative of Respondent's lack of good-faith intent to engage in productive bargaining are its dilatory submission of counterproposals and its intransigent position on the critical issue of wages. The Union's complete contract proposal was presented to Respondent at the first bargaining session on September 9, 1975. It included a \$2-per-hour wage increase. At the third session on October 13, Negotiator Amaro out-

<sup>16</sup> Lopez did not remember discussion of the buzzer and coffee matters on this occasion. However, she also testified that she danced part of the time, "usually" with Duckworth.

<sup>17</sup> Concerning the December meeting at the Airport Marina, also unscheduled, Pearce at first recalled no December conversation with Freund, placing it in February 1976. He then recalled two separate occasions when, according to Pearce, he told Freund in response to her query as to when he was going "to give us a raise" that, "Doris, you're on a one way street. You're on a dead-end street," and "Doris, you must have your head in the sand." Pearce attempted to explain these responses on not wanting to discuss the subject in a cocktail lounge. The Administrative Law Judge accepted his version because it strained his credulity to believe that Pearce "would have been so incredibly naive as to senselessly compromise his Company and its negotiating position so soon after the recent union organizational campaign and Board election and at a time 3 months after contract negotiations had begun." That Respondent stretched these negotiations for nearly 11 months without reaching a contract was entirely overlooked by the Administrative Law Judge; he misinterpreted the time frame.

<sup>18</sup> I would also find an 8(a)(1) violation, as alleged in sec. IX(d) of the complaint, concerning the October 13, 1975, negotiating session, at which President Duckworth reminded the negotiating committee that Respondent had once before gone out of business because of a union's demands and they should keep this in mind. The Administrative Law Judge, in his discussion of that October 13 meeting, failed to mention not only the adamant position Respondent had taken on no wage change—corroborated by its own negotiating notes—but also this threat by Duckworth, which is similar to his remarks at the Holiday Inn made that same month. In my view, the threatening remark is plausible in context, and I would not rely, as the Administrative Law Judge apparently did, on his general crediting of Duckworth over Union Negotiator Turner whenever there was a conflict.

lined Respondent's position on wages by stating that there would be "No change in present wages. We believe our present wages are adequate. Although we will discuss wages for months, we will not change them." This statement is blatantly antithetical to good-faith bargaining. In my view, this approach characterized the bargaining for more than 10 months and was only slightly varied on July 15, 1976, as discussed below.

For example, as of October 13, 1975, the vast majority of employees were receiving \$2.30 per hour as assemblers or machine operators. On October 20, Respondent proposed a rate of \$2.20 per hour for new employees, with increases of 10 cents per hour at the end of 60 days and another 10 cents at the end of 4 months. Had a contract resulted, that proposal would have meant higher wages for employees hired after the effective date than for existing employees. Another proposal limited to new employees was made by Respondent on January 12, 1976. This would have put the base rate for them at \$2.30, with an even greater potential after 4 months for the new over existing employees. Then, in early March 1976, Respondent proposed that new employees be paid at "ten cents per hour above the minimum wage." It went on as follows: "On each consecutive anniversary date of this agreement and until its expiration, each employee will receive an increase in their rate of pay of ten cents per hour." The latter apparently prompted the Union on March 9 to write employees and members as follows: "Would you believe that even though we have filed unfair labor practice charges against the Company, they are offering us no wage increase at all for one year. They know we could never agree to anything so ridiculous . . ." (Resp. Exh. 12). It should be noted that at that time the Union was picketing with signs saying there had been no wage increase for 2 years.

Then, on July 15, 1976, Respondent offered a 4-year contract that would pay new employees \$2.60 per hour, with an increase to \$2.75 after 90 days, and it set \$2.75 as the base rate for machine operators and assemblers "for the first year after signing the agreement." Not only had the Union opposed accepting more than a 3-year agreement in the absence of substantial benefits, but Respondent's July 1976 offer was again on the basis of equating new employees with employees having some experience, such as strikers and strike replacements (unless the latter were lead persons, packers, shippers, or tool-and-die makers). This closely approaches a demand that the Union abdicate, as the Board found in *Tomco Communications, Inc.*, 220 NLRB 636 (1975).

To return to the progress of negotiations on other issues, at the fourth session, on October 20, 1975, Respondent submitted to the Union its first written

counterproposals, which, however, did not cover cost-of-living increases, wage classification and job-bidding proposals, plant safety, jury duty, sick leave, funeral leave, vision care plan, and dental care plan.<sup>19</sup>

By the seventh session, on November 28, the parties had reached agreement only on preamble, jurisdiction (by agreeing to use the description of the unit in which the election was conducted), and bulletin board use. At the next session, on December 30, the only item agreed upon was a plant visit clause. At this session, however, Respondent sought to change the jurisdiction clause agreed to at the last session, on the grounds that Respondent had not consented to the Regional Director's unit description.

At the January 6, 1976, meeting, the Union renewed its request for a full list of shop rules, which Respondent wished to incorporate in the contract. On the subject of grievance-arbitration, Respondent was insisting upon no shop steward being present to represent the grievant at the first step.

On January 12, the Union reported that it had requested the services of the State Conciliation Service; Respondent would not accept this. Respondent also maintained that it would not change its position on management rights. The Union again asked for a full list of work rules on January 27, and proposed a choice of four dates for the next meeting, at which it planned to have an International representative present. Respondent found none of the dates convenient. The Union stated that a strike vote would probably be held and asked whether Respondent was still refusing mediation. The answer was "yes." The strike began January 30, and the initial charge was filed February 3.

At the February 8 meeting, Respondent, after declining to review the various proposals to see what had been agreed to, refused the Union's unconditional offer to return the strikers to work and to withdraw the charge. Respondent declined the offer, demanding that the charge first be discussed. As my colleagues find, and I agree, this converted the strike into an unfair labor practice strike.

The February 17 meeting was arranged by a Federal mediator, whom Respondent called an "arm of the Union." No significant progress was made, and some less favorable proposals were advanced by Respondent.

On March 8, the 15th meeting, Respondent changed its original 3-year contract proposal to a 5-year proposal on the grounds that the Union—which initially had proposed a 1-year contract—failed to

<sup>19</sup> Through the 12th prestrike bargaining session on January 27, 1976, a period spanning nearly 5 months, Respondent had yet to make counteroffers on these matters. Respondent's prolonged failure to engage in any meaningful bargaining on these matters refutes the Administrative Law Judge's finding that it did not use delaying or evasive tactics or refuse to discuss proposals.

respond to Respondent's 3-year term proposal. As of this late date, Respondent had still not presented a *written* counteroffer regarding the jury duty, sick leave, and funeral leave proposals. Its counterproposals of that date stated: "Employees shall not be paid for time away from work due to jury duty, sickness, or attending funerals."<sup>20</sup> At the next session, on March 19, Respondent informed the Union that it would remain unyielding in its concept "that there would be no pay in those areas."

Here, as with respect to wages, Respondent was obdurate to the extent of appearing to exclude the Union from participation in decisions involving obvious conditions of employment. Its posture was similar in its handling of the Union's September 9, 1975, safety proposal. Respondent considered it an "internal problem" but failed to convey its objections to the Union. At the January 27 meeting, it spoke of the possibility of a "safety committee," as to which no specifics had then been developed, but made no actual proposal until May 7.<sup>21</sup>

Proposals regarding job bidding and promotions as initially proposed by the Union also received the obdurate treatment. Amaro admitted that Respondent never made a "formal counteroffer" to the Union on job bidding or promotions until the March 8, 1976, meeting. What it then proposed was that it have the sole right to determine these matters. Also, at the March 19, 1976, session, Respondent maintained its position that its supervisors were to have the unilateral and nongrievable right to determine work assignments and promotions. Earlier, during the prestrike negotiations, Respondent displayed its intransigent opposition on another management rights matter. Respondent's counterproposals included the provision, deemed unacceptable by the Union, that "there will be no change in the amount or nature of work now performed by supervisory and/or salaried personnel." Attempting to reach a compromise position, the Union, at the January 12 meeting, proposed that supervisors or salaried personnel be allowed to perform bargaining-unit work under certain conditions such as "testing, set-up (work), training and emergencies." Respondent rejected this concession. In fact, as Union Negotiator Turner testified, President Duckworth viewed management rights as "the Company's birthright, and they were not about to give it up, re-

gardless of how many mediators or conciliators were brought into the picture."

Against this background of Respondent's dilatory tactics and intransigent positions on mandatory subjects of bargaining such as employee wages and safety procedures, I am persuaded that Respondent engaged in surface bargaining without good-faith intent to reach overall agreement. I am not persuaded by the contrary view based on the parties' having reached agreement on 18 of over 30 items by the end of the 23rd bargaining session on July 15, 1976—near the end of a 6-month strike and after the assistance of the Federal Mediation and Conciliation Service. From the Administrative Law Judge's tabulation in his Decision (see par. 3 of the section entitled "*Bargaining Sessions Subsequent to May 7, 1976*"), the parties lacked agreement on eight significant issues. That assessment of the matter simply establishes to my satisfaction an intent on the part of Respondent to negotiate for months on end concerning issues that did not add up to total agreement, thus "lasting out" the certification year without achieving a bargaining contract. The Union had by then lost the strike; at least half of the 65 employees who struck failed to respond to the July 30, 1976, unconditional offer to return to work.

It is Respondent's entire course of conduct that we are assessing. Because I am convinced that Respondent's overall conduct reveals an intent to frustrate agreement, I would find that Respondent bargained in bad faith.

#### APPENDIX

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

WE WILL NOT discourage membership in the International Chemical Workers, Union Local 97, or any other labor organization, by unlawfully failing or refusing to reinstate or otherwise discriminating against employees because they have engaged in protected strike or other concerted activity for their mutual aid or protection or because they have engaged in union activity.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed under Section 7 of the National Labor Relations Act, as amended.

WE WILL make whole those employees who went out on strike on January 30, 1976, for any loss of pay they may have suffered as a result of our discrimination against them, plus interest.

WEATHER TEC CORPORATION

<sup>20</sup> This tends to refute the Administrative Law Judge's finding that, at the January 27 meeting, the Union's proposals with respect to employees' jury duty, sick leave, and funeral leave "were conceptually agreeable," with disagreement only "as to the ambit of and amount of leave time to be accorded the employees."

<sup>21</sup> The Board has found that an employer's persistent refusal to discuss specific safety and work rules, except to insist that it would accept nothing less than the absolute right to promulgate such rules unilaterally, constitutes bad-faith bargaining. See, e.g., *San Isabel Electric Services, Inc.*, 225 NLRB 1073, 1080 (1976).

## DECISION

## STATEMENT OF THE CASE

HENRY S. SAHM, Administrative Law Judge: On February 3, 1976, and March 17, 1976, International Chemical Workers Union, Local 97, hereinafter called the Union, filed charges with Region 20 of the National Labor Relations Board, hereinafter called the Board, alleging that Respondent, Weather Tec Corporation, violated Section 8(a)(5) and (1) of the National Labor Relations Act, hereinafter called the Act. Respondent filed an answer on May 10 denying the commission of any unfair labor practices.<sup>1</sup>

The hearing commenced at Fresno, California, on July 19 and concluded on August 25. At the close of the hearing the parties waived oral argument. Volumes of transcript, over 2,000 pages, and literally hundreds of exhibits were received the following month. All parties filed briefs on November 1, which have been carefully considered.

Upon the entire record in this proceeding, including my observation of the witnesses, and after consideration of the briefs, there are hereby made the following:

## FINDINGS OF FACT

## I. THE BUSINESS OF RESPONDENT

The Respondent, a California corporation with an office and a factory located in Fresno, California, is engaged in the manufacture and sale of agricultural water-sprinkling heads. It has a working complement of approximately 80 production and maintenance employees, including shipping and receiving employees. During the past calendar year, Respondent Company purchased and received goods and materials valued in excess of \$50,000 directly from suppliers located outside the State of California. It is undisputed that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

## II. THE LABOR ORGANIZATION INVOLVED

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

## III. BACKGROUND

On July 30, 1975, a secret-ballot election was conducted by the Regional Director for Region 20.<sup>2</sup> A majority of Respondent's production and maintenance employees, including shipping and receiving employees, designated the International Chemical Workers Union, Local 97, to be their bargaining representative. On August 7, 1975, the Union was certified as the exclusive bargaining representative of the unit described immediately above.

That same month union and company officials met to arrange a date for a bargaining conference. The parties scheduled a meeting for September 9, 1975. Thereafter, there were 22 additional negotiation sessions between union

and company representatives, the last one being held 10 months later, on July 25, 1976. Eddy Turner, financial secretary and business agent of the Union, attended all 22 of the negotiating sessions hereafter described. Turner testified in response to a question by the General Counsel that each of the "separate bargaining sessions last[ed] on the average . . . approximately three hours."

The Respondent canceled some five meetings and the Union about three from the time of the first session, on September 9, 1975, to January 30, 1976, when the strike began. Additionally, 4 days after the strike was called, the Union canceled a meeting which had been scheduled for February 3.

The General Counsel contends that Respondent's bargaining team "refused to meet at reasonable times and places." The General Counsel argues that "on many occasions while the Union requested that there be longer negotiating sessions, the sessions were scheduled approximately [by Respondent] a week apart for only an hour, hour and a half. This is in the initial stage of the investigations, approximately September through January . . ." It is also General Counsel's position that "the Employer refused to bargain about what have been termed mandatory subjects of bargaining . . . with respect to Union security clauses, Union check-off clauses, and, in part, clauses referring to seniority of employees in the bargaining unit or on temporary layoff in the bargaining unit." The employees' union representative claimed after the 12th negotiating session that the Company's attorneys and officials were not bargaining in good faith by resorting to delaying tactics which hindered any substantial progress from being made. It is General Counsel's contention, therefore, that the Union was compelled to call a strike on January 30 to protest the Employer's dilatory tactics.

The Respondent's version, however, for the genesis of the January 30 strike places the onus on Jerome Levine, an official of the International Union. According to the Respondent, Eddy Turner announced at the January 27 session that Levine would be in Fresno from January 30 to February 2 and would like to arrange the next negotiating session on one of those 4 days. Terry Amaro, Respondent's general manager, informed Turner that the company negotiators had prior out-of-town business commitments but that it would be agreeable for them to meet with the Union's negotiating team a day later, on February 3. Levine, upon hearing of this, became piqued and called a union meeting at which he recommended a strike vote, which was passed by Local 97's membership. Amaro testified that during this period of time the Federal Mediation and Conciliation Service (FMCS) was assisting both parties in an effort to get them to resume bargaining. According to Amaro, one of the FMCS officials "predicted" that if there was no meeting scheduled for a date acceptable to Levine "there would be a work stoppage." The strike began on January 30 and was still in effect on August 25, when this proceeding concluded. The Respondent contends that these circumstances reveal that this was an economic strike rather than an unfair labor practices strike.

Detailed below are the respective positions of the parties during the course of negotiations, and the Respondent's position, allegedly instituting unilateral changes in its employ-

<sup>1</sup> All dates refer to 1976 unless otherwise indicated.

<sup>2</sup> A stipulation for a consent election was executed by the parties on June 24, 1975, and approved by the Regional Director on June 27, 1975.

ees' working conditions; dealing directly with the employees and not the Union; and "refusing to meet at reasonable times and places to negotiate a contract, refusing to furnish information relating to the duties of salaried personnel it sought to exclude from the unit, refusing to bargain about mandatory subjects of bargaining and refusing to make substantive changes in an effort to arrive at a contract."

#### The Prestrike Meetings

September 9, 1975

At the first meeting of the union and company representatives, Eddy Turner, the local's financial secretary and business agent, along with the employee members who together made up the Union's negotiating team,<sup>3</sup> submitted to the Company's negotiators a proposed collective-bargaining agreement for their consideration.

Turner, the Union's chief negotiator, testified that as he was preparing to hand the Union's proposals to the company representatives Duckworth, Respondent Company's president, stated at the outset that it would be the Company's policy to avoid "any personal vendettas or anything like this to enter into negotiations. And I told him that the Union agreed completely with him, that we were here to bargain in good faith, to reach an agreement, and we expected the Company to do the same." Duckworth then asked the bargaining committee members, including the employee negotiators, whether they had any complaints with respect to working conditions or union matters that they wanted to discuss before actual negotiations for a collective-bargaining agreement commenced. None were voiced.

The Respondent, upon being given the Union's proposed 15-page contract, comprised of 21 provisions, stated they would study it and report back at the next bargaining meeting. The Union, through Turner, requested that the Company furnish it with a seniority list of its bargaining-unit employees and their date of hire, marital status, and number of dependents. The Company complied with the request.

October 3, 1975

All the provisions of the Union's proposed contract were reviewed and discussed, with emphasis on new job and wage classifications, particularly a request by the Union that three leadmen be included in the collective-bargaining unit. Additionally, the Union requested that the Company provide the unit employees with a health, dental, and optical insurance plan. The duration of the proposed contract was also discussed.

Duckworth complained in response to the Union's demands for speedy replies to its proposals that he was physically unable to intelligently and objectively discuss and answer the Union's complicated questions. This applied particularly to the involved health, dental, and optical insurance programs until the Company could contact casu-

<sup>3</sup> The employees' negotiating committee was comprised of Gayle Weber, Doris Freund, Billy Joe Alsop, Edna Smith, and Bill Harris.

ality and insurance companies to study various plans to determine the costs entailed and ascertain whether the Company could afford the various union health plan proposals. Turner outlined in a general fashion the estimates of the various plan costs he had obtained from several insurance companies as compared to the cost of the union plans.

Back seniority was the next topic discussed. The Union took the position that reemployed workers should retain all seniority acquired during a previous employment in case of an economic layoff, so that those workers last hired would be the first laid off. Duckworth countered that the solution to this particular matter would be subject to the Respondent's "past rehire policy." The Union agreed that a further study was required by the conferees.

October 13, 1975

At the beginning of this third bargaining meeting, Terry Amaro complained that Doris Freund, a bargaining-unit employee and member of the employees' negotiating team, was creating a problem. Amaro claimed that Freund was soliciting employees not to drink coffee furnished by the Company during their breaks by telling them the Company had changed its practice of paying for the coffee without first clearing the new system with the Union. Freund was telling the employees that this was illegal. Duckworth added that he changed the coffeebreak system in April 1975, long before the Company was aware that the Union was organizing its employees and more than 4 months before the Union was certified.

The Union then requested the Company's reaction to its wage proposal, which provided an hourly pay increase of \$2 for all unit employees. Duckworth commented that it was his belief this proposal of a \$2-per-hour wage increase was ridiculously exorbitant and cruelly deluding to the employees. Duckworth stated that the Union was using the proposed wage increase as a ploy for leverage in an effort to hold the employees together and united in order to uplift their morale during the long time it might take to negotiate a contract.

The company representatives stated that a union dues checkoff provision was unacceptable to them. Discussed, too, was a provision for a union shop, which would require all unit employees to join the Union. The company negotiators opposed this, stating, according to Turner, that "they didn't believe that any employee should have to belong to a union unless they wanted to."

The company representatives then asked Turner to explain the Union's wage demand, and he told them that supplement A to the proposed agreement made reference to the various wage classifications and the wage rates for those classifications and that supplement B detailed the formula for computing the cost-of-living escalator clause. Nothing was agreed upon.

Turner then asked Duckworth if he had brought the Company's plant working rules for the employees in performing their duties. Duckworth replied in the negative, assuring Turner that he would produce them at the next meeting.

The parties then discussed and established ground rules for the manner in which all negotiations would be con-

ducted at future bargaining sessions. This meeting lasted 2-1/2 to 3 hours.

October 20, 1975

At the start of this meeting, the Respondent Company's bargaining representatives submitted to the union negotiators their counterproposals. These consisted of a complete written proposed collective-bargaining agreement of 12 pages, containing 19 provisions which Respondent was willing to sign. Turner suggested a recess in order to afford the members of the union negotiating team sufficient time to study the Company's counterproposals. When the union representatives returned to the meeting room, Turner announced they would prefer to adjourn, stating "that from looking over [Respondent's counterproposals] it appeared that we had a lot of work to do . . . ." They thereupon adjourned.

November 6, 1975

The only subject on the agenda of this fifth meeting was the Company's jurisdictional clause proposal, which provided, *inter alia*, that "supervisory employees" and other designated employees would be excluded from the terms of the collective-bargaining agreement. A discussion ensued on this proposal, including the meaning of the term "salaried personnel" in the context of specifying certain named employees. No agreement was reached, and the meeting adjourned after approximately 3 hours' discussion.

November 21, 1975

At the outset Turner requested permission of the Company "for a tour of their plant, to go through the plant and observe the working conditions, et cetera," to which Duckworth consented. It was next agreed by the parties to discuss each of the items in Respondent's written counterproposals *seriatim* and chronologically. After discussing all the provisions, Turner noted that no mention was made nor provisions included in the Company's counterproposals with respect to "an optical plan, cost-of-living increases, funeral and sick leave and excused absences for jury duty." The Company negotiators agreed to look into these provisions suggested by the union negotiators and to report back to the Union on these matters at the next meeting.

A discussion was then held as to whether four named employees should be included in the bargaining unit. The Company contended they were supervisors and the Union denied they were. No agreement was reached.

November 28, 1975

As soon as the conferees convened, Duckworth, the president, announced that Respondent's general manager, Amaro, would supplant him as principal spokesman for the Company. The first matter discussed was the preamble language submitted by each party as the proposed version of this item of the contract. It was agreed to accept the language proposed in the Company's counterproposals as amended.

The next topic considered was jurisdiction, in the context of whether certain named employees should be included or excluded from the bargaining unit. Amaro agreed with the Union that employee Martino should be excluded. After additional discussion and at the insistence of Turner, the Company agreed that the language of the Board's certification of representative should be adopted.

The next matter discussed was the Company's management rights proposal. Turner testified that the Company "had proposed that they would slip over to the management rights clause, I think, and we had objected to the language itself." Turner continued that this had reference "to no change in the amount of work done by supervisors . . . . Discussion on salaried personnel doing bargaining unit work, and we told the Company that we disagreed with this, that we did not believe that bargaining unit work should be done by supervisors." Turner stated that the company representatives suggested in answer to the Union's objection that this disagreement could be resolved by transferring the clause in dispute from the jurisdictional provision and inserting it in the management rights section.<sup>4</sup>

Turner then responded by stating to Amaro that "if the Company would consider a successor clause, then we would give some serious consideration to putting it into an agreement." This provision provided that in the event of a sale of Respondent's business the buyer was bound by the provisions of the collective-bargaining agreement executed by Respondent and the Union. Duckworth agreed that the successor clause would be all right with him, provided the Respondent's board of directors would approve it. Turner acknowledged that this provision was agreed to in April 1976.

Turner then raised the question of the Company's section 5 provision, "Hours of Work," complaining that it "defined [neither] the hours of work . . . [nor] a day's shift . . . and also when [the three shifts] would start and when they would end. This in turn," stated Turner, "would create a problem for possibly a shift differential, this type of stuff." Amaro volunteered to study the matter and, if necessary, draft new language to meet Turner's objections.

Turner was critical of the Company's overtime proposal, stating it "was not clear, it was on the cloudy side as to what would be considered overtime and what would not and what the rate of pay would be . . . . There was a rate of pay but it was tied [to a situation where] if an employee was absent, then it would result in that employee not being able to get time and a half on a Saturday or Sunday [if he were absent on any day from Monday to Friday inclusive of that same week] . . . ." The Company also proposed a provision that in the event overtime was scheduled the employee would be required to work it, and in the event he refused this would be grounds for termination unless he was excused for a valid reason. No agreement was reached.

Next discussed at this bargaining session was holidays. The Company objected to the number of days the Union demanded should be designated as holidays, which the Union defined as "unworked paid holidays." No agreement was reached at this time.

<sup>4</sup>"Section 2-Jurisdiction" of the Company's counterproposals provides: "There will be no change in the amount or nature of the work now performed by these salaried personnel."

The parties then considered absences, in the context of the Company's proposal which would amend the Union's provision by requiring employees to notify the Employer 4 hours before they were scheduled to report for work. The failure to do so, testified Amaro, is presently provided for in the Company's printed working rules under the disciplinary sections. Amaro promised he would supply Turner with a copy of the rules. Turner admitted he received the rules before the employees went out on strike on January 30, 1976.

The parties next considered seniority, in the context of what the result of a layoff would be with respect to an employee's seniority rights and the computation of seniority when he was recalled to work. The Company maintained that in an economic layoff of less than 60 days, the priority of an employee's recall status would be controlled or determined by his seniority. The Company argued, however, that a layoff of more than 60 days would be tantamount to a dismissal and that, therefore, seniority would not apply when the plant resumed operations. The Union disagreed, pointing out that Respondent's plant was a seasonal operation, frequently working only 6 to 8 months each year, so that, according to Turner, employees "would never be able to establish seniority or recall rates." No agreement was reached.

The Union then passed on to their proposed contract provision with respect to job bidding, which the Company had made no provision for in its collective-bargaining agreement counterproposals. The company conferees contended they could not agree with the policy behind a job bidding system whereby a job opening in the plant would be filled exclusively by plant employees. The procedure followed in the past by the Company had been to post vacancies as they occurred on the plant bulletin board so the employees could apply or "bid" for them. Turner testified that the Company insisted its supervisors must possess the exclusive authority as to whom they selected for job openings, as it was within management's competency alone to determine who could best perform the particular job.

The Union's job bidding procedure also required 72 hours to elapse between the times the job was posted and the vacancy filled. This, the Company argued, was not feasible, as some jobs were of such a critically important nature they had to be filled as soon as possible in order for the plant to continue operating. Turner suggested that whenever such circumstances occurred, the Union would draft appropriate language to cover this type of situation. No agreement was reached at that time.

The Company's counterproposals also included a clause whereby an employee, in order to be entitled to a vacation, must work a minimum of 1,600 hours annually. The Union objected, explaining that the Company's production of agricultural sprinkling equipment was seasonal in nature, causing layoffs of 4 to 5 months each year. This would result, argued Turner, in the employees rarely working a sufficient number of hours annually to qualify for a vacation. Turner thereupon requested that the Company furnish the Union with figures showing how many, if any, employees would qualify for vacations under this provision. The Company never did so. No agreement was reached.

A discussion on the plant's working rules was held in

abeyance pending the Respondent furnishing the Union with copies of these rules.

Reference was next made to no-strike and no-lockout provisions, but discussion was postponed until a later meeting.

The parties then discussed provisions on health and hospitalization insurance and a dental plan. A resolution was deferred until each party had obtained cost data from its insurance company.

The Union next referred to the Company's proposed grievance procedure. It objected in particular to the provision obligating the employee to file his grievance in writing within 24 hours of the alleged incident. The Union complained that this gave the grievant insufficient time. Also objected to by the Union was the Company's failure to provide in its proposal that the employees could request the shop steward's presence at the first step of the grievance procedure. Turner testified that the Union objected to proposed company language "under the exceptions to the grievance procedure . . . [wherein] they were telling us [certain situations under which employees] could possibly be terminated . . . with absolutely no recourse to the grievance procedure. And we didn't agree to that." Turner explained that these "exceptions" to the grievance procedure meant, in effect, that if employees violated these particular rules they would be terminated without recourse to the grievance procedure. Turner stated that this was objectionable.

Next considered was the method of selecting "arbitrators." The Union objected to the Company's proposal, which called for the selection of "mediators." The Union also objected to the absence in the Company's proposal of the method by which the three arbitrators would be selected. No agreement was reached.

At this bargaining session, agreement was reached on the following items: the language of the preamble and jurisdiction sections of the agreement and a provision obligating the Company to post a bulletin board in the plant to be used by the Union for union-related affairs, including meeting dates for its members.

December 29, 1975

Since the last negotiation meeting on November 28, the Union's negotiating team had amended and revised the Union's original proposed collective-bargaining agreement in order to draft a "clean" set of up-to-date proposals incorporating what had been tentatively agreed to during the course of the previous meetings. Turner described it this way: "We gave the Company some proposals, not a complete package . . . on certain items which we had been discussing, hoping that we could by discussing these proposals, that both parties would understand what the intent was and we could possibly reach agreement on some of them."<sup>5</sup>

The first subject discussed was hours of work. No agreement was reached with respect to this item at this meeting. The following subjects which had been discussed at the pre-

<sup>5</sup> The General Counsel, when requested to clear up what appeared to be some confusion as to what the witness meant by this description, described it as follows: ". . . the Union's regrouped set of proposals which were later given to the Company as a package." See G.C. Exhs. 3(a), (b), and (c).

vious meetings were gone over again *seriatim* by the parties: vacations, grievance procedure, shop rules, and the union dues checkoff provision proposed by the Union. Turner testified that Duckworth stated with respect to the latter "that he did not believe in it, that in fact he didn't even like the idea of having to take Social Security out of the employees' paychecks but that was required by the law so he had no choice."

December 30, 1975

At the start of this meeting, the Union and the Company both presented proposals.<sup>6</sup> The meeting then began with the Company presenting its completely revised counterproposals brought up to date, which included, *inter alia*, amendments encompassing the language describing the appropriate bargaining unit. Turner testified it was his understanding that the language describing the bargaining unit had already been agreed upon at a previous meeting so that this proposed amendment at this late date was tantamount to renegeing on the part of the Company.

The next item discussed was the provision requiring the Union's business agent to give the Company 24 hours' advance notice before visiting the Company's plant. The company representatives stated that such notice would not be necessary; merely a phone call from the Union would be agreeable to the Company.

The next item on the agenda was job bidding. Amaro testified that the Union's demand that all job vacancies could not be filled until 72 hours had elapsed from the time of posting on the Company's bulletin board would result in forcing the plant to shut down where the job advertised was of critical importance to the plant. It was feared that this might result in a shutdown of the production line, employees being laid off, and the plant closed until such time as the job vacancy could be filled. The Company suggested language exempting from the 72-hour waiting period requirement a job which required the qualifications of a person who had to be either a "foreman or lead person." Turner would not agree to this exemption.

The last matter discussed at this bargaining session was appropriate language defining excused and unexcused employee absences from work. No agreement was reached.

January 6

At this meeting, Amaro presented a second complete revision of the Company's original counterproposals, which included language affecting "rotating shifts and hours of work." The parties discussed the item, but no agreement was reached. Amaro then explained the Company's revised counterproposal with respect to the definitions of excused and unexcused absences, but the Union did not agree to the language offered by the Company or to the Company's proposal concerning overtime.

Amaro then submitted the Company's revised counterproposal regarding the amount of time an employee had to

<sup>6</sup> At the December 30 meeting, the Company presented to the Union its revisions of the following provisions: hours of work, shift operation, shift overtime, emergency work, union rights and responsibilities, jurisdiction, grievance procedure, qualifications, call-back pay, and seniority.

file a grievance. The Company had modified its original 24-hour proposal and extended the filing time to 48 hours. No agreement was reached, as the Union was adamant in its insistence that the grievant should be allowed 72 hours to file.

The Company did agree, however, to the Union's previously submitted proposal which provided that the union shop steward would be permitted to be present at the first step of the grievance procedure. Also agreed to by the Company was the Union's proposal on allowing an oral grievance. (See *supra*.) At this January 6 bargaining session, the Company complied with the Union's earlier request and supplied the negotiation team with a written copy of the plant's shop working rules.<sup>7</sup>

The next item discussed was the Company's original counterproposal with respect to the notice required to recall employees who had been laid off because of economic reasons. The proposal merely stated that the Company would make a "reasonable attempt" to contact the employees. The Union objected to this recall language, stating that not only was it too indefinite, but that the Company also should be required to send registered letters to the employees with return receipt of their delivery. Duckworth agreed, providing that the Union paid half the postage. The union negotiators refused.

The last matter discussed at this bargaining session was a request by Turner that the Company join in a request with the Union to invite Federal Mediation and Conciliation Service officials to attend the next meeting, scheduled for January 12.

According to Amaro, Turner stated, "I believe we have made substantial progress and we suggest that we get a third impartial party into the program now." Duckworth countered by suggesting that this be postponed, as he and Amaro wanted another meeting before giving the Union an answer, in order for the Company to consider revised language for those proposals still in dispute.

January 12

At the start of this meeting, both parties presented their revised packets of proposals. The Respondent's consisted of 14 typewritten pages and included revisions of the original counterproposals which were submitted to the Union on October 20, 1975, as further revised on December 30 and January 6 and 12.

The jurisdictional clause was the first item discussed at this meeting. Turner charged the Respondent with renegeing from the clause previously agreed on at the November 28 meeting. Turner claimed that the clause presented at this meeting specified which of the employees were to be included in the unit but not which were to be excluded.

The management's rights clause was next discussed. Turner testified that Duckworth stated that this provision was the Company's "birthright and he would not agree to its being compromised." It was discussed vigorously, but no agreement was reached.

Turner testified that tentative agreement had almost been reached with respect to the Union's rights provision in the

<sup>7</sup> After the January 30 strike, the Company supplied the Union with a copy of its disciplinary procedures.

contract. When the Company negotiators stated, however, that the Union's proposal was acceptable provided the Union would notify the Company promptly of the name of the shop steward it would appoint, Turner refused to grant the Company's request.

Both parties agreed to a clause whereby they would not engage in any discriminatory conduct.

When the union-security provision was debated, Turner testified that the company representatives declared they did not believe in the concept embodied in such a clause. Moreover, the company representatives added that there was a cost factor involved, inasmuch as the Company would be saddled with the bookkeeping costs entailed in deducting union dues from each unit employee's paycheck and forwarding these dues deductions to the Union's headquarters.

Next on the agenda was hours of work. The Union complained that the Company's proposal failed to specify the starting and concluding times of the day shift and night shift. This was important because it "might affect a particular shift having a wage differential." No agreement was reached.

Turner then informed the company representatives that he was requesting the intervention of the FMCS in order to assist in the negotiations and arrive at the execution of a collective-bargaining agreement. According to Turner, Duckworth replied, "He was not accepting it. He didn't want [them] in . . . He didn't believe they were necessary."

According to Amaro, Duckworth stated "that the negotiations up to this time have been in good faith . . ." Amaro testified further that Turner agreed and stated there was no reason to question their integrity at this time.

At this point in the negotiations, Duckworth advised the Union that the Respondent was moving into a new plant the following week. Turner acknowledged that he already knew that prior to this meeting. Duckworth then stated that as soon as the new plant began operating again at its new location, he would so inform Turner and they would arrange a date for the resumption of negotiations. After the move was completed, the Respondent notified the Union, and the parties agreed to meet on January 27.

#### January 27

The Union presented to Respondent at this 12th meeting its revised proposals. The first matter discussed was the no-lockout-no-strike clauses in the parties' respective proposals. Turner commented that he could understand the reason the Company would want a commitment embodied in a collective-bargaining agreement whereby the Union agreed not to strike but he could not understand why the Company in its proposals had failed to include a no-lockout provision. Turner testified to the effect that Duckworth said he "would be willing to consider a no-lockout clause but it would only be effective if the Union did not strike . . ." The Company, continued Duckworth, according to Turner, "had requested a no-strike clause and had submitted language which would say [that if] the Company did not lock out [the Union] we would not strike the Company . . . The Company, however, was taking the position that they weren't going to give us a no-lockout clause, but it would be

effective only up to the point that the Union struck." No agreement was reached on this provision at this bargaining session.

The next subject considered by the conferees was subcontracting. Turner testified that the Company would not agree to a subcontracting provision which would forbid the Company to subcontract "certain bargaining unit work." No agreement was reached.

Next discussed were the Union's proposals with respect to employees' jury duty, sick leave, and funeral leave. These items, in essence, were conceptually agreeable, but there was disagreement as to the ambit of and amount of leave time to be accorded the employees. No agreement was reached.

Finally, consideration was then given by the conferees to the employees' safety rules provisions. The Company stated that the safety of the workers in the plant was the Company's responsibility and not that of the Union. Moreover, it was asserted by the Company that various Federal, state, and local agencies were authorized to enforce safety regulations amply covering all phases of this subject. No agreement was reached at this meeting.

The parties then tried to resolve a disagreement with respect to the date of the next bargaining session. Turner testified that he had telephoned Amaro on or about January 23 and informed him that an out-of-town International representative of the Union, Jerome Levine, was coming to Fresno. Turner asked if the Company would agree to meeting with Levine and the Union's negotiating team on January 30 or 31 or February 1 or 2. Turner testified that "the Company's response was that they were unable to make those dates as they were committed elsewhere." Amaro, however, informed Turner that the company negotiators would be available on February 3. Turner responded that this date was "unacceptable" and insisted an earlier meeting was necessary, as Levine would be available only on the above-stated 4 days. The Company then suggested 10 a.m. on February 3. Turner replied that he would have to check with Levine to ascertain if this date was suitable. It appears that Turner, in the course of arguing about when the next meeting should be held, threatened the Company with a strike. Turner testified that Amaro then asked him if the Company would agree to a 10 a.m. February 3 negotiating session "[if that] would assure them that there would be no strike?" Turner answered, "No, [he] would not assure them that there would be no strike" Faced with this dilemma, if not ultimatum, Amaro agreed to the February 3 meeting with Levine and the union negotiating team. When Turner obtained the Company's consent, he testified that he told Amaro, "Now, that is how you get a 10:00 [a.m.] meeting."

On cross-examination, Turner denied that he had threatened to call a strike, stating: "I simply informed the Company that we were taking a strike vote. I did not in any way threaten a strike. I did not tell the Company at that time that we were going out on strike. As a matter of fact—on that particular meeting, Mr. Amaro asked if he would agree—if the Company would agree to a 10:00 [a.m.] meeting . . . the 3rd of February [if] that would assure him that there would not be a strike, and I said it would not insure him that, it would not assure him of anything." When asked by counsel what he meant by his statement, "that's the way

to get a 10 a.m. meeting." Turner's answer was evasive and incoherent.

Turner testified that at this January 27 meeting he again asked the company representatives if they would assent to a Federal Mediation and Conciliation Service representative attending the February 3 meeting. The Company's reply was in the negative.

At the hearing, Turner refused to comply with a *subpoena duces tecum* served by Respondent requesting the longhand notes he had taken during the course of the first 12 negotiating sessions. Turner stated he refused this request on the advice of his counsel, Jerome Levine. I asked Levine whether he was speaking for Turner as his "counsel" and as an "attorney" and member of the State Bar of Georgia. Levine answered, "Yes, sir."

#### The Strike Activity

Turner's interrogation on cross-examination elicited that about a week to 10 days before the January 27 negotiating meeting he contacted his Union's International headquarters and spoke to Mr. Arthur Wood, regional vice president for Region 9 of the International Chemical Workers Union, Los Angeles, and Mr. Jerome Levine. Turner advised Levine that a strike vote was being taken by Respondent's employees and also notified him that the membership had decided to strike the Respondent.

The day after the January 27 meeting, Turner met with Local 97's membership. He characterized this meeting as a "strike meeting" for the employees to determine whether or not to call a strike. The vote was unanimous to go out on strike. A picket line was established at the plant at approximately 1 p.m. on January 30.

When asked by the General Counsel the reasons the employees went on strike, Turner answered:

Well, there were many reasons. I think part of the reasons were some of the stuff that the Company had presented to us, and et cetera, that the employees felt were completely unreasonable and unjustified.

During his testimony Turner denied that he mandated the employees to vote for the strike or called the strike as a tactic to force Respondent into signing a contract with the Union. Turner stated he did not have such authority; only the employees' bargaining committee had the power to call for a vote by the employees on whether they wanted to go out on strike. Turner did admit, however, that he called the strike to exert pressure on the Company when it claimed prior out-of-city commitments prevented its negotiators from meeting with the Union on January 30 or 31 or February 1 or 2, stating, "That was part of it, yes."

Approximately 65 employees went on strike on January 30, 1976, about 1 p.m., and established a picket line manned by 20 to 25 employees. Turner testified that the placards carried by the strikers as they picketed Respondent's plant read: "International Chemical Workers Union, Local 97 on strike." Also on some of the picket signs was "a cartoon figure or drawing of Mickey Mouse" and the following writing: "No wage increases in two years."

After the employees went on strike, the Company immediately began to recruit replacements. The plant opened on Monday without a full complement of employees. It should

be noted that not all employees struck on January 30 but that some remained at their jobs.

Jerome Levine is a representative of the International Chemical Workers Union whose duties, *inter alia*, include handling grievances and arbitrations, assisting the membership in conducting local union meetings, and assisting local unions in negotiating collective-bargaining agreements with employers. Levine acknowledged that he contributed to the decision to convene the employees to vote on whether they wanted to strike on January 30. It appears that he was motivated, at least in part, to favor a strike when the Company informed him that their negotiators had prior out-of-town business commitments on the four dates of January 30 and 31 and February 1 and 2, when Levine was available, and suggested they meet on February 3. Levine refused and requested the FMCS to notify the Company that the union negotiating team would not be present for the meeting on February 3, which had been the date proposed by the Company. After the employees walked out on strike on January 30, Levine informed the FMCS immediately thereafter that he would see that the strikers returned to work if the Company would meet with the Union on one of the four dates agreeable to him, namely January 30 and 31 and February 1 and 2. On January 31, Levine requested the FMCS to use their good offices in an effort to end the strike and said that he was "pretty sure [he] could get the strikers" to return to work. On January 31, Levine drafted unfair labor practice charges that were signed by Turner and filed them on February 3 with the Board.<sup>8</sup>

Shortly after the strike began, on January 30, the Company instituted an injunction proceeding in the state court to restrain the employees from allegedly damaging the plant and intimidating working employees. Amaro testified he met Turner at the courthouse and "Turner expressed a desire to get back to the negotiating table and get this thing settled. And I [Amaro] said, 'Eddy, we certainly want to do that. We are genuinely interested in getting something settled here.'"

#### The Post-strike Meetings

After the strike began, Respondent's counsel, Robert Coyle, contacted Jerome Levine and requested a meeting with the Union as soon as possible. Levine testified that Coyle stated his desire "to get the strike behind us and to start negotiating a contract and in the meantime get everybody back to work."

#### February 8

A meeting was held on February 8 at which Attorneys Coyle and Carruth were present along with the company negotiators, Amaro, Duckworth, Frank Dye, and George Pearce, owner of the Respondent Company.<sup>9</sup> Present for the Union were Levine, supplanting Turner as chief negotiator;

<sup>8</sup> The allegations of the charges are quoted *infra*.

<sup>9</sup> It appears Pearce was present at most, if not all, bargaining sessions, beginning with this meeting.

February 27

Turner; Alsup, the President of Local 97; and also the four members of the employees' negotiating committee: Doris Freund, Edna Smith, Gayle Weber, and Bill Harris.

As a preliminary matter before discussing the substantive aspects of each party's provisions embodied in their respective proposals and counterproposals, Levine accused the Company of never having provided the Union with necessary information which the Union needed to bargain effectively. Levine cited the employees' seniority list consisting of their dates of hire, job classifications, and rates of pay and also the disciplinary procedures promulgated by the Company in dealing with its employees.

Carruth denied the truth of this accusation and declared that during the course of the first 12 bargaining sessions all the material described by Levine had been supplied to Turner. Levine insisted that none of this material had ever been supplied to Turner.

Levine then retorted by charging that the Company during the previous negotiations had also refused to consider union proposals, refused to meet with the Union at reasonable times and places, and reneged on items previously agreed to by the Company.

Respondent's attorneys requested that before the substantive issues of the proposals submitted by both parties were considered, Turner and Levine should first inform them of the facts upon which they accused the Respondent, in their NLRB charge filed on February 3, of the following: "refusing to meet with the Union at reasonable times and places; refusing to consider Union bargaining proposals; insisting on illegal and nonmandatory bargaining proposals to the point of impasse; renegeing on agreements reached with the Union; unilaterally changing working conditions; proposing and putting into effect a pay system which punished employees who voted for the Union; threatening employees with loss of jobs because of the Union and refusing to furnish information which the Union requested and needed to properly represent its members . . . . The company has engaged in surface bargaining insisting on bargaining over nonmandatory proposals and illegal proposals, withdrawn the authority of its spokesmen to reach binding agreements and unilaterally changed working conditions."

On March 17 Levine filed with the Board another charge signed by him accusing Respondent of "refusing to bargain in good faith, engaging in surface bargaining and backwards bargaining."

Levine refused to supply Respondent's attorneys the information they requested. The attorneys inquired how they could possibly answer the unfair labor practice charges of not bargaining in good faith if Levine, the Union's chief negotiator, would not supply them with the facts upon which the Union based its allegations, detailed above, that Respondent bargained in bad faith. Levine remained adamant in his refusal. At this point, testified Levine, "we packed our papers up and left the [negotiating] room." Thus the tone for the resumption of bargaining after the strike commenced was set by Levine as chief negotiator for the Union. Nothing was accomplished at this February 8 meeting.

The next bargaining meeting was arranged by the FMCS. In addition to the conferees from the Union and the Company, Manuel Fernandez and John Kraczyk of FMCS were present at this meeting. At the outset of the meeting, Coyle, Respondent's co-counsel, expressed his appreciation of the efforts of the FMCS in arranging the meeting. He continued that he preferred to negotiate with the Union alone, as he "still wasn't satisfied that it was necessary to have a mediator present."

Commissioner Fernandez, citing his statutory authority, emphasized that this meeting was his and convened by him. Moreover, added the commissioner, his prime interest was the damage to the local economy resulting from the "work stoppage." Attorney Coyle corrected this statement, pointing out that the Respondent's plant was presently in full operation. Amaro testified that Attorney Carruth then told the commissioner: "Don't you really agree, Mr. Fernandez, that a mediation service is really just an arm of the Union?"—a charge which the commissioner denied. After both sides conferred separately, the negotiation session commenced with Amaro and Levine as chief spokesmen.

The first matter on the agenda was the most recently revised proposals drafted by both parties. Levine testified that he told Amaro the current company proposals with respect to wages, hours, and the reopener clause were not understood by him and required clarification "as to what the Company's intent was beyond the written language." Levine also questioned Amaro with respect to the Company's proposal on union rights, stating he "could not make heads or tails of it." Levine, in describing Amaro's response, stated "If he gave me any response at all, it was really not an explanatory response. The best recollection I have now is that he said that was corresponding to the management's rights section, and that therefore there should be that kind of a union rights section." Company counsel then asked Levine if his objection would be met if the Respondent would withdraw this proposal. Levine, thereupon, stated that this met his objection, and the Company withdrew the proposal. Levine then demanded that the Company agree to language in the contract which would state that it agrees to observe not only the "express" terms of the contract but also the "intent" of the contract. Amaro suggested that Levine draft language to effectuate this proposal and when submitted the Company would study it. It was agreed to at the next meeting, on March 8.

Prior to this negotiating session, the Company had given Levine its proposed grievance procedure and copies of its employee working and disciplinary rules. The company proposal provided that at the first step of the grievance procedure the employee must state his complaint in writing and the union shop steward would not be permitted to represent the grievant. Additionally, if the grievance was processed to the third step with no agreement, the matter would then be submitted to arbitration.

Levine asked Amaro whether the Company intended to include those working and disciplinary rules in the collective-bargaining agreement. Amaro answered in the affirmative. Levine demurred, stating "this was a new proposal"

and objectionable to the Union, as "these rules should not be subject to the grievance procedure."

The next proposal discussed concerned a no-strike—no-lockout provision. No agreement was reached.

The Company's latest wage proposal was next discussed. It provided that newly hired employees' starting wages would be \$2.30 an hour, which would be increased to \$2.50 upon completing their probationary period. Also included was an incentive pay program in the context of established levels of production. No agreement was reached.

The conferees then passed on to the jurisdictional clause. The clause reads:

All production and maintenance employees, including shipping and receiving employees, employed by the employer at its present facility in Fresno, California, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

It appears that agreement on the wording of this unit description foundered on whether the word "only," which had been added by the Union at line 3 after "excluding," should remain. This revision was objected to by the Respondent, who insisted the language remain identical to that in the Board's certification. Levine testified he agreed to omit the word "only" after consulting with Turner, who advised Levine "that that word had merely crept in somewhere."

The next subject discussed was the Union's most recently revised proposals, which included a dues checkoff provision. Amaro stated that the Company would not agree to this. According to Levine, Amaro's reason was "that the Company did not believe in it." Levine stated that another reason advanced by the Company for not providing a checkoff of union dues "was that the employees would somehow not know what the cost of [union] representation was [to them] if the money were deducted from their paychecks, but that this would be brought home to them if they themselves physically had to pay that amount of money [each month] to the Union." And a third argument, testified Levine, "that Mr. Amaro made for not agreeing to a check-off clause was that there was bookkeeping costs [to them] involved . . ."

The next items discussed were the Union's union-security clause and the Company's agency shop proposal. The Company would not agree to the establishment of a union shop. It did, however, propose an agency shop. The parties could neither syncretize nor coalesce their conflicting views, and no agreement was reached.

The next item discussed at this meeting was union rights and responsibilities. Levine told Amaro that the Union would permit company supervisors to perform bargaining unit work "under certain circumstances, if the Company would make those circumstances clear." Levine then told Amaro that "he would draft language on supervisors doing unit work." The matter was then postponed to the March 8 bargaining session, at which time the Company agreed to the Union's revised proposal.

At this same meeting of the conferees, they discussed the following typewritten material sent to Levine by the company attorneys on February 12, in accordance with his request: a "list" of Respondent's disciplinary rules; an up-to-date (January 30) list of the names of its employees, their

current pay rates and their job classifications.<sup>10</sup> Levine inquired of Amaro whether the Respondent's so-called shop or plant working rules and disciplinary procedures were intended to be subject to the proposed grievance procedures. According to Levine, Amaro replied that neither the work rules nor the disciplinary procedures would be subject to the grievance procedures. Later, agreement was reached on the rights and responsibilities of management provision.

Next discussed was the Union's proposal regarding report-in pay, which provided, *inter alia*, that whenever the Company, because of lack of work, notified an employee not to report for work, he must be given 4 hours advance notice before the time he was scheduled to report for work. The Company objected to the requirement of 4 hours advance notice. Its previous proposal of January 12 only required 30 minutes advance notice. No agreement was reached at this time.

The next item discussed was call-in pay. According to Levine, Amaro had no objection to the substance of the Union's proposal, with the exception that the Company disagreed with the number of hours of advance notice the proposal required it to give the employee. The Union's proposal called for 4 hours' notice, while the Company believed that 2 hours would be sufficient. Levine stated that "There was tentative agreement reached on the language with the exception of the number of hours."

Next on the agenda was the Union's revised proposal on holidays. Levine testified that Amaro agreed to this proposal except for those matters having to do with "the number of holidays, the probationary period and the 2.5 times base-pay rate . . ."

Levine continued: "The next subparagraph [of the Union's proposal] has three items in it, that is: on eligibility for a holiday if an employee was off of work because of an industrial type injury, illness, or vacation, would he be entitled to that holiday pay . . . I asked Mr. Amaro if we could perhaps get closer to an agreement, if we could separate those three items and take them up one at a time . . . Mr. Amaro said that he didn't really see anything wrong if the holiday was tacked onto that vacation, that it might be okay." Levine concluded his discussion of this subject by characterizing Amaro's attitude as "a little closer meeting of the minds . . ." The Company also agreed with subparagraph (c) of the Union's substantive holiday subsection, which reads: "All time worked in excess of 8 hours on any designated holiday will be paid at three times the straight time rate of pay."

The next subject discussed was employees' absences. The Union had amended its original proposal to provide that 1 hour's notice must be given by the employee to the Company. The Company agreed with this revision, providing that the Union would agree to add a clause stating that in those situations where the Company had good cause to believe an employee was malingering and feigning illness the Company could request the employee to state the reasons for his absence. The Union refused to consider this.

With respect to the Union's loss-of-seniority provision, the Respondent Company was agreeable to most of the

<sup>10</sup> See G.C. Exhs. 4 and 5.

Union's proposals. The only difference revolved around economic layoffs of 3 or more months, which the Union contended should not result in a loss of an employee's seniority. Levine insisted on Amaro explaining his opposition to an economic layoff situation based on the premise that Respondent's business was seasonal. Amaro, the plant manager, predicted that although Respondent had been in business for only a short period of time, it was his judgment that the future augured well for the Company and that the number and duration of seasonal layoffs would become less in the future.

The parties then considered the Union's revised proposals, subparagraphs (3) and (4) of paragraph (B), entitled "voluntary quit and discharge for just cause," which the Company had accepted by adopting the identical language in its own counterproposal. The Union's proposal of subparagraph (C)(1), "Seniority," had been adopted by the Company when it conformed its revised counterproposal to the language of the Union's proposal. No agreement was reached with respect to subparagraph (D)(1) of the seniority provision, although Levine testified Respondent's counsel stated that he would "get back" to the Union later.

March 8

All the participants present at the February 27 session were in attendance at this meeting except the two Federal mediators. In addition, Arthur Woods, the International vice president and Levine's immediate superior, joined the union negotiating team at this meeting. This meeting convened at 10 a.m. and adjourned about 5 p.m.

At the outset of this meeting, counsel for the Company complained that tacks had been scattered in the vehicle driveway of the plant. Mr. Levine responded that if counsel or their clients "had any evidence of wrongdoing on any person's part, he would certainly be free to take the appropriate action. I did not know of any wrongdoing and the Union did not condone any wrongdoing."

The first item of bargaining on the scheduled agenda was the Company handing to the Union 29 pages of revised typewritten counterproposals, all of which constituted a complete proposed collective-bargaining agreement which the Company was prepared to execute. See General Counsel's Exhibit 14 for its provisions.

Levine stated that all of the provisions embodied in General Counsel's Exhibit No. 14 had been agreed to by the parties, subject, of course, to the express understanding that any provision agreed to earlier was "tentative" and could be withdrawn at any time prior to the parties affixing their signatures to the document.

At this session, the Company's written proposal captioned "Jurisdiction" embodied in the draft contract was agreed to by Levine, who wrote opposite it "okay" and the date, "3/8." Progress was made on the proposals of the Company with respect to management rights and union rights and ultimately agreed to by both parties later in this same bargaining session. Since all prior agreements, according to Levine, were merely "tentative," both parties reaffirmed their prior acceptance of the nondiscrimination clause.

The *casus belli*, namely, union security, with its concomi-

tant dues checkoff, also a bone of contention, were next discussed. The same arguments pro and con which are detailed *supra*, were again debated, with both sides engaging in hard bargaining but to no avail. Levine testified he informed the Company that "the Union is not inflexible on the union shop and this was a change in our position. But we really wanted the Company to consider checkoff with modification of the union shop. Mr. Amaro said, yes, they would consider it." Equally contentious, as detailed above, was the checkoff of union dues provision. Again it was vigorously discussed, but no agreement reached at this time. Later, however, agreement was reached on an agency shop.

The parties then moved on to the Company's written proposal titled "Hours of Work." No agreement was reached at this time.

The Company's report-in pay proposal was next discussed. No agreement was reached. Then call-back pay was discussed, and agreement was reached. Absences was next considered, but no agreement was reached. Holidays was the next subject on the agenda. No agreement was reached.

Respondent Company's wage proposal was discussed next. Levine inquired of Amaro what the phrase "new employees or new hires" meant, and Amaro explained. No agreement was reached.

The duration-of-contract proposal was considered, with the Company requesting a contract for 5 years and the Union 3 years. Again, no agreement was reached.

March 19

The March 19 meeting was attended by the same participants that were present at the previous meeting except for Woods, the International vice president. Attorney Carruth announced on behalf of Respondent that he and Amaro were authorized to bind the Respondent to any contracts, agreements, commitments, and verbal statements made or signed, subject to ratification by the Company's board of directors.

The hours of work provision was the first item discussed at this meeting. Carruth stated that the Respondent agreed to the Union's demand that there be three 8-hour shifts. Additionally, the Company agreed to reimburse the employees on each shift for a 30-minute paid-for lunchtime.

Next on the agenda were promotions and work assignments. The Company stated it was unable to agree with the Union's insistence that all job vacancies be filled exclusively on the basis of seniority. Respondent's negotiating team maintained that certain jobs required unique expertise which by their very nature could not be filled on a seniority basis but rather required a person having specialized qualifications. Levine admitted that "criteria . . . and factors of skill, ability and training" were important, but said where they were "substantially equivalent . . . that seniority would be the deciding factor." Moreover, argued Levine, the supervisor who made the job selections might be "unfairly guided by favoritism, bias . . . [and] abuse." The various aspects of seniority were then discussed, but there was no agreement reached.

Work stoppages were next considered, and Levine inquired what was meant in the company proposal by the phrase "work slowdown." Carruth replied that he would

furnish the Union with a copy of the Company's written minimum work production standards. Levine inquired whether these work production standards applied to individuals or a group, and Carruth assured Levine he would supply him with both individual and group written statistics concerning work production standards. Levine then raised the right of the Company to use these production standards as a basis for locking out employees. Carruth answered this could only occur as a matter of self-defense in the event the employees were to engage in a slowdown. Levine referred to this colloquy, which was prolonged, as an "impasse."

After a recess, the Company submitted a revised proposal to meet the Union's strenuous objections to its work stoppage provision by deleting the words "or work slowdown." Levine then inquired as to what was meant by the word "interference," which had been in the Company's prior proposal, and Carruth answered that it applied, in part, to employee sabotage situations "like deliberate misdirection of the materials or people physically preventing other people from working." There was no agreement.

Seniority was again discussed, but with no success. Levine, when asked whether agreement on this subject was "ever reached" in subsequent bargaining sessions, answered: "Not to my knowledge."<sup>11</sup>

The conferees then discussed their respective proposals with regard to the grievance procedure. Levine objected to language in the Company's proposal which stated grievance meetings "would be held at a mutually agreeable time and place." Levine then asked the parenthetical question: ". . . What if the parties do not agree on what is a mutual time and place?"

May 7

The negotiation session of May 7 was convened by and at the request of Commissioner Fernandez of FMCS. This meeting was the last one attended by Levine, who was supplanted as chief negotiator after this meeting by his superior, International Vice President Arthur Woods. Amaro describes this meeting as "acrimonious" and not "conducive to open negotiations." Reading from his written notes which he took during this negotiation session, Amaro charged Levine with being "very aggressive and threatening. Still accusing us of bargaining in bad faith" and testified that Levine warned the company negotiators that "You'll never get a contract."

The meeting began with the Company handing to Levine, as he had requested at a prior meeting, a current list of the Company's employees. The Company also submitted suggested language for the only undecided section of the Company's arbitration proposal, namely the manner in which the three arbitrators would be selected. In addition, the Company handed the Union its proposed revised contract provision concerning the beginning and ending times of the three work shifts and a clause dealing with the duration of the collective-bargaining agreement and the circumstances under which discussion of specified provisions of the contract might be reopened.

After a recess, Amaro reminded Levine that he had

promised to deliver to the Company at this meeting the Union's proposal in the event work stoppages and slowdowns should be engaged in by the employees. Levine answered that they had not prepared these proposals and retorted, according to Amaro, "We want your proposed production standards that we asked for last time. You said they would be available at this meeting." Amaro responded: "We did not say they would be ready at this meeting."

The next matter on the bargaining table was job seniority. Respondent maintained they reserved the sole right to promote and assign jobs. No agreement was reached.

Respondent informed the union representatives that they would talk about wages, duration of the term of the collective-bargaining agreement, and arbitration but would be firm concerning their position on an agency shop, checkoff of dues, and their unilateral right to promote employees, although they would recognize seniority in that regard. The Respondent added that if the Union is "firm" on any of these last three matters "then we have reached impasse on these points."

At approximately 3 p.m. of the May 7 meeting, Levine stated to all those present, according to Amaro: "Unless the Company has a change of position, we should break off, because we're not making any progress." Levine then handed the Company a writing stating that the Union was hereby "making an unconditional offer to return to work" at Weather Tec's plant. The Company shortly thereafter handed Levine a writing dated May 7, which reads as follows:

Weather Tec will accept applications from any person who decides he or she wants to work at Weather Tec. This has been its position since January 30, 1976 [the date the strike began].

/s/ Lowell T. Carruth, Attorney for Weather Tec

Levine did not testify as to his account of this meeting. I suggested to the General Counsel's representatives after Levine was excused by them that it was not too unreasonable to have the benefit of his testimony as part of their case-in-chief with respect to his version of what occurred at this May 7 bargaining session. They replied that the law precluded calling Levine as a witness, as the complaint issued on April 30, which would render any testimony by him related to matters and events occurring after April 30, "the cut-off date," as irrelevant and incompetent as a matter of law.

When Levine was asked on cross-examination whether he was removed as a member of the Union's negotiating team because of his inability to "get along" with the company negotiators, he stated that he was "not called off." He explained that he told Arthur Woods "that [Carruth] and I, whenever we talked, the sparks flew; that I could not see that I could contribute anything further towards getting the contract, and that if he would or could use any influence to bear or perhaps assist, it would be wise if he could get in touch with Mr. Turner to arrange any further negotiating meetings. But I didn't feel that my presence would any longer make a contribution toward resolving the issues."

Amaro described "the air of antagonism and hostility" when Levine became the Union's chief spokesman. Amaro

<sup>11</sup> The last negotiating meeting Levine attended was on May 7.

continued that these meetings were "far from calm; it was very heated . . . I had the impression [Levine] wanted to start at the front and go to the back and again resolve what had been agreed to [already] . . . Levine again stated that he wanted to start at the beginning of the contract, but Mr. Coyle [Respondent's co-counsel] protested that this did not seem logical."

From the time Levine joined the Union's negotiating team, the company negotiators repeatedly requested Levine to explain the basis for his sworn allegations in the NLRB charge in which he had accused the Company, *inter alia*, of insisting on bargaining on nonmandatory subjects and renegeing on proposals to which it had agreed previously. According to Amaro, Levine refused to furnish such information, stating: "Let's start negotiating now. And if we come to the point where we've charged you with bargaining in bad faith, when we get there I'll tell you." Levine then countered by offering to call off the strike and "dismiss" the charges he had filed with the Board "if the people will be returned to work . . ." At that point, added Amaro, "We said, 'We still can't accept it.' And if he just would explain to us the nature of those [NLRB] charges so that we'll know what the problems were, we would negotiate the contract. [Levine] said, 'No. The discussion is meaningless.' At that point they [the Union's negotiators] got up and left the meeting." The Respondent's negotiating team continued to remain in the meeting room but then departed when the Union did not return.

#### Bargaining Sessions Subsequent to May 7

The next meeting was held on May 24, with Arthur Woods, the International Union's vice president, acting as chief negotiator and Turner being present for the Union. Present and representing the Company were Attorneys Caruth and Coyle and General Manager Amaro.

Under the leadership of Woods, the Union's negotiating team held six meetings with the Company's representatives, those of June 9 and 25 and July 8, 14, 15, and 25.<sup>12</sup> Agreement at the conclusion of the 22d meeting, on July 15, had been reached with respect to the following:

1. Preamble
2. Jurisdiction
3. Successorship
4. Management rights
5. Union rights
6. Union security
7. Nondiscrimination
8. Hours of work
9. Call-in pay
10. Report-in pay
11. Absences
12. Vacations
13. Work stoppages
14. Grievance procedures, except in the manner of selecting the three arbitrators
15. Bulletin board
16. Jury duty

<sup>12</sup> The hearing began on July 19 but recessed on July 25 to discuss settlement; it was reconvened the next day when the parties reported no progress.

17. Absences by employee officers of Union
18. Health and hospital benefits

No agreement was reached on the following issues:

1. Holidays—Union requested two additional holidays
2. Promotions—permits bidding by employees on vacant jobs, but there was disagreement on what indicia should be used in determining employees' qualifications
3. Work assignments—permitted in context of job biddings but a disagreement as to the definition of "qualified" employees
4. Shop rules—Union sought their removal from contract, whereas Company claims that exclusion of its shop rules would prevent it from setting employees' minimum production standards
5. Wages—parties disagreed with respect to classification differentials as to starting and base pay scales
6. Duration of collective-bargaining agreement
7. Sick leave pay
8. Attendance at funerals to be limited to deceased persons of employees' immediate families.

#### The Alleged 8(a)(1) Violations

The complaint alleges that since "August 1975" Respondent has interfered with, restrained, or coerced its employees in the exercise of their Section 7 rights (29 U.S.C. §151, *et seq.*) in the following manner:

In September 1975, Respondent, by Georgesen and McLain, promised the employees benefits if they would abandon their support for the Union.

In September 1975, Respondent, by Georgesen and McLain, pointed out the futility of supporting the Union by stating the Respondent would not sign a contract with the Union.

In October 1975, the Respondent, by its president, Duckworth, pointed out the futility of supporting the Union by stating the Respondent would not sign a contract with the Union.

On October 13, 1975, during the course of contract negotiations with the Union, the Respondent threatened to cease operations and sell its business unless the Union agreed to Respondent's contract proposals.

In December 1975, the Respondent by its owner Pearce threatened to sell its business because employees had selected the Union to represent them.

Doris Freund, an employee since 1972 and a member of the Union's negotiating committee, was still on strike on July 27, 1977, the date she testified at this trial. She stated that in a restaurant one evening in September 1975 she and employees Georgesen,<sup>13</sup> Chandler, and Harris and his girl friend had a conversation with Keith McLain, a company "salesman," who had been employed by Respondent for about a month when the above incident occurred. According to Freund, they spoke, among other things, about the

<sup>13</sup> Georgesen is described in the complaint as "plant manager" and a "supervisor" within the meaning of Sec. 2(11) of the Act. The record, however, discloses that he was an "agricultural salesman"; obviously not a supervisor.

Union, and McLain said, "The Union wasn't going to do us any good . . . let him and Elmer Georgesen help us. And then we got into a big fight about it."

Freund also told those present she had heard that George Pearce, the owner of Weather Tec, had once owned a trucking company and that when the employees voted to be represented by a union, he immediately sold the business. When Pearce later testified, he denied that any such thing had ever occurred.

Freund also testified about being in a restaurant in October 1975 with three other employees when Duckworth, president of Respondent Company was there. She testified that she went over to Duckworth's table uninvited and asked him why the Company had started "that buzzer policy [in the plant]--we never had that before." Freund later inconsistently testified that when she went to work for the Company in 1972 there was a buzzer system in operation in the plant which gave notice to the employees when their shift began, at which time they were to commence operating their machines. It also signaled coffeebreaks, lunchtime, and quitting time.

Duckworth, president of Weather Tec, testified this buzzer incident occurred a short time after the Board election. Upon arriving at the plant, he had noticed on several occasions that when the 8 a.m. bell for the commencement of work had sounded some of the employees were "just standing around, not working at their machines." Thereupon, the Company posted on the employees' bulletin board on August 5, 1975, the following notice:

August 5, 1975

In order to improve our operating efficiency, the system of work buzzers will be changed.

Effective tomorrow the buzzer will sound at 7:55 a.m. and again at 8:00 a.m. All employees should be at their stations and working when the second buzzer sounds.

This procedure will be repeated at 12:55 and 1:00 p.m.

At 4:50 the buzzer will sound for clean up and again at 5:00.

Duckworth testified with respect to the so-called buzzer incident, which occurred shortly after the union election. Duckworth's testimony continues as follows:

. . . [there were] eight to ten people . . . who were still seated at the coffee table [after 8 a.m., the beginning of the workday]. I made no comment to anyone on that particular day. . . . The same procedure was carried out the following day. The same people . . .

The third day, the same . . . It was at this point in time that I called our General Manager in and I said, "Terry [Amaro], there are some things that are going on that are absolutely not right." I said, "Now we recognize that we are in negotiations, but hours of work and negotiations at this particular point in time must be separated. The employees are supposed to work eight hours a day, less the time for their breaks, and they're to be at their work station at 8 o'clock in the morning."

Duckworth testified that the buzzer system was intended to apprise the employees when they were to start and end their shift, lunchtime, and rest breaks. He said this system "had always been the policy" and that the buzzer system did not change the hours of work but was merely "to advise everyone that it is now 7:55 or 12:55 . . . that you're to be at your work station and start work at your regular starting hours." Duckworth stated the "cleanup buzzer" had been in existence for at least 12 years and that it notified the employees of the time to begin work, coffeebreaks, and lunchtime and that at 4:50 p.m. they were to shut down their machines preparatory to cleaning up and leaving the plant at 5 p.m., the quitting time.

Strangely, much time was spent in eliciting testimony regarding this buzzer incident although it is not alleged in the complaint as an unfair labor practice. If it was intended to allege an 8(a)(5) violation in that Respondent unilaterally instituted a buzzer system after the Union was certified, it is without merit, as Freund herself testified that the *same* buzzer system was in operation in 1972 when she was hired by Respondent and the subsequent incident in 1975 does not reveal any change in either the hours of work or working conditions.

Freund testified that Duckworth also told her and three unidentified employees during this same conversation in the restaurant that "all [the Union] wanted was our money." It should be noted that the General Counsel failed to call these three unidentified employees to corroborate Freund's testimony, which casts doubt upon this phase of Freund's version of this incident.

Freund then related an incident in which she and Linda Hoffmann, an employee, saw George Pearce, owner of Respondent Company, and Terry Amaro, plant manager, in a bar about 7:30 p.m. on December 12, 1975. Freund went over to Pearce's table uninvited and complained that she couldn't dress well because of the inadequate wages that he was paying her. As Freund put it, one thing led to another regarding the Union when Pearce, according to Freund, said: "No union was going to come in and tell him how to run his business and that if we went on strike we could walk for three or four months or we could walk forever; he didn't care. He was not going to let a union come in and tell him how to run his business. . . . You're on a dead end street." And, according to Freund, Pearce said, "If I thought that union was so good, why didn't I let the Union pay me. And if I didn't like working at Weather Tec, why didn't I just quit." Freund was corroborated by employees Faye Chandler and Linda Hoffman.

Amaro's version of this incident is the opposite to what was testified to by Freund. According to his testimony, these employees came over to the table uninvited where he and Pearce were sitting and Freund initiated the conversation, whereupon Pearce asked them if they would care to join them and then he ordered cocktails. Amaro denied Pearce ever made these statements which Freund imputed to Pearce. Amaro testified that Freund's insistence about talking about union matters so annoyed Hoffman that she told Freund: "Doris, knock it off. Let's don't talk about this. This is supposed to be a social, relaxing thing."

Resolutions of Fact and Credibility<sup>14</sup>

A major portion of the testimony delineated above with respect to the 8(a)(5) violations is uncontradicted. However, some of the witnesses' versions of what occurred with respect to the salient issues in the various alleged 8(a)(5) violations require a careful analysis of the diametrical conflict in the versions of the General Counsel's and Respondent's witnesses, especially the 8(a)(1) violations. Consequently, findings of fact and resolutions of credibility made herein with respect to those conflicts in both 8(a)(5) and 8(a)(1) testimony result from an attempt to reconcile the evidence as a whole in an effort to determine in some instances what was meant by various witnesses and in what chronological order the salient events in this proceeding occurred, which includes, of course, resolutions of credibility where necessary.

Observation of the witnesses, as well as an analysis of the entire record and the inferences to be drawn from it, have resulted, where required, in certain credibility findings with respect to the substantive testimony of the witnesses. These conclusions have been reached by noting the witnesses' manner of testifying with respect to the accuracy of their memories, their comprehension, and their general demeanor on the witness stand in answering the questions put to them by counsel. In crediting some witnesses and discrediting others or giving weight to certain evidence as against other evidence, it has been necessary to detect and appraise various "potent imponderables permeating the entire record."<sup>15</sup>

One of these "potent imponderables" is the demeanor of witnesses in testifying. The Board has recognized that the demeanor of witnesses must often be a factor of great consequence in resolving issues of credibility, and it attaches great weight to credibility findings based on demeanor.<sup>16</sup> This type of incommunicable evidence, which may not appear in the record and consists of elusive intangibles and "potent imponderables" that "words do not preserve" and that are difficult to capture and describe by written words, often make it difficult for the trier of the facts to convey or describe the impression which a particular witness makes upon him.<sup>17</sup> This difficulty is inherent in making credibility findings where the trier of the facts *must* choose between discordant versions of witnesses whom he has seen.<sup>18</sup> Judge Learned Hand described this difficulty as:

... [findings] based on that part of the evidence which the printed words do not preserve. Often that is the most telling part, for on the issue of veracity the bearing and delivery of a witness will usually be the domi-

nating factors, when the words alone leave any rational choice.

... nothing is more difficult than to disentangle the motives of another's conduct—motives frequently unknown even to the actor himself. But for that very reason those parts of the evidence which are lost in print become especially pregnant, and [this Court] which had no access to them should have hesitated to assume that the Examiner was not right to act upon them.<sup>19</sup>

It should be noted that in many Labor Board trials, demeanor evidence provides a valuable tool for the trier of the facts in evaluating the trustworthiness or lack thereof of a witness' testimony. Corroborative of this observation is the Board's declaration in *Roadway Express, Inc.*, 108 NLRB 874, 875 (1954), in which the Board declared:

... we recognize that credibility findings may rest entirely upon evidence through observation which words do not and could not either preserve or describe. . . . The courts and the Board have held that its reliability, substantiality, and probative character are in no way affected by the failure of a trier of fact to describe with particularity those aspects of demeanor which have persuaded him to find a particular witness credible or incredible as the case may be.

However, findings of credibility made herein are in no way based exclusively on demeanor evidence, as that was only one factor. Careful consideration has also been given to the surrounding circumstances and the plausibility, as well as the consistency or inconsistency, of individual witnesses' testimony when collated with substantial uncontroverted evidence and demonstrable facts.

Moreover, findings may not rest on suspicion, surmise, implications, or plainly incredible evidence.<sup>20</sup> Circumstances that merely raise a suspicion that an employer may be activated by unlawful motives are not sufficiently "substantial" to support a finding.

The Supreme Court has defined substantial evidence as follows:

Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. . . ."<sup>21</sup>

Freund, who testified with respect to the 8(a)(1) allegations in these proceedings, did not impress me as a frank or forthright witness, as she seemed to be not only seeking to color her testimony but also to be concealing facts on her cross-examination. Her testimony was vague and evasive and she left the impression of being an unconvincing witness. Much of her testimony not only was implausible and militates against ascribing credence to Freund's story of

<sup>14</sup> See *N.L.R.B. v. Lewisburg Chair and Furniture Company*, 230 F.2d 155, 156 (C.A. 3, 1956); *N.L.R.B. v. Local 420, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL*, 239 F.2d 327, 328 (C.A. 3, 1956).

<sup>15</sup> *International Association of Machinists; Tool and Die Makers Lodge No. 35 v. N.L.R.B.*, 311 U.S. 72, 79 (1940).

<sup>16</sup> *Hadley Manufacturing Corporation*, 108 NLRB 1641, 1643 (1954); *Roxboro Cotton Mills*, 97 NLRB 1359, 1368, (1952), where the Board said: "... the Trial Examiner made no reference to the demeanor of either witness—as to which it is our policy to attach great weight."

<sup>17</sup> *N.L.R.B. v. James Thompson & Co.*, 208 F.2d 743, 746 (C.A. 2, 1953).

<sup>18</sup> *Casa Grande Cotton Oil Mill*, 110 NLRB 1834, 1836 (1954).

<sup>19</sup> *N.L.R.B. v. Universal Camera Corp.*, 190 F.2d 429, 430, 431 (C.A. 2, 1951). See *Howell Chevrolet Company*, 204 F.2d 79, 86 (C.A. 9, 1953), *aff'd*, 346 U.S. 482 (1953); *Retail Store Employees Union, Local 400, Affiliated with Retail Clerks International Association, AFL-CIO v. N.L.R.B.*, 360 F.2d 494, 496, 497 (C.A.D.C., 1965); *N.L.R.B. v. Dinion Coil Company, Inc.*, 201 F.2d 484, 487 (C.A. 2, 1952).

<sup>20</sup> *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 484, 485 (1951).

<sup>21</sup> *N.L.R.B. v. Columbian Enameling and Stamping Company, Inc.*, 306 U.S. 292, 300 (1939).

what occurred but compels a factual finding discrediting her version of what happened at the restaurant in September 1975 when she testified that she conversed with Respondent's employees McLain and Georgesen; likewise at another restaurant in October 1975 when the "buzzer" incident, *supra*, was discussed; and her testimony with respect to complaining to Pearce and Amaro in a cocktail lounge on December 12, 1975, about the Respondent Company's payment of "poor" wages to its employees and also Pearce's alleged threats to her.

Furthermore, it should be borne in mind that any determination of a credibility issue herein must rest upon the consistency of one disputed version with the logic of events, the inherent probability of testimony which is inconsistent with demonstrable facts, and normal human behavior. This is particularly true in the case of some of the statements imputed to Pearce, the owner of the Company, and Duckworth, the president, by Freund. Freund's testimony that, when she saw George Pearce, owner of the Respondent Company, in a cocktail lounge on the evening of December 12, 1975, and complained about working conditions at the plant and the conversation then gravitated into certain aspects about the Union, Pearce told her "[t]hat no union was going to come in and tell him how to run his business and that if we went on strike we could walk for three or four months or we could walk forever; he didn't care. He was not going to let a union come in and tell [him] how to run [his] business. . . . You're on a dead end street. And if I [Freund] thought that union was so good, why didn't I let the Union pay me. And if I didn't like working at Weather Tec, why didn't I just quit."

The credibility of such testimony by Freund which was attributed to Pearce must be evaluated in the light of the evidence in this record and by an analysis of the realities of the situation. Such evaluation leads to the conclusion that Pearce's denial, corroborated by Amaro, that he ever had such a conversation with Freund is to be credited. It strains one's credulity to believe that Pearce, owning various business enterprises and having executive responsibilities in directing these various business ventures, would have been so incredibly naive as to senselessly compromise his company and its negotiating position soon after the union organizational campaign and Board election and 3 months after contract negotiations had begun.

It should also be mentioned that some of the answers of Turner, Levine, and Freund were voiced in response to leading and suggestive questions propounded by the General Counsel's two representatives, which impugns the weight to be given such testimony. Furthermore, as the vice in counsel asking his witnesses leading questions is that he may suggest the desired answers which the witnesses will often merely adopt, it may seem futile for opposing counsel to object once such a question has been asked and the desired answer suggested. Little probative value has been given to the testimony elicited in this manner.<sup>22</sup>

Also, Turner denied that he threatened to call a strike if the Company would not meet with the Union on the 4 days Levine would be available to attend a negotiation meeting (January 30 and 31 and February 1 and 2). The Company

countered with a suggested meeting date of February 3, as all its negotiators had prior binding out-of-town business commitments on the four dates proposed by Levine. Turner's denial that during these discussions he ever threatened to call a strike is not credited.

Jerome Levine, the Union's chief negotiator for four bargaining sessions, who was a prime protagonist in these proceedings, was a volatile, verbose, and self-dramatizing witness, given to exaggeration and to exhilaration in unwinding a strongly flavored story of what transpired during the period of time covered by the four negotiating sessions after Levine replaced Turner as chief negotiator. When this occurred the atmosphere and mood of the negotiations deteriorated and ultimately collapsed due to Levine's attitude, at which point Wood, the International vice president, supplanted him. Levine withdrew from the bargaining table on May 7.

Levine set the tone of his first meeting with the company conferees on February 8 by accusing them of never having provided the Union with information necessary to bargain effectively, which accusation they denied, stating all requested information had been given to Turner. He then impeached the company conferees' *bona fides* by denouncing them for not according due consideration to union proposals, refusing to meet with the Union at reasonable times and places, and reneging on items previously agreed to by the Company. Levine displayed an inadequate memory, and his answers to crucial questions on cross examination were sometimes equivocal, evasive, vague, ambiguous, and confusing and other times somewhat inconsistent and seemingly intentionally incomprehensible because he resorted to purposeful obscurity in his answers to embarrassingly probing questions asked him by counsel for the Respondent. Moreover, his demeanor while on the witness stand and his tendency to fence with counsel while under cross-examination was also obstructive. Keeping in mind that a search for the truth is the purpose of a trial, it is not too unreasonable to assume that Levine's refusal during the trial to produce subpoenaed written notes that he took during the four bargaining sessions he attended which were relevant to the resolution of the salient issues in this proceeding indicates that he was not bargaining in good faith. Equally disconcerting and confusing was Levine's resorting at times to *double entendre* allusions in connection with word plays which rendered his answers to relevant questions incapable of interpretation. Such deportment while on the witness stand has been considered in evaluating the weight to be accorded his testimony. This appraisal was one factor in concluding that the testimony of Attorney Coyle, Amaro, and Duckworth was credible where it conflicted with Levine's and Turner's versions of what occurred when the employees went out on strike during negotiations and also what transpired at the bargaining table up to May 7, when Levine made his exit.

#### Section 8(a)(1)

#### Discussion and Conclusionary Findings

In determining whether an employer's conduct amounts to interference, restraint, or coercion within the meaning of

<sup>22</sup> See *Liberty Coach Company, Inc.*, 128 NLRB 162, fn. 7 (1960).

Section 8(a)(1), the test is not the employer's intent or motive but whether the conduct is reasonably calculated or tends to interfere with the free exercise of the rights guaranteed employees by the Act.<sup>23</sup> To determine whether Section 8(a)(1) has been violated, consideration must be given to Respondent's entire course of conduct. It is required that each item of Respondent's actions not be considered separately and apart from all others; consideration must be given to all such conduct as a whole, with a view to drawing inferences reasonably justified by their cumulative probative effect.

The allegations in paragraph IX(a) to (e), inclusive, of the complaint that Pearce, Duckworth, Georgesen, and McLain threatened to go out of business unless the Union agreed to the Respondent's contract proposals and the additional allegation that the Company threatened to sell its business because the employees had selected the Union to represent them is not substantiated by the evidence. Nor is the allegation that the employees were promised benefits if they would abandon support of the Union. Likewise, there is no substantial evidence that Respondent's officials and/or employees pointed out the futility of supporting the Union saying they would not sign a contract with the Union. There is also a failure of proof that Respondent, through any of the above-named officials or employees, threatened to go out of business unless the Union agreed to the Company's proposals and in the event the employees selected the Union to represent them.

The record reveals that the promises, threats, and other statements referred to above were never made by the aforementioned individuals. Moreover, some of the assertions claimed by the General Counsel's representatives to have violated Section 8(a)(1) of the Act were initiated by the employees during the course of casual conversations in cocktail lounges and restaurants and were discussed in the context and in the aftermath of a union campaign and Board election which occurred in July and August 1975. Such a background often lends itself to rancor and animosity but not necessarily to the commission of unfair labor practices, which is the situation here.

The campaign immediately preceding a Board election is usually such a hard and bitter conflict that the Act provides both affirmative rights and prohibited acts governing the conduct of both management and union. Each is accorded the right of persuasion and denied the use of coercion. But it would be unrealistic indeed to expect management to use words of conviction in an effort to persuade an employee to vote against unionization without the presence of "antiunion animus." In the matter of the election the management is "of course" antiunion. The union is equally anticompany. It is necessarily so. And hostility towards each other [and the ancillary aftermath of a union campaign and Board election] in such regard, is not an unfair labor practice.<sup>24</sup>

<sup>23</sup> *Time-O-Matic, Inc. v. N.L.R.B.*, 264 F.2d 96, 99 (C.A. 7, 1959); *N.L.R.B. v. Illinois Tool Works*, 153 F.2d 811, 814 (C.A. 7, 1946); *Russell-Newman Mfg. Co., Inc.*, 153 NLRB 1312, 1315 (1965); *Neco Electrical Products Corporation*, 124 NLRB 481, 482 (1959).

<sup>24</sup> *N.L.R.B. v. Colvert Dairy Products Company*, 317 F.2d 44, 46 (C.A. 10, 1963).

In this proceeding, however, the bare recital of the facts is sufficient to show there was neither restraint, coercion, or interference within the meaning of Section 7 nor substantial evidence of unfair labor practices encompassed by Section 8(a)(1).

The fact that there is evidence considered, of and by itself, to support an administrative decision is not sufficient where there is opposing evidence (including credibility considerations) so substantial in character as to detract from its weight and render it less than substantial on the record as a whole, particularly when the cogent fact is considered that there is no evidence in this proceeding of any union animus on the part of Respondent Company.<sup>25</sup>

These factual circumstances, in the context of the applicable law, have been considered compositely and inferences drawn which are reasonably justified by their cumulative, probative effects. "Events obscure, ambiguous, or even meaningless when viewed in isolation may, like the component parts of an equation, become clear, definitive, and informative when considered in relation to other action. Conduct, like language, takes its meaning from the circumstances in which it occurs. . . ."<sup>26</sup>

To be sure, one of the purposes of the Act is to insure that employees shall have a free choice as to the question of their representation in negotiating with an employer. This, of course, does not preclude the employer's stating his views as to whether or not his employees should join a union or to point out inadequacies in its representation. Section 8(c), *supra*, cautions that "the expressing of any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." To allow such privileged communications to thwart the constitutional right of free speech by indirection is to frustrate this inalienable prerogative and the appanage of persuasion which the Company exercised in many of the episodes that the General Counsel attempts to metamorphose and depict as unfair labor practices.

When one considers the rather intimate and informal relationship that existed between the employees and Duckworth, Amaro, and Pearce in the plant as well as outside the plant, the fact that they may have discussed the Union, and also working conditions, in restaurants, cocktail lounges, and the plant, in conversations which were initiated by the employees themselves and during which, in some instances, the company officials were provoked, or at least piqued, into discussing the aforementioned subjects, it would seem to be rather captious to hold that the evidence adduced here by the General Counsel requires a finding of an independent violation of Section 8(a)(1) or that any useful purpose would be served by issuing a cease-and-desist order based on them. Moreover, as found above and as has been discussed in the context of the credibility resolutions made above, there is insufficient probative evidence based on an overall perspective upon which to predicate a finding

<sup>25</sup> *Russell H. Williams v. U.S.*, 127 F.Supp. 617, 619, citing *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 487 (1951).

<sup>26</sup> *Stafford Trucking, Inc.*, 154 NLRB 1309, 1310 (1965). See *International Association of Machinists, Tool and Die Makers Lodge No. 35, etc. [Serrick Corporation] v. N.L.R.B.*, 311 U.S. 72, 79 (1940).

that Respondent interfered with, restrained, or coerced the employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act.<sup>27</sup>

There is only one instance when this area can be inquired into, and that is when these judgments are motivated by antiunion considerations. No credible evidence was adduced by the General Counsel to show by a preponderance of the evidence that the actions of the company officials were motivated by union animus. Nor is there manifest here any substantial evidence of an attempt on the part of Respondent to minimize or disparage the influence of organized bargaining and to interfere with the right to self-organization, as alleged in the complaint, by emphasizing to the employees the futility of supporting the Union or the lack of any necessity for a collective-bargaining agent.<sup>28</sup>

In *N.L.R.B. v. Lenkurt Electric Company, Inc.*, the Ninth Circuit Court of Appeals stated:<sup>29</sup>

It is well established law that an employer has the right to express opinions or predictions of unfavorable consequences which he believes may result from unionization. Such predictions or opinions are not violations of the National Labor Relations Act if they have some reasonable basis in fact and provided that they are in fact predictions or opinions rather than veiled threats on the part of the employer to visit retaliatory consequences upon the employees in the event that the union prevails.

It is found, therefore, that there is not a preponderance of substantial evidence in this record elicited by the General Counsel to prove his allegations in the complaint that Respondent either promised employees benefits if they would abandon support of the Union or pointed out the futility of supporting the Union based upon the Respondent's alleged threat: that Respondent would not sign a contract with the Union; or that Respondent threatened to go out of business unless the Union agreed to Respondent's contract proposals or threatened the employees because they had selected the Union to represent them.

Furthermore, there was a failure of proof on the part of the General Counsel to show that either Georgesen or McLain was a supervisor within the meaning of Section 2(11) of the Act or was authorized to act on behalf of the Respondent. The burden of proving that the Respondent has acted unlawfully rests upon the General Counsel. This burden of proof the General Counsel has not sustained.<sup>30</sup> Accordingly, it is found that it has not been proved affirmatively by substantial, credible evidence that the alleged unfair labor practices of the complaint, including an intention by Respondent to subvert the Union *vis-a-vis* its employees, occurred. Therefore, it will be recommended that the 8(a)(1) allegations of the complaint be dismissed.<sup>31</sup>

#### The alleged 8(a)(5) violations

The complaint alleges that since September 10, 1975, the Union has requested Respondent to bargain with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment and that Respondent has refused since that time to bargain in good faith.

It is also alleged in the complaint that since on or about September 10, 1975, and continuing to date the Respondent has refused and continues to refuse to meet with the Union at reasonable times and places for the purposes of collective bargaining.

Also alleged is that on or about November 21, 1975, the Respondent refused to furnish relevant information requested by the Union relating to the job duties of salaried personnel. In addition, the complaint states that since September 10, 1975, the Respondent has refused to make substantive concessions in an effort to achieve a contract and that in September and October 1975 the Respondent at the Arms Restaurant and Holiday Inn in Fresno, California, by McLain and Duckworth, bypassed the Union by dealing directly with employees with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

The complaint alleges that Respondent refused to bargain in good faith with the Union when in August 1975 the Respondent unilaterally and without bargaining with the Union changed its practice relating to the purchase, brewing, and distribution of coffee for its employees in violation of Section 8(a)(5).

Also alleged is that sometime in August 1975, after the advent of the Union, the Respondent unilaterally and without bargaining with the Union changed its manner of supplying coffee for employees' rest periods and also changed its notification and docking procedures relating to employees' worktime in violation of Section 8(a)(5) of the Act.

Basically, whether the above alleged unfair labor practices (except the asserted unilateral 8(a)(5) violations which are discussed *infra*) have merit is dependent on a determination of whether the Respondent Employer was legitimately or illegitimately motivated in seeking to reach agreement and whether it sincerely or insincerely bargained in good or bad faith with the Union. This depends in the final analysis upon all the facts and attendant circumstances in this across-the-table bargaining situation of some 10 months, which requires in turn that the facts be stated *in extenso* with respect to what transpired between the Company and the Union at the 23 bargaining sessions.

The cases disclose that there is no simple yardstick by which a good or bad faith determination can be made. This demands a study in depth of the applicable case law. I have been perforce compelled to weigh all the evidence, including the sequence of events, to determine not only the character and extent of the alleged unfair labor practices but more particularly whether some of the averments in the complaint actually occurred at all. After this evaluation in depth is completed, then and only then can a finding of good-or bad-faith refusal to bargain be determined.

It is generally agreed that the question of good faith becomes relevant only where there is an implied refusal to

<sup>27</sup> See *Howard Aero, Inc.*, 119 NLRB 1531 (1958); *General Electric Co.—Apparatus Service Shop*, 119 NLRB 1821 (1958).

<sup>28</sup> *May Department Stores Company, doing business as Famous-Barr Company v. N.L.R.B.*, 326 U.S. 376, 385 (1945).

<sup>29</sup> 438 F.2d 1102, 1105, 1106 (1971).

<sup>30</sup> *Campbell & McLean, Inc.*, 106 NLRB 1049 (1953); *W. C. Nabors, d/b/a W. C. Nabors Company*, 89 NLRB 538, 540 (1950).

<sup>31</sup> *N.L.R.B. v. Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261 (1938); *N.L.R.B. v. Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1937). Cf. *American Newspaper Publishers Association v. N.L.R.B.*, 193 F.2d 782, 805 (C.A. 7, 1951).

bargain rather than an express one. Just where the line is drawn between implied and express refusals is not clear.

Unfair labor practices alleged herein include unilateral action, as exemplified in the General Counsel's claim that the Company bypassed the Union and unilaterally dealt directly with employees with respect to changing its employees' coffeebreaks and unilaterally changing its "docking" procedure relating to employees' worktime.

It might be argued that such conduct of bypassing the Union, unilaterally dealing with the employees directly, and denying the Union's request for relevant information is a refusal to bargain irrespective of good faith. Such a case is to be distinguished from the situation in this proceeding at bar, where after 23 across-the-table bargaining sessions the resolution of the critical issue of whether Section 8(a)(5) was violated is dependent entirely on whether good or bad faith is found.

The instant case is not a simple one, as where the employer has made an explicit and positive refusal to bargain with the union. Rather, the situation presented here is one where the employer engaged in a long series of bargaining conferences which "got nowhere." In such a posture, the question is whether it is to be inferred from the totality of the Respondent's conduct that it went through the motions of negotiations as an elaborate pretense with no sincere desire to reach an agreement or that it bargained in good faith but was unable to arrive at an acceptable agreement with the Union.

The record is clear in the case here that the Respondent met with the Union on numerous occasions, conferred regarding contract proposals, made concessions, discussed at length, and finally agreed on 18 items and disagreed on 8 others. Each side here places the blame for no contract being executed on the other.

In the instant case, the facts are such as to require a discussion and analysis not only of the presence or lack of subjective good faith but of the objective considerations as well. This task requires a determination of

Whether it is to be inferred from the totality of the employer's conduct that he went through the motions of negotiation as an elaborate pretense with no sincere desire to reach an agreement if possible, or that it bargained in good faith but was unable to arrive at an acceptable agreement with the Union.

\* \* \* \* \*

It is true . . . that [the trier of the facts] may not "sit in judgment upon the substantive terms of collective bargaining agreements." But it seems that if the [trier of the facts] is not to be blinded by empty talk and by the mere surface motions of collective bargaining, some cognizance must be taken of the reasonableness of the position taken by an employer in the course of bargaining negotiations.

\* \* \* \* \*

Thus, if an employer can find nothing to agree to in any ordinary current-day contract submitted to him, or in some of the union's related minor requests, and if the employer makes not a single serious proposal meet-

ing the union at least part way, then certainly [one] must be able to conclude that this is at least some evidence of bad faith, that is, of a desire not to reach an agreement with the union. In other words, while an employer cannot be forced to make a "concession" on any specific issue or to adopt any particular position, the employer is obliged to make some reasonable effort in some direction to compose his differences with the union if Section 8(a)(5) is to be read as imposing any substantial obligation at all.<sup>32</sup>

In carrying out this function, the Board has stated, the broad test of good-faith bargaining requires the parties to have a sincere desire to reach an agreement and, to that end, to make every reasonable effort to reach common ground. E.g., *N.L.R.B. v. The Boss Manufacturing Company*, 118 F.2d 187, 189 (C.A. 7, 1941). The cases which come before the Board upon charges that a party has refused to bargain in good faith involve, for the most part, an evaluation of the parties' subjective state of mind, as evidenced by their conduct, to determine whether they have negotiated with a genuine desire to compose their differences and reach an agreement. But this factor is not the sole measure of the bargaining obligation. The duty to bargain in good faith is not always satisfied by a mere showing that the parties have evidenced a genuine desire to come to an agreement.<sup>33</sup> It also embraces a duty to refrain from conduct which, viewed in the context of the statutory purposes and objectives, may fairly be said to be incompatible with the philosophy of bargaining embedded in the Act.

Although a state of mind may occasionally be revealed by declarations, ordinarily the proof must come by inference from external conduct. And this would appear to be so even though Section 8(d) does not require the making of a concession; the cases' definitions of good faith suggest that willingness to compromise is an important consideration.<sup>34</sup> It also would seem that an essential ingredient of good-faith bargaining is a sincere effort to reach an agreement, with the ever-present caveat that adamant insistence on a bargaining objective is not necessarily a refusal to bargain in good faith. As the Board said in *Times Publishing Company, et al.*, 72 N.L.R.B. 676, 682 (1947):

The test of good faith in bargaining that the Act requires of an employer is not a rigid but a fluctuating one, and is dependent in part upon how a reasonable man might be expected to react to the bargaining attitude displayed by those across the table.

It is proper to consider whether "in all the circumstances" the parties' conduct reveals a subjective state of mind set upon disrupting negotiations or frustrating agreement and that a bargaining position on one or more subjects, even if not in itself sufficient evidence, may in context

<sup>32</sup> *N.L.R.B. v. Reed & Prince Manufacturing Company*, 205 F.2d 131, 134-135 (C.A. 1, 1953), cert. denied 346 U.S. 887.

<sup>33</sup> "'Good faith' is one form of credibility; it means that the motive that actuated the conduct in question was in fact what the actor ascribes to it; i.e., that what he gives as his motive was in truth his motive." Judge Learned Hand in *N.L.R.B. v. James Thompson & Co., Inc.*, 208 F.2d 743, 745 (C.A. 2, 1953).

<sup>34</sup> See *N.L.R.B. v. Highland Park Manufacturing Company*, 110 F.2d 632 (C.A. 4, 1940).

justify an inference of bad-faith bargaining.<sup>35</sup> Likewise, where the conduct of negotiations amounts to a sham, with intent to avoid reaching an agreement, this constitutes an unfair labor practice within the meaning of Section 8(a)(5) and (d). Sophisticated pretense in the form of apparent bargaining, colloquially referred to metaphorically as shadow-boxing or more properly, in a legal sense, as surface bargaining, will not satisfy the statutory duty to bargain in good faith. *Per contra*, in determining a charge of bad-faith bargaining, such an allegation requires the difficult resolution of ascertaining the state of mind of the party charged, insofar as it bears upon that party's *mala fides* or *bona fides*, as the case may be.<sup>36</sup>

In addition to the intangible, imperceptible considerations, there are also those which are factually based upon such indicia as overt conduct, statements, unfair labor practices, and the reasonableness of the bargaining proposals and also considerations or a lack thereof evidencing employer animosity toward the union—with a caution that such isolated incidents of past misconduct, not being part of the matters being adjudicated, have no probative value.<sup>37</sup>

It should be stressed, as it has application to the facts of this proceeding here, that the Board and the courts have considered a respondent's union animus in cases where it has been found that the respondent committed unfair labor practices. It would seem that evenhanded justice requires, where no substantial evidence is produced by the General Counsel to show such antiunion bias or the commission of any unfair labor practices on the part of the employer, that this factor be considered and accorded equal probative worth in evaluating whether the employer who evidences no such union bias has committed the unfair labor practices alleged in the complaint.

#### Section 8(a)(5)

#### Discussion and Conclusions

The *sine qua non* in the conduct of negotiations under the National Labor Relations Act requires both the parties to negotiate in good faith with open minds in an attempt to reach an agreement, if possible. Section 8(d) of the Act includes within the duty to bargain "the performance of the mutual obligation . . . to . . . confer in good faith with respect to wages, hours, and other terms and conditions of employment." Even before the enactment of Section 8(d), the Board and courts nonetheless construed Section 8(a)(5) to require not simply the meeting with the union but also the serious intent to adjust differences and to reach an acceptable common ground. To allay any interpretation that

<sup>35</sup> "Adamant insistence on a bargaining position . . . is not in itself a refusal to bargain in good faith." *Chevron Oil Company, Standard Oil Company of Texas Division v. N.L.R.B.*, 442 F.2d 1067 (C.A. 5, 1971). Also, this case evidences the dispute which has befallen the *per se* concept. The same court earlier had stated in *N.L.R.B. v. Cummey-Graham Company*, 279 F.2d 757, 761 (C.A. 5, 1960): "We do not hold that under no possible circumstances can the mere content of various proposals and counter proposals of management and union be sufficient evidence of a want of good faith to justify a holding to that effect."

<sup>36</sup> *Continental Insurance Company et al. v. N.L.R.B.*, 495 F.2d 44 (C.A. 2, 1974).

<sup>37</sup> See *Collins & Atkman Corporation v. N.L.R.B.*, 146 F.2d 454 (C.A. 4, 1944), enfg. 55 NLRB 735 (1944).

a party to the negotiations might be forced to compromise a position strongly held which it in good faith believed important not to change and which it had sufficient economic strength to resist changing. Congress not only inserted a requirement in Section 8(d) that the parties "confer in good faith" but also added the proviso that "such obligation does not compel either party to agree to a proposal or require the making of a concession . . ." or yield a position fairly maintained. Adamant insistence on a bargaining position is not in itself a refusal to bargain in good faith.<sup>38</sup>

The term "surface bargaining" apparently had its origin in *N.L.R.B. v. Whittier Mills Co.*,<sup>39</sup> in which the court said that "the Act requires, when requested, a good faith negotiation touching wages, hours and conditions of labor. Though there be surface bargaining, yet if in reality there is a purpose to defeat it, and wilful obstruction of it, there is a refusal really to bargain."

A leading case on this is *N.L.R.B. v. Herman Sausage Co., Inc.*, 275 F.2d 229, 231, 232 (C.A. 5, 1960), enfg. 122 NLRB 168 (1958), where it was stated:

If the insistence is genuinely and sincerely held, if it is not mere window dressing, it may be maintained forever though it produce a stalemate. Deep conviction, firmly held and from which no withdrawal will be made, may be more than the traditional opening gambit of a labor controversy. It may be both the right of the citizen and essential to our economic legal system . . . of free collective bargaining. The Government . . . may not subject the parties to direction either by compulsory arbitration or the more subtle means of determining that the position is inherently unreasonable, or unfair, or impracticable, or unsound.

The obligation of the employer to bargain in good faith does not require the yielding of positions fairly maintained. It does not permit the Board, under the guise of finding of bad faith, to require the employer to contract in a way the Board might deem proper. Nor may the Board ". . . directly or indirectly, compel concessions or otherwise sit in judgment upon substantive terms of collective bargaining agreements . . ." for the Act does not "regulate the substantive terms governing wages, hours and working conditions which are incorporated in an agreement."

On the other hand while the employer is assured of these valuable rights, he may not use them as a cloak. In approaching it from this vantage, one must recognize as well that bad faith is prohibited though done with sophistication and finesse. Consequently, to sit at a bargaining table, or to sit almost forever, or to make concessions here and there, could be the very means by which to conceal a purposeful strategy to make bargaining futile or fail. Hence, we have said in more colorful language it takes more than mere "surface bargaining," or "shadow boxing to a draw," or "giving the Union a runaround while purporting to be meeting with the union for purposes of collective bargaining."

Lack of good faith in the conduct of negotiations may be

<sup>38</sup> *N.L.R.B. v. Insurance Agents' International Union, AFL-CIO*, 361 U.S. 477 (1960).

<sup>39</sup> 111 F.2d 474, 478 (C.A. 5, 1940).

indicated in various objective ways, none of which were displayed by Respondent Weather Tec, such as use of delaying or evasive tactics, refusal to discuss proposals, withdrawal of concessions previously granted, and refusal to meet or to reduce to writing an agreement already reached. Nor did Respondent come to the bargaining table and go through motions akin to a charade, such as discussing proposals and counterproposals, while intending in fact to disrupt negotiations and frustrate agreement. Respondent did not attempt to create an atmosphere of unreasonableness. On the contrary, the record reveals that its real intention was to ultimately seek agreement, which is evidenced by the totality of its conduct at the bargaining table. It is for this very reason that Section 8(d) requires not only that parties "confer" but also that they confer "in good faith."

This statutory recognition of the rights of the parties to disagree and to remain adamant on positions honestly maintained is significant. In formulating a guiding policy for the bargaining process there arose the apprehension of the possibility of the parties' reaching an impasse. This perception that difficulties did inhere in the administrative development of the mutual obligation of unions and employers to bargain in "good faith" and to meet and confer without having to agree or concede, it would seem, recognizes an inalienable statutory privilege and is the strength of Section 8(d), which is sometimes slighted in this regard.

In the congressional debates leading up to the enactment of the Taft-Hartley amendments, the legislative history reveals a concern over administrative interference with the bargaining process, especially when that interference assumed the feature of judging the reasonableness of the employer's proposals in order to ascertain his state of mind in the context of deciding whether he bargained in good or bad faith.<sup>40</sup>

As distinct from "objective" conduct, there are subjective indicia to be considered which usually have reference to a state of mind that is receptive to the adjustment of differences. This entails, in addition to the objective standards, an absence on the part of negotiators who may foster a subjective desire to frustrate negotiations and who reject the principles underlying good-faith collective bargaining. If this is the situation, such a subversive attitude will not normally be expressed to those sitting across the bargaining table. This, in turn, frequently requires inferring from the substantive positions articulated by the respective parties whether this amounts to a finding of bad- or good-faith bargaining. It should also be kept in mind that even though individual incidents may not be sufficient to prove that bargaining is not being conducted in good faith, it may nevertheless be found that the total course of conduct of the respective negotiators as bargaining progresses is or is not an illegal refusal to bargain within the meaning of Section 8(a)(5) as amplified by Section 8(d).

Reference has been made above to surface bargaining, which is closely aligned with the concept of viewing the totality of the bargaining sessions in this proceeding. In this regard, it should be kept in mind that although an employer may be willing to meet at length and confer with a union, it has been held that if he is merely going through the motions

of negotiation without a sincere desire to reach agreement, this is a violation of Section 8(a)(5).<sup>41</sup> Moreover, it is an unfair labor practice when a party rejects the other side's proposal, tenders his own, and does not attempt to reconcile the differences, as this is likewise surface bargaining.<sup>42</sup> When a proposal is offered which is patently unacceptable, in conjunction with an inflexible attitude on major issues and absent any proposal of reasonable alternatives, this is a *prima facie* violation of Section 8(a)(5).<sup>43</sup>

In *American National Insurance Co.*, 343 U.S. 395 (1952), the Supreme Court stated that good-faith bargaining is a "two way street" and that the parties' inability to reach an agreement was due not only to the employer's unyielding position but also to the steadfast position of the union with respect to what it proposed. The overriding consideration in that proceeding was the Court's premise that collective bargaining is a method of resolving labor-management industrial disputes and the conduct of employment relations with a minimum of over-the-shoulder policing of the substantive character of table bargaining in the application of the good-faith standard.

In another case, the Board held it to be a violation when it found that the employer bargained without any intention of seeking agreement in the hope of prolonging his existing practices and that it was not until almost 4 months after the union requested a written counterproposal that one was submitted.<sup>44</sup> Moreover, dilatory tactics with the intention of bringing about an impasse is an unfair labor practice.<sup>45</sup> Furthermore, arbitrary scheduling of bargaining meetings is a violation.<sup>46</sup>

However, the employer's counterproposal which is "predictably unacceptable" is not, standing alone, held the Second Circuit Court of Appeals, sufficient to justify a finding of bad-faith bargaining where the proposal does not foreclose future discussion.<sup>47</sup> The court stated: "Consideration of the negotiations themselves, rather than the proposed contracts within whose framework they were conducted, is a better guide as to whether there was good faith bargaining."<sup>48</sup>

In a leading case, the union charged that the company had engaged in surface bargaining during prestrike negotiations. The Board did not accept this contention of the General Counsel, pointing to the company's request to get to the substantive matters of the proposed contract, its regular attendance at bargaining sessions, its exploration of alternatives and the reasonableness of its arguments in not agreeing to certain union proposals as well as its rational arguments in support of its bargaining positions.<sup>49</sup>

The fact that extensive negotiations fail to produce a collective-bargaining agreement does not justify an inference that the company is engaged in surface or bad-faith bargaining. Since the Act does not compel the parties to reach

<sup>41</sup> *Tower Hosiery Mills, Inc.*, 81 NLRB 658 (1949).

<sup>42</sup> *A. H. Belo Corporation, (WFAA-TV)*, 170 NLRB 1558 (1968).

<sup>43</sup> *S. Morena & Sons, Inc.*, 163 NLRB 1071 (1967).

<sup>44</sup> *Irvington Motors, Inc.*, 147 NLRB 565 (1964), *enfd.* 343 F.2d 759 (C.A. 3, 1965).

<sup>45</sup> *Wheeling Pacific Company*, 151 NLRB 1192 (1965).

<sup>46</sup> *Moore Drop Forging Company*, 144 NLRB 165 (1963).

<sup>47</sup> *N.L.R.B. v. Fitzgerald Mills Corporation*, 313 F.2d 260 (C.A. 2, 1963).

<sup>48</sup> *Id.* at 266.

<sup>49</sup> *Kohler Co.*, 128 NLRB 1062, 1069 (1960).

<sup>40</sup> See 1 Leg. Hist. 301, 302, 310, 311, 312, 430, 538 (1940).

an agreement, in Kohler, the parties had exchanged proposals and counterproposals, had met with no dilatory tactics evident on the part of the employer, and had discussed thoroughly, reasonably, and at length all matters "on the bargaining table", and the union negotiator admitted this, stating the parties were "not too far apart" on the issues. The Board found no bad faith and dismissed the 8(a)(5) allegation.<sup>50</sup>

The employer's insisting on a "package" proposal during negotiations was held not to be an unfair labor practice where he conceded other proposals.<sup>51</sup> Moreover, bargaining by the company and union in a "cool atmosphere" of patient "mutual hostility" "will not dilute a finding of good faith where the totality of the [Respondent's] conduct conforms to the dictates of the statute."<sup>52</sup>

In another case, the Board refused to adopt a possible implication drawn by the Trial Examiner that the failure to make concessions to the union with respect to wages or financial benefits was *per se* a refusal to bargain rather than only a material factor in assessing good faith.<sup>53</sup> On the other hand, granting of numerous concessions has been considered a cogent factor in concluding the respondent bargained in good faith.<sup>54</sup>

In a case similar to the instant proceeding, where the company agreed to more than 12 important proposals made by the union and in subsequent negotiations made other substantive concessions and offered proposals of its own on wage increases and other material issues, it was held that the testimony did not warrant a finding that the respondent violated Section 8(a)(5).<sup>55</sup>

In another case analogous to the one here, a union at the outset of negotiations submitted its proposed collective-bargaining agreement *in toto* with the exception of a wage provision, which it subsequently offered. The employer, in turn, presented counterproposals on every issue except three. When negotiations came to a close, 51 of 62 sections that had been proffered were agreed upon by the parties. The complaint was dismissed.<sup>56</sup>

Other important considerations are agreement on many major bargaining subjects and the respondent's continued willingness to discuss the issues raised by the union's proposals, particularly so where the parties had reached agreement on virtually every bargaining item.<sup>57</sup>

In the last analysis, it would appear that the totality of negotiations is the *sine qua non* in ascertaining whether the parties' conduct is to be characterized as being in good faith or bad faith, subsuming the delicate distinction between hard bargaining and unlawful bargaining. It would also seem that an additional and puissant consideration is where hard bargaining is found rather than unlawful conduct in a

situation involving respondent's unyielding position on wages.<sup>58</sup>

In *H. K. Porter Company, Inc. v. N.L.R.B.*, the employer objected to granting a dues checkoff solely on the ground that he was not going to give aid and comfort to the union, for in his view the collection of union dues was the "union's business." The Supreme Court held that the Board had no authority to compel agreement to any substantive provision in a collective-bargaining agreement.<sup>59</sup>

Certain specified incidents occurred at the bargaining table which have not been adverted to heretofore. These occurred during Levine's tenure as the Union's chief negotiator; a striking difference is evidenced by antagonism and contentiousness as distinct from Turner's incumbency, when the bargaining was agreeable. The change in the atmosphere and conduct of negotiations with the advent of Levine upon the bargaining scene was grim and uncongenial. The longer discussions continued, the more unruly negotiations became, as evidenced by mutual hostility, engaging in personalities, and deprecating each other's motives—eventually culminating in Levine's being replaced after four meetings by his immediate superior, Arthur Woods, vice president of the Union. The meetings thereafter were constructive, in that various unresolved disputes were compromised and others settled although hard bargaining continued on the part of both parties.

By the time of the last bargaining session, 18 proposals had been consented to by the parties. There then remained the following subjects, upon which no agreement had been reached: wages, holidays, employees' promotions, work assignments, shop rules, duration of the collective-bargaining agreement, sick leave pay, and whether attendance at funerals should be limited to the employees' immediate families.

The record reveals, and it is found, that in the general course of negotiations extending over a period of 10 months there is a case of hard bargaining rather than of bad-faith bargaining or "surface bargaining." Both the Company and the Union engaged in arduous negotiations to which careful consideration has been given in evaluating whether or not Respondent's conduct can be characterized as a violation of the Act within the meaning of Section 8(a)(5) and the definition of Section 8(d).

The Respondent Company was not obdurate; it was, in fact, flexible. It abandoned its original proposal on various proposals it offered, as well as accepting compromises on other matters and agreeing to redraft some of its proposals. Its reasons for not agreeing to eight of Respondent's proposals, as delineated above, cannot be condemned as patently spurious pretexts invented to frustrate agreement. Corroborative of this finding is Respondent's agreeing to 18 contract provisions.

General Counsel's burden of proof in these cases requires more than raising mere doubts or suspicions as to the Com-

<sup>50</sup> *Shelly Gordon and Palmer Gordon, Partners d/b/a Lakeland Cement Company*, 130 NLRB 1365 (1961).

<sup>51</sup> *Midwestern Instruments, Inc.*, 133 NLRB 1132 (1961).

<sup>52</sup> *N.L.R.B. v. Almeida Bus Lines, Inc.*, 333 F.2d 729, 731 (C.A. 1, 1964).

<sup>53</sup> *Marion G. Denton and Valedia W. Denton d/b/a Marden Manufacturing Company*, 106 NLRB 1335 (1953), *enfd.* 217 F.2d 567 (C.A. 5, 1954) cert. denied 348 U.S. 981.

<sup>54</sup> *N.L.R.B. v. The General Tire and Rubber Company*, 326 F.2d 832, 833 (C.A. 5, 1964).

<sup>55</sup> *Star Expansion Industries Corporation*, 164 NLRB 563 (1967).

<sup>56</sup> *Dierks Forests, Inc. (Treating Plant, D & E Shop Mill Supply)*, 148 NLRB 923, 927-928 (1964).

<sup>57</sup> See *The Procter & Gamble Manufacturing Company*, 160 NLRB 334 (1966); *John S. Swift Company, Inc.*, 124 NLRB 394 (1959).

<sup>58</sup> Cf. *W. L. McKnight, d/b/a Webster Outdoor Advertising Co.*, 170 NLRB 1395 (1968) (wage offer); *N.L.R.B. v. The General Tire & Rubber Company*, *supra* (checkoff); *Cone Mills Corporation*, 169 NLRB 449 (1968); *McClane Company, Inc.*, 166 NLRB 1036 (1967). Cf. *N.L.R.B. v. Stevenson Brick & Block Co.*, 393 F.2d 234 (C.A. 4, 1968); *Memorial Consultants, Inc.*, 153 NLRB 1 (1965).

<sup>59</sup> 397 U.S. 99 (1969).

pany's motives. Here General Counsel is unaided by independent evidence of hostility on the part of the Respondent to the Union, of unreasonable counterproposals that were illegal in their very nature or so indefensible or lacking in rationality as to warrant inferring bad faith, or of the Company's renegeing on matters already agreed to on proposals it had advanced.

This is a situation where it is patently evident that the Union was neither tame, compliant, nor meekly acquiescent in seeking any reasonable agreement from a recalcitrant and unyielding employer. Moreover, this was not a situation where the Respondent could find nothing to agree to in any of the Union's proposals which were submitted to it. Nor is this a case where the Respondent not only could find nothing to agree to in the Union's minor requests but also proposed not a single serious proposal meeting the Union at least part way. In such a situation, it could be concluded there is a desire not to reach agreement with the Union. Such is not the case in this proceeding. Nor does the record show that the Company foreclosed negotiations on any mandatory subject of collective bargaining or that it insisted upon any nonmandatory subject. Neither is it found, as alleged in the complaint, that it withdrew any proposal when agreement was reached. Nor is there a scintilla of evidence to show that it indicated a predetermination to neither reach an agreement nor execute a contract.

Respondent did not go through the motions of bargaining. It engaged in hard bargaining. It did not have a fixed, inflexible position at any stage of the negotiations. Throughout negotiations it did not remain adamant in an invidious sense. Rather than demonstrating bad faith bargaining by the Respondent, it would appear that the entire record leads one to believe that it was the Union's conduct which brought the negotiations to naught. And this should be considered in the context of its occurring before any claimed impasse was reached and while negotiations were pending. The Union brought this about in disregard of its obligation to continue bargaining with the Respondent. Highly significant is a letter dated April 22 to Levine (Resp. Exh. 54) from counsel for Respondent asking the reason no further negotiations had taken place since March 19. Thereupon a meeting was held on May 7, but at the initiative of the Federal Mediation Service. The Union also cancelled a meeting scheduled for February 3, after it went on strike on January 30, because the Company was unable to meet on 1 of 4 days demanded by Levine.

The Union's filing a charge with the Board tended to chill the continuation of bargaining. On the other hand, there is nothing in the record to evidence on the part of Respondent "an unmistakable effort to escape genuine collective bargaining."<sup>60</sup> The Supreme Court has concerned itself with the totality of negotiations and has been loath to look at specific acts as being violative of the Act apart from the bargaining totality.<sup>61</sup> The evidence in the case at bar must be tested within the framework of the entire bargaining situation as revealed by the record. Justice Frankfurter, concurring in *Insurance Agents'*, *supra*, stated:

In enforcing the duty to bargain, the Board must find the ultimate fact whether in the case before it and in the context of all its circumstances, the respondent has engaged in bargaining without the sincere desire to reach agreement which the Act commands.<sup>62</sup>

It should be stated at this point of the decision that there is no basis for the General Counsel's contention that the Union's strike, which began on January 30, was an unfair labor practice strike. On the contrary, it was from its inception unwarranted and resulted because of Levine's pique at the Company's not capitulating to his ultimatum that they meet with him on one of four dates designated as being acceptable to him. It continued to remain at all times pertinent herein, and at the time of the trial, a walkout not attaining the stature of an economic strike. Moreover, Respondent explained that all the members of its negotiating team had prior binding out-of-town business commitments which prevented their meeting on those dates designated by Levine. However, they assured Levine they would meet with him the next morning of the day following their return to Fresno, where all bargaining sessions were held. In spite of these assurances, Levine called a meeting of the union members to consider taking a strike vote, which they approved on January 30.<sup>63</sup> In fact, by May 7, Respondent agreed to "accept applications from any person who decides he or she wants to work at Weather Tec. This has been its position since January 30, 1976." See General Counsel's Exhibits 19 and 20. No employees of Respondent who were union members who had gone out on strike returned to work until some time after July 30, when all such union-member strikers who desired to return to work for Respondent Weather Tec did so. It would appear that as of November 1, the strike had ended. See Respondent's Exhibit 46.

It would be an exercise in futility at this point to review and relate in detail the 23 negotiating sessions covering 10 months and then to assay the tortuous path followed by the negotiating parties, in order to sit in judgment as to which party ultimately prevailed. It would be not only impracticable but as a matter of *stare decisis* and beyond my competency, because the Supreme Court has clearly stated so in *American Insurance Company*, *supra*. It was precisely to avoid the pitfalls of being entrapped in such a semantic morass that the Supreme Court enunciated and the Congress enacted Section 8(d). Accordingly, it is unnecessary to reiterate whether the parties' many proposals and counterproposals are deemed either "fair, reasonable, inherently unreasonable, impractical or unsound." Judge Brown stated it very well:

Deep convictions, firmly held and from which no withdrawal will be made, may be more than the traditional opening gambit of a labor controversy. It may be both the right of the citizen and essential to our economic legal system, thus far maintained, of free collective bargaining. The Government, through the Board, may not

<sup>60</sup> *N.L.R.B. v. Mexia Textile Mills, Inc.*, 339 U.S. 563, 565 (1950).

<sup>61</sup> *N.L.R.B. v. Insurance Agents' International Union, AFL-CIO* 361 U.S. 477 (1960).

<sup>62</sup> 361 U.S. at 495.

<sup>63</sup> See *Kentile, Inc.*, 145 NLRB 135 (1963), as to whether the Respondent was obligated to continue bargaining in view of the fact that there was no impasse nor unfair labor practice committed by it at the time the Union went on strike.

subject the parties to direction either by compulsory arbitration or the more subtle means of determining that the position is inherently unreasonable, or unfair, or impractical, or unsound.<sup>64</sup>

The record herein conclusively demonstrates, contrary to the allegations in the complaint, that the Respondent did not refuse at any time to bargain on rates of pay and the myriad other conditions of employment. Nor has the General Counsel met his burden of proof with respect to the allegation in the complaint that Respondent at all times has refused to bargain in good faith with the Union, with no intention of entering into any collective-bargaining agreement.

Twenty-three bargaining sessions were held, which includes one held after this trial commenced. A strike was called when the Union was annoyed by the Company's inability to meet on four dates selected for the sole convenience of Levine, who then submitted to the company negotiators on a take-it-or-leave-it basis the dates convenient for him to meet, even though Respondent pleaded binding out-of-town business commitments.

The facts further reveal that the Respondent Company did not take the position at any time throughout the 10 months of bargaining that any of the issues were removed from the area of collective bargaining or that the Company adamantly and unreasonably insisted that certain topics were within its exclusive control. Moreover, the General Counsel's representatives, in arguing various matters at the trial, appeared to premise their contentions on the fallacious notion that the Company perforce was obligated to make concessions or agree to the Union's "reasonable" proposals. The short answer to this is that Section 8(d) of the Act and *American National Insurance, supra*, provide unequivocally the opposite, namely: neither party need agree to a proposal, nor is either obligated to make a concession.

Succinctly stated, the trier of the facts should not figuratively set himself at the bargaining table looking over the conferees' shoulders and passing judgment on the *modus* of their bargaining or inhibit and restrain their freedom in negotiations. In *American National Insurance*, 343 U.S. at 404, the Supreme Court stated:

[I]t is equally clear that the Board may not, either directly or indirectly compel concessions or otherwise sit in judgment upon the substantive terms of collective-bargaining agreements.

This is beyond my competency, as the employer is bound to bargain but is not bound to agree.

The complaint's allegation that Respondent refused to meet with the Union at reasonable times and places to bargain is devoid of any substance. The evidence is to the contrary. Respondent not only met when requested but in some instances took the initiative in arranging for bargaining sessions.

Moreover, the evidence reveals that Respondent furnished any and all relevant information requested by the Union.

Furthermore, as explicated above, Respondent made nu-

merous concessions during the course of bargaining in an effort to reach agreement, as witness the 18 proposals agreed upon by the parties.

Finally, there is not a modicum of evidence produced by the General Counsel that the Respondent, through McLain and Duckworth, bypassed the Union by dealing directly with its employees with respect to wages and working conditions.

There is found to be both a lack of substantial evidence adduced by the General Counsel's representatives and a failure of proof on their part, and the contentions and allegations enumerated below are herewith dismissed: (1) that Respondent failed to meet at reasonable times and places; (2) that Respondent refused to schedule additional and longer negotiating sessions; (3) that Respondent refused to bargain with respect to specified mandatory subjects of bargaining, namely union-security and dues checkoff clauses and seniority of employees in general and when on temporary layoffs; (4) that after the 12th bargaining session Respondent did not bargain in good faith by resorting to delaying tactics; (5) that the Union was forced to call a strike to protest Respondent's dilatory tactics; and (6) that Respondent refused to furnish information with respect to duties of salaried personnel and refused to make substantive changes.

The complaint also avers Section 8(a)(5) was violated when, in August 1975, Respondent, unilaterally and without bargaining with the Union, changed its practice relating to the purchase and distribution of coffee for the employees' coffeebreaks.

Angel Chacon worked as a clerk for Respondent from 1970 to January 1976, when she voluntarily left the Company's employ. She testified that in early October 1975 there was a change in the Company's coffee policy. Prior to this change, she testified, she purchased coffee supplies each working day with money given her by the Company, driving in a company pickup truck to a grocery store to purchase the supplies which were used to make coffee for the employees' morning and afternoon breaks. After the change in October 1975, continued Chacon, the Company did not pay for coffee supplies or furnish transportation to purchase the coffee supplies. After October 9, continued Chacon, "we ha[d] to get the coffee with our money, on our own time and with our own transportation." She never purchased coffee thereafter.

Also alleged as a violation of Section 8(a)(5) is a unilateral change made by Respondent in August 1975, when it established a new procedure in its notification and docking procedures relating to employees' worktime. This allegation, although it is not stated clearly, evidently has reference to the testimony of Roy Quitariano, who has been employed by the Respondent since July 1974 but was on strike at the time he testified on July 26. On November 29 and December 13, he testified, he was "docked for being tardy [twice]; 3 minutes and 15 minutes" on 2 separate days. He stated that prior to the advent of the Union in August 1975 he had been late for work, but no deductions were ever made from his pay.

These two unfair labor practice allegations of unilateral changes in heretofore existing coffee and docking procedures, contrasted with the accusations of refusing to bargain and the infringement of employees' Section 8(a)(1)

<sup>64</sup> *N.L.R.B. v. Herman Sausage Co., Inc.*, 275 F.2d 229, 231 (C.A. 5, 1960).

rights, assume *de minimis* proportions and may be characterized as minor in importance and isolated in character. The coffee matter was a mere convenience furnished to the employees. These two incidents cannot be held to be mandatory subjects of bargaining, as neither one was mentioned by the union conferees at any time during the 10 months that bargaining sessions were held, which is corroborative of the unimportance the Union ascribed to them. It is not reasonable to hold the coffee and docking allegations to be unfair labor practices, inasmuch as the facts disclose the Respondent could not take unilateral action on a matter the Union was not aware occurred. It is not too unreasonable to assume they were *ex post facto* afterthoughts on the part of those who drafted the complaint. If so, the Respondent cannot be held guilty of violations which the Union never requested it to bargain upon. If so, these two alleged unfair labor practices had no real impact on the employees or their working conditions. Nor were there substantial changes in working conditions so as to warrant a finding that the Union was unilaterally bypassed and Section 8(a)(5) violated. *supra*. Moreover, there is an absence of evidence in the record to support the allegations of the commission of unfair labor practices by the Respondent's refusing to bargain and interfering with employees' rights with regard to the coffee and docking incidents. Accordingly, it would not effectuate the purposes of the Act under the circumstances present in this proceeding to issue an order based on these unimportant incidents in the context of the totality of events.

These two allegations involving the (isolated, innocuous, unoffending) coffee and docking incidents, standing alone, are insufficient to support a finding of a violation of Section 8(a)(5) in the context of Respondent's blameless conduct during the numerous bargaining sessions extending over 10 months. Moreover, there is an absence of any objectives on its part to achieve ends forbidden by the Act. Furthermore, these considerations are compelling reasons for finding no violation, as there is a lack of evidence of *mala fides* or union animus in its conduct toward the Union to support a

conclusion that these two incidents attain the stature of unfair labor practices. This finding is based on Respondent's entire course of conduct. Added to this is the cogent fact that here is an employer with no visible antiunion background and not associated with a pattern or course of conduct hostile to unionism. Such a lack of union animus in itself, as well as evenhanded justice, must be considered as a part of the whole picture present in this proceeding.

In view of the foregoing conclusions and upon the entire record and totality of events herein, it is found that the evidence warrants no finding that Respondent committed unfair labor practices within the meaning of Sections 8(a)(1) and 8(a)(5) of the Act. It will, therefore, be recommended that an order issue dismissing the complaint in its entirety.<sup>65</sup> The burden of proving the commission of unfair labor practices rests at all times upon the General Counsel.

#### CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Chemical Workers Union, Local 97, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in any unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, inasmuch as the General Counsel has failed to establish by a preponderance of the evidence that Respondent has violated the Act as alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]

<sup>65</sup> Since the courts and the Board have made it abundantly clear that the determination of whether unfair labor practices have been committed depends ultimately on the facts and circumstances of each particular case, a detailed account has been given of what the various witnesses alleged to have occurred. Also, many of the witnesses have been quoted verbatim in the belief that their choice of language is so expressive that much of the meaning would be lost and its significance escape the reader if their testimony were paraphrased.