United Contractors Incorporated, JMCO Trucking Incorporated, Joint Employers *and* Teamsters "General" Local Union No. 200, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Cases 30-CA-4253, 30-CA-4437, 30-CA-4264, and 30-CA-4485

August 9, 1979

DECISION AND ORDER

BY MEMBERS PENELLO, MURPHY, AND TRUESDALE

On March 13, 1979, Administrative Law Judge Karl H. Buschmann issued the attached Decision in this proceeding. Thereafter, Respondents filed exceptions and a supporting 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 brief[1] and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

On September 19, 1975, in Case 30-CA-2885 (220 NLRB 463), the Board found, *inter alia*, that the same Respondents had violated Section 8(a)(5) of the Act by failing to abide by the terms of their collective-bargaining agreement with the Union, by dealing directly with the unit employees in respect to their terms and conditions of employment, and by changing their employees' terms and conditions of employment without bargaining with the Union. The Court of Appeals for the Seventh Circuit subsequently enforced the Board's Order on June 23, 1976.[3] Thereafter, on January 17, 1977, the Supreme Court denied Respondents' petition for certiorari.[4]

Following the Supreme Court's ruling the Board sent a letter to the parties, requesting that they commence bargaining pursuant to the Board's Order. The Union, by letter of February 3, 1977,[5] proposed a meeting with Respondents for February 15. While agreeing to the bargaining session, Respondents also indicated in their response, dated February 9, that they would terminate the existing contract on its expiration date, May 31. For reasons not disclosed by the record, the parties did not begin to negotiate a new contract until February 22. The meeting on that date ended abruptly when Respondents insisted on tape-recording the bargaining session. The Union refused to negotiate under this condition.

Both sides submitted their bargaining proposals, in writing, prior to the next meeting, on May 24. The Union's proposal was based primarily on the expiring contract. By contrast, Respondents' demands contained several important revisions, including a strong management-rights clause and an across-the-board 20-percent wage reduction for the three unit employees. The second meeting lasted less than 1 hour, as the parties were unable to agree on any significant issues. Both sides agreed that they had reached an impasse in their negotiations. There were no further contract discussions.

Based on these facts, the Administrative Law Judge found in the instant case that Respondents had violated Section 8(a)(5) of the Act when they refused to bargain in good faith with respect to the terms and conditions of a successor agreement. We agree with the Administrative Law Judge's finding for the reasons set forth below.

Section 8(a)(5) of the Act establishes a duty "to enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement." *N.L.R.B.* v. *Herman Sausage Company, Inc.*, 275 F.2d 229, 231 (5th Cir. 1960). As the Supreme Court stated in *N.L.R.B.* v. *Insurance Agents' International Union, AFL-CIO [Prudential Insurance Company of America]*, 361 U.S. 477, 485 (1960):

> Collective bargaining, then, is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of "take it or leave it"; it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract.

This obligation does not compel either party to agree to a proposal or to make a concession. *N.L.R.B.* v. *American National Insurance Co.*, 343 U.S. 395 (1952). However, the Board may, and does, examine the contents of the proposals put forth, for "if the Board is not to be blinded by empty talk and by the mere surface motions of collective bargaining, it must take some cognizance of the reasonableness of the position taken by an employer in the course of bargaining negotiations." *N.L.R.B.* v. *Reed & Prince Manufacturing Company*, 205 F.2d 131, 134 (1st Cir. 1953), cert. denied 346 U.S. 887.

[1] Respondents have requested oral argument. This request is hereby denied, as the record, exceptions, and brief adequately present the issues and the positions of the parties.

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

[3] 539 F.2d 713.

[4] 429 U.S. 1061.

[5] All dates herein are in 1977, unless otherwise indicated.

In this instance Respondents agreed to meet with the Union only after being ordered to do so by the Board and the courts. Then Respondents arrived for the first bargaining session in February with a tape recorder, which, as the Administrative Law Judge pointed out, "is not conducive to a free and open bargaining process." This conduct, while not alleged to have been unlawful, apparently served no other purpose than to prolong the negotiations. When the parties subsequently exchanged contract proposals prior to the second meeting, Respondents demanded, as noted, an extensive management-rights clause and a significant wage reduction for the employees. In their letter to the Union Respondents attempted to justify the pay decrease as follows:

> This will give the men and the Teamsters an opportunity to stand on the front line in the war against inflation. It is obvious that inflation is the product of escalating wages and the Teamsters have the opportunity now to fight inflation. A 20 percent decrease in the wage rate is a small but effective means of combating inflation.

Predictably, the parties could agree only on minor items, such as raincoats and meal periods, during the second negotiating session.

In our view the foregoing facts plainly show that Respondents never intended to reach a collective-bargaining agreement with the Union. We cannot accept the contention that Respondents, in good faith, believed that the Union could agree to a 20-percent wage reduction for its members during a period of widespread inflation, at least in the absence of any supported claim of economic necessity. Furthermore, the management-rights clause demanded by Respondents would have required that the Union yield all bargaining rights on such basic items as the setting and enforcement of work rules, the scheduling of hours and the assignment of duties, the discipline and discharge of employees, subcontracting, and relocation or shutdown of operations. While it is clear under *American National Insurance Co., supra*, that the mere insistence upon a management-rights clause is not a *per se* violation of the Act, the Board has consistently held that a violation is made out when, as here, the employer demands a contractual provision which would exclude the labor organization from any effective means of participation in important decisions affecting the terms and conditions of employment of its members.[6] Thus, we conclude that Respondents' negotiation strategy was to submit an "offer" that they were certain would be unacceptable to the Union. For these reasons, we adopt the finding of the Administrative Law Judge that Respondents have violated Section 8(a)(5) and (1) of the Act by refusing to bargain in good faith with the Union.

We also adopt the Administrative Law Judge's finding that Respondents further violated Section 8(a)(5) of the Act by reducing their employees hourly wages by 4 percent on November 11. Had Respondents implemented their last offer to the Union after a valid bargaining impasse had been reached, Respondents' action would have been lawful. *Midwest Casting Corporation*, 194 NLRB 523 (1971). It is well established, however, that no such impasse can exist in the presence of bad-faith bargaining, such as found herein. *Taft Broadcasting Co.*, 163 NLRB 475 (1967). Moreover, even assuming that a lawful impasse did exist in this case, it is clear that the unilateral change instituted by Respondents was significantly different than their last offer to the Union.[7]

Finally, we agree with the Administrative Law Judge's findings that Respondents violated Section 8(a)(1) and (3) of the Act by laying off drivers Guy Bourdo, Milan Mix, and Percy Williams during 1977 because they engaged in union or other protected activities. However, contrary to the Administrative Law Judge, we are unable to find that Respondents further violated Section 8(a)(4) of the Act in these layoffs.

In finding that Respondents' unlawful conduct was also in violation of Section 8(a)(4) of the Act, the Administrative Law Judge relied solely on evidence that the three discriminatees herein gave testimony in the prior Board proceeding which was adverse to the position of Respondents. There the Board found, in addition to the 8(a)(5) violations, that Respondents had discriminatorily discharged Bourdo, Mix, and Williams in the fall of 1974. The evidence in the subsequent backpay proceeding reveals, however, that Respondents reinstated all three drivers to their former positions—Bourdo and Mix in January and Williams in July—prior to the date that the Board's Decision in Case 30-CA-2885 (220 NLRB 463), issued in 1975. For approximately the next 2 years these employees were employed by Respondents without any further incidents involving alleged discrimination against them. Then, 1 month after Bourdo had filed grievances with the Union, Respondents laid off Bourdo and Williams, in late June 1977. Respondents recalled these drivers on July 29. Thereafter, in October and November 1977, the three discriminatees filed complaints with state and local authorities alleging that Respondents had paid them less than the hourly wage rate required under local guidelines. Re-

[6] *Gulf States Manufacturing, Inc.*, 230 NLRB 558 (1977); *San Isabel Electric Services, Inc.*, 225 NLRB 1073 (1976); *Gulf States Canners, Inc.*, 224 NLRB 1566 (1976); *Tomco Communications, Inc.*, 220 NLRB 636 (1975).

[7] See *Horizons Communications Corporation of California*, 211 NLRB 792, fn. 2 (1974), where the Board found that "an increase in wages of almost 15 percent . . . can hardly be viewed as insignificant."

spondents retaliated by laying off Bourdo, Mix, and Williams on November 11.

Based on these facts, we conclude that the layoffs of these drivers, though unlawful, did not violate Section 8(a)(4) of the Act. The record does not show that Respondents laid off these employees in retaliation for their giving testimony in the prior unfair labor practice proceeding, but establishes rather that they were laid off because of their conduct in filing grievances with the Union and complaints with state and local governmental agencies. Therefore, we shall dismiss this portion of the complaint.

AMENDED CONCLUSIONS OF LAW

Substitute the following for the Administrative Law Judge's Conclusions of Law 2 and 6:

"2. Teamsters 'General' Local Union No. 200, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act, representing an appropriate unit of employees employed by Respondents. The appropriate unit is:

> All truckdrivers employed by Respondents at their Menomonee Falls, Wisconsin, location, excluding all other employees, guards and supervisors as defined by the Act.

"6. By laying off Guy Bourdo and Percy Williams in the summer of 1977 and by laying off Guy Bourdo, Percy Williams, and Milan Mix in the fall of 1977, Respondents have violated Section 8(a)(1) and (3) of the Act."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that Respondents, United Contractors Incorporated, JMCO Trucking Incorporated, Joint Employers, Menomonee Falls, Wisconsin, their officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraphs 1(b) and (c):

"(b) Withholding the wages of their employees for filing grievances with state or local authorities.

"(c) Refusing to bargain collectively in good faith with Teamsters 'General' Local Union No. 200, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of the employees in the unit described below, concerning rates of pay, wages, hours of employment, and other terms and conditions of employment.

> "All truckdrivers employed by Respondents at their Menomonee Falls, Wisconsin, location, excluding all other employees, guards and supervisors as defined by the Act."

2. Substitute the following for paragraph 1(e):

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

3. Substitute the following for paragraph 2(a):

"(a) Offer Guy Bourdo, Milan Mix, and Percy Williams immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings they may have suffered due to the discrimination practiced against them in the manner set forth in the section of this Decision entitled 'The Remedy.' "

4. Substitute the attached notice for that of the Administrative Law Judge.

IT IS FURTHER ORDERED that the portion of the complaint alleging that Respondents have discriminated against employees for giving testimony in a National Labor Relations Board proceeding be, and it hereby is, dismissed.

APPENDIX

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

WE WILL NOT lay off our employees or take any other reprisal against them because they filed grievances with a union or because they joined, supported, or engaged in union or other protected activities.

WE WILL NOT withhold the paychecks of our employees because they filed grievances with state and local authorities or because they engaged in other protected activities.

WE WILL NOT refuse to bargain collectively in good faith with Teamsters "General" Local Union No. 200, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of our employees in the bargaining unit described below, concerning rates of

pay, wages, hours of employment, and other terms and conditions of employment.

WE WILL NOT change or eliminate our employees' wages, hours, holidays, vacations, or other terms and conditions of employment established by collective bargaining with the above-named Union without bargaining in good faith with said Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Guy Bourdo, Milan Mix, and Percy Williams immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings they may have suffered due to the discrimination practiced against them, with interest.

WE WILL, upon request, bargain collectively in good faith with the above-named Union as the exclusive representative of all employees in the bargaining unit described below with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody it in a signed agreement. The bargaining unit is:

All truckdrivers employed by Respondents at their Menomonee Falls, Wisconsin, location, excluding all other employees, guards and supervisors as defined by the Act.

WE WILL honor and enforce the provisions of our contract with the above-named Union which expired on May 31, 1977, and WE WILL restore to our employees all benefits, including wages, paid holidays, and vacations, which we have failed to pay pursuant to that agreement.

UNITED CONTRACTORS INCORPORATED, JMCO TRUCKING INCORPORATED

DECISION

KARL H. BUSCHMANN, Administrative Law Judge: This case arose upon charges filed by Guy Bourdo, an individual, in Cases 30-CA-4253 and 30-CA-4437 and by Teamsters "General" Local Union No. 200, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Case 30-CA-4264 and 30-CA-4485 and upon a consolidated complaint issued December 30, 1977, alleging that Respondents violated Section 8(a)(1), (3), (4), and (5), of the National Labor Relations Act.

A hearing on the allegations in the complaint was held before me on February 1-3, 1978, in Milwaukee, Wisconsin. Respondents filed a brief on April 3, 1978. Counsel for the General Counsel, although requested to file a brief in this case, submitted a two-page letter.

Upon the entire record in this case, including the brief filed by Respondents and from my observation of the witnesses, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

United Contractors Incorporated (herein called United) is a Wisconsin corporation with its principal office located in Menomonee Falls, Wisconsin. United is engaged primarily in the business of road construction in the Milwaukee County area. JMCO Trucking Incorporated, also a Wisconsin corporation located in Menomonee Falls, is engaged in provided trucking services primarily for United at various sites in the Milwaukee area. United and JMCO are affiliated businesses with common offices, ownership, directors, operators, and supervisors and constitute a single integrated business enterprise. They constitute a single employer for purposes of collective bargaining and are now and have been an employer engaged in commerce as defined in Section 2(6) and (7) of the Act.

The Union, Teamsters "General" Local Union No. 200, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is admittedly a labor organization within the meaning of Section 2(5) of the Act.

In substance, the complaint alleges that Respondent laid off certain employees and withheld their wages because of their protected activities and that the Employer unilaterally reduced wages of its truckdrivers and refused to bargain collectively.

General Counsel requested that administrative notice be given to the Board's decision in *United Contractors Incorporated*, 220 NLRB 463 (1975), enfd. 539 F 2d. 713, cert. denied 429 U.S. 1061 (1977). There, the same Respondent was found to have violated the Act in several respects and was ordered to bargain collectively with the Union. Although Respondent had signed a multiemployer bargaining agreement effective June 1, 1974, with Teamsters Local No. 200, it was found to have failed to bargain with that bargaining representative. Moreover, that case also established that three employees, Milan Mix, Guy Bourdo, and Percy Williams had been discriminatorily discharged. All three had testified during that proceeding.

Similar allegations are the subject of this proceeding and might more appropriately have been the subject of a contempt proceeding in the Seventh Circuit, particularly since the instant proceeding deals with the same parties as those involved in the prior decision.

In any case, the record in this case shows that the bargaining agreement (G.C. Exh. 2) between Respondent and Teamsters Local Union No. 200 terminated on May 31, 1977. Prior thereto Respondent had informed the Union of its intention to regard the agreement as at an end. For example, by letter of February 3, 1977, the Union, referring to a January 25 letter from the Board requesting the parties to begin bargaining pursuant to the prior order, proposed a meeting for February 15, 1977 (G.C. Exh. 31). Respondent

replied by letter of February 9, 1977, and agreed to the meeting. But Respondent stated as follows (G.C. Exh. 32): "[W]e hereby give you notice that our contract with Teamsters Local No. 200 will terminate on its expiration date, May 31, 1977. We are willing to negotiate a new contract with you but this should not be interpreted as merely an attempt to change or modify our contract since it is our intent to terminate that contract and all letters of assent related thereto."

The parties apparently did not meet on February 15, but did meet on February 22, 1977. One day before that meeting, however, Respondent sent another letter to the Union informing it that the Company did not intend merely to change or modify the existing contract but that it was prepared to negotiate for a new contract on an individual basis (G.C. Exh. 36). The meeting on the 22d was unsuccessful because Respondent insisted on tape-recording the bargaining session, and the Union refused.

The next negotiation meeting was held on May 24, 1977. Both sides had submitted their proposals. The Union's proposal (G.C. Exh. 34) was primarily based on the expired contract, whereas the Company's proposal, in a letter dated May 18, 1977. (G.C. Exh. 33), contained several important provisions, including substantial reductions in wages. After less than an hour of discussion, the meeting ended in what both parties described as an impasse, because the parties were unable to agree to anything except two or three minor items. Subsequently, by letter of June 24, 1977, Respondent informed its truckdrivers that the Company planned to become a "merit shop," that a fringe benefit plan was in the planning stage and that their wages would conform to the Davis-Bacon Act requirements (G.C. Exh. 4-6).

In the meantime, on May 17 and 27, 1977, Respondent's, employee Guy Bourdo filed grievances with the Union complaining that the Employer had failed to pay him for his work and that he had not been assigned work in accordance with his seniority. On June 26, 1977, the Company laid off two of its truckdrivers, namely, Guy Bourdo and Percy Williams. They were recalled on July 29, 1977.

The record shows that during the time of the layoffs of Bourdo and Williams in July 1977, Respondent's trucks were driven by Milan Mix, the only remaining member of the Teamsters unit; Frank Watson, the concrete foreman; and, on two occasions, Richard Welda, an operator with the Company. In terms of seniority, the record indicates that of the three truckdrivers, Mix, who began working for Respondent in 1968, was senior to Bourdo, who started in 1970, and Williams, who started in 1974. In terms of company seniority, Frank Watson, who had worked for Respondent since 1965, was senior to Bourdo and Williams; however, Weldar, who commenced working in 1972, had less seniority than Bourdo.

In October and November 1977 Guy Bourdo and the two other truckdrivers, Percy Williams and Milan Mix, filed complaints with state and local authorities because Respondent had paid them an hourly rate less than the minimum scale required under the local guidelines. As a consequence of their complaints to state and local authorities that the Employer had failed to pay the required minimum wage scales, Respondent repeatedly withheld the pay due the three employees. For example, Mix, Williams, and Bourdo each filed complaints in October and November 1977 with the State of Wisconsin. Its Department of Public Works informed the Employer by letter of December 1, 1977, that such complaints had been filed and requested an explanation from the Employer (Resp. Exh. 8). Similar claims were considered by the city of Milwaukee (Resp. Exh. 10) and the department of transportation of the State of Wisconsin (Resp. Exh. 9).

As a result of these employees' claims, the local and state departments withheld the scheduled installment checks due Respondent until the matter had been settled (Resp. Exh. 8). Respondent justified its withholding of the wages of the three employees on the basis that their complaints caused the local and state authorities to withhold payments of substantial sums of money.

On November 11, 1977, Respondent reduced the hourly wages of its three truckdrivers from $7.80 an hour to $7.49 retroactively to August 1, 1977. And on the same day, November 11, 1977, the three drivers, Guy Bourdo, Percy Williams, and Milan Mix, were laid off.

During the layoffs in November and December 1977, when all three drivers were affected, trucks were driven by Gorden Duquaine, a mechanic who had worked at Respondent's plant since 1967; La Verne Schlei, the grading foreman, whose company seniority dates back to 1965 and who was found to be a supervisor within the meaning of the Act in the prior case; and Frank Watson.

Only Milan Mix was ultimately recalled in January 1978.

Analysis

General Counsel's position as stated orally at the conclusion of the hearing is basically that Respondent's hostility against the Union as well as the truckdrivers' protected activities have prompted the layoffs and the withholding of the employees' paychecks and that Respondent has unilaterally changed the working conditions of its truckdrivers following the unsuccessful bargaining for a renewal of the contract.

Respondent, in contrast, asserts that the layoffs were occasioned by legitimate business reasons, that the withholding of the employees' pay was necessitated by failure of the local and state authorities to meet their installment obligations, and that the Employer was justified in changing the working conditions, since the bargaining agreement had expired, and the parties had reached an impasse in their negotiations.

It is well established that in my analysis of these competing contentions I am authorized to rely upon the previous unfair labor practice decision, involving the same Employer and the identical parties, at least to the extent of finding Respondent's union animus, a bargaining obligation pursuant to the bargaining order, and the appropriateness of the bargaining unit consisting of all truckdrivers and exclusive of all other employees.

Turning first to Respondent's unilateral changes of working conditions, the record is clear that the bargaining agreement ended on May 31, 1977, that the parties met twice to negotiate a new agreement, that an "impasse" was reached, and that the Employer substantially changed the working conditions for its truckdrivers, including a reduction in

wages from a $7.80 to a $7.49 an hour for the purpose of "fighting inflation." Although the letters of June 24, 1977, addressed to the truckdrivers ostensibly recognized the Union as the bargaining agent for the three employees, it informed the employees of the changed working conditions initiated by Respondent. It stated (1) that the wages would be paid in accordance with the Davis-Bacon Act and the prevailing wage rates of the various project contracts, (2) that the Company was initiating a fringe benefit plan, and (3) that Respondent would become a "merit shop."

The law is clear: a duty to bargain does not require a party to engage in fruitless and endless discussions. Where irreconcilable differences exist in the respective positions after good-faith negotiations, the parties may be at an impasse. At such a point the duty to bargain is not terminated, but only suspended. Nevertheless, when a lawful impasse has been reached and the parties are at a stalemate, the employer may make unilateral changes in working conditions. However, a *legal* impasse does not exist when the impasse is the result of a party's bad faith or unfair labor practices.

Here, Respondent made a proposal which was predictably unacceptable to the Union and which contained such substantially different provisions from those of the expired contract that such a proposal could not be taken seriously by a bargaining representative. First, the proposal contained a management's rights provision giving the Company absolute control over the employees; second, it provided for an open shop where a teamster employee had the option as to whether he wanted to belong to the Union or not; third, Respondent demanded a 20-percent pay cut; fourth, while the proposed contract provided for quarterly discussions, such discussions would exclude subcontracting issues. In short, Respondent's proposal on its face was unworthy of serious negoatiation.

Significantly, Respondent in its earlier letters to the Union expressed its intention to negotiate a *new* contract and not one which would be based upon the expired contract or one which would contain mere changes or modifications in the expired contract. Obviously, then, Respondent thereby clearly expressed its intention to discontinue its prior contractual relationship. Moreover, Respondent arrived for its first bargaining session with a tape recorder, which obviously is not conducive to a free and open bargaining process. In its second meeting Respondent agreed to such minor items as raincoats and meal periods. To be sure, the record shows that on one or two occasions Respondent requested additional bargaining meetings. However, given Respondent's premise for negotiations, any further meetings would have amounted to surface bargaining.

Considering that Respondent had a bargaining obligation not only because of the contractual relationship but also by order of the Board and the courts, Respondent has without doubt defaulted on its obligation. As summarized above, Respondent has failed to bargain in good faith.

Moreover, Respondent has also engaged in unlawful labor practices which rendered its unilateral changes improper. Only recently, the Board has ruled that an employer's discrimination against an employee for the pursuit of his right for unemployment compensation benefits under state law constituted a violation of Section 8(a)(1) of the Act. *Self Cycle & Marine Distributor Co., Inc.*, 237 NLRB 75 (1978).

In the case at hand, Respondent repeatedly withheld the earned wages due its Teamsters on the basis that they had filed complaints with state and local authorities about the Employer's failure to pay the minimum pay fixed by local and state law. To be sure, Respondent was economically adversely affected in that substantial installment payments due the Employer under the contracts with the state and municipal authorities were suspended pending resolution of the employees' complaints. However, this was the direct result of Respondent's failure to pay even the minimum wages specified by the local governments and the failure to pay the hourly rates of the expired contract. Accordingly, it is clear that the complaints of Bourdo, Williams, and Mix to state and local governments constituted protected concerted activity and that Respondent's retaliation by withholding the pay of the three individuals amounted to an interference with their protected activities, in violation of Section 8(a)(1) of the Act.

With respect to the layoffs in July and November 1977, it was the testimony of James Mews, Respondent's president, that a general lack of work prompted the layoffs of two teamsters in July 1977 and all three truckdrivers in November and December 1977. He further testified that the layoffs were made in accordance with company seniority. Yet the record shows that trucks were driven during the times of the layoffs and that other employees of Respondent were assigned to the task. With regard to seniority, the record shows that employee Welda, with less company seniority than Bourdo, drove trucks at least on several occasions in July 1977. The expired contract, in article 3, under "Work Assignments," provides, *inter alia:* "The Employer agrees to respect the jurisdictional rules of the Union and shall not direct or require its employees or persons other than the employees in the bargaining units here involved, to perform work which is recognized as the work of the employees in said units." Clearly, then, Respondent, contrary to that provision, assigned other employees to the truck driving work without bargaining with the Union. In addition, Respondent permitted a less senior employee to drive the trucks, a practice which is contrary to what Mews had described as company policy.

Also the timing of the layoffs is of significance. In late May Bourdo filed grievances with the Union, and in late June the Company laid off Bourdo and Williams. Similarly, in November, when Bourdo, Williams, and Mix were laid off, Bourdo had already filed a complaint with the Department of Transportation of the State of Wisconsin concerning the failure of Respondent to pay the wages established by the State.

Finally, the record reflects Respondent's efforts to justify the layoffs upon considerations other than Mews' official reasons. For example, Respondent offered evidence showing Williams' use of alcohol during and after working hours and evidence suggesting that Bourdo left another company under suspicious circumstances. Lack of work, however, was the sole justification offered by Respondent's president, James Mews. Contradictory evidence of this type is not persuasive; to the contrary, considering the timing of the lay-

offs and the fact that the trucks were driven by other employees, including on occasion a junior employee, as well as Respondent's inconsistent position on the underlying reasons, it is clear that the layoffs were improperly motivated. Considering also the totality of the evidence in this case as well as the antiunion animus established in the prior decision, Respondent's actions were predicated upon its hostility toward the Union and the protected activities of the employees when they filed complaints with the Union and the various state and local authorities concerning their pay scales. Accordingly, Respondent violated Section 8(a)(1) and (3) of the Act.

Significantly, the three employees, Bourdo, Mix, and Williams, gave testimony in the prior proceeding. Their testimony was in substantial part adverse to the position of the Company. Without doubt, Respondent's discriminatory treatment of the three employees was also prompted by their prior testimony, which resulted, in part, in an Order against Respondent and the requirement that Respondent reinstate them and make them whole for any loss of earnings which they had suffered by reason of the prior discriminatory acts of Respondent. It is therefore clear that Respondent's discrimination against them because of their prior testimony amounts to a violation of Section 8(a)(4) of the Act.

CONCLUSIONS OF LAW

1. United Contractors Incorporated and JMCO Trucking Incorporated are a single employer engaged in commerce as defined in Section 2(2), (6), and (7) of the Act.

2. Teamsters "General" Local Union No. 200, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing to bargain in good faith with the Union, Respondent violated Section 8(a)(1) and (5) of the Act.

4. By unilaterally changing the working conditions of its truckdrivers without bargaining with the Union and absent a lawful impasse, Respondent violated Section 8(a)(5) and (1) of the Act.

5. By withholding the paychecks of the truckdrivers because they had filed complaints with state and local authorities concerning their wages, Respondent violated Section 8(a)(1) of the Act.

6. By laying off Guy Bourdo and Percy Williams in the summer of 1977 and by laying off Guy Bourdo, Percy Williams, and Milan Mix in the fall of 1977, Respondent violated Section 8(a)(1), (3), and (4) of the Act.

7. The aforesaid practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

In order to remedy the unfair labor practices found herein, my recommended Order will require Respondent to cease and desist from further violations, to post an appropriate notice to employees, and to offer unconditional reinstatement to Guy Bourdo, Percy Williams, and Milan Mix and make them whole for all wages lost as a result of the unlawful discrimination, such backpay to be computed on a quarterly basis, plus interest thereon to be computed as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[1] I will also recommend that Respondent be ordered to bargain in good faith with the Union as the exclusive collective-bargaining agent of the employees in the unit.

Pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[2]

Respondent, United Contractors Incorporated and JMCO Trucking Incorporated, Menomonee Falls, Wisconsin, the officers, agents, successors, and assigns of both these corporations, shall:

1. Cease and desist from:

(a) Discouraging membership in, or activities on behalf of, Teamsters "General" Local Union No. 200, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, by laying off its truckdrivers or by discriminating in regard to the hire or tenure of employment, or discriminating in any other manner in regard to any term or condition of employment, of any of Respondent's employees in order to discourage union membership or union or other concerted activities.

(b) Withholding the wages of its employees for filing grievances with state or local authorities or in any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

(c) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with the above-named Union as the exclusive bargaining representative of its truckdriver employees in the established unit.

(d) Unilaterally changing or canceling employees' wages, hours, holidays, vacations, or other terms and conditions of employment without bargaining in good faith over said matters with their exclusive collective-bargaining representative.

(e) Laying off or otherwise discriminating against its employees because they gave testimony under the Act.

2. Take the following affirmative action, which is deemed necessary to effectuate the policies of the Act.

(a) Offer to Milan Mix, Guy Bourdo, and Percy Williams immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make each of them whole for any loss of earnings they may have suffered as the result of the discriminatory layoffs.

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[1] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

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

(b) Honor and enforce the terms of the collective-bargaining agreement with the above-named Union which expired May 31, 1977, until a new agreement is reached.

(c) Bargain collectively, upon request, with the above-named Union with respect to the rates of pay, wages, hours, and other terms and conditions of employment of the employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

(d) Restore to all employees in the collective-bargaining unit all unpaid wages and other benefits established under the aforesaid collective-bargaining agreement.

(e) Preserve and, upon request, make available, for examination and copying, 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.

(f) Post at its Menomonee Falls, Wisconsin, place of business copies of the attached notice marked "Appendix."[3] Copies of said notice, on forms provided by the Regional Director for Region 30, after being duly signed by Respondent, shall be posted by it 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.

(g) Notify the Regional Director for Region 30, in writing, within 20 days of the date of this Order, what steps Respondent has taken to comply herewith.

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[3] In the event 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."