Twin City Concrete, Inc. *and* International Union, Allied Industrial Workers of America, AFL–CIO. Cases 18–CA–12248, 18–CA–12502, and 18–CA–12773

July 27, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND BROWNING

On August 17, 1994, Administrative Law Judge James S. Jenson issued the attached decision. The Respondent and the General Counsel each filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as explained below and to adopt the recommended Order as modified.[2]

On April 28, 1993, the Regional Director approved agreements settling allegations in Cases 18–CA–12248 and 18–CA–12502, based on unfair labor practice charges filed in May 1992 and January 1993. The Charging Party filed additional unfair labor practice charges against the Respondent in August 1993 (Case 18–CA–12773). On September 28, 1993, the Regional Director revoked his approval of the earlier settlement agreements and issued a complaint consolidating allegations in the three cases.

In its exceptions, the Respondent argues that it did not commit any postsettlement unfair labor practices and therefore the settlement agreements should not have been set aside. The Board has long held that ''a settlement agreement may be set aside and unfair labor practices found based on presettlement conduct if there has been a failure to comply with the provisions of the settlement agreement or if postsettlement unfair labor practices are committed.'' *YMCA of Pikes Peak Region*, 291 NLRB 998, 1010 (1988). For the reasons set forth below, we find that the Respondent failed to comply with the settlement agreements it signed and that it committed two postsettlement unfair labor practices.

1. The judge found, and we agree, that the Respondent violated Section 8(a)(5) by refusing to meet and negotiate in person over the effects of its decision to eliminate the trucking operation. The judge properly found that, prior to the April 28, 1993[3] settlement agreements, the Respondent insisted that negotiations with the Union occur by telephone in violation of its duty to bargain collectively. It appears that the judge also intended to find, as alleged in the complaint, that, after the settlements, the Respondent committed a similar violation,[4] but the judge's decision is not entirely clear. We shall therefore clarify the judge's decision on this point.

Both settlement agreements provided, inter alia, that the Respondent will bargain collectively with the Union. Citing the bargaining obligation contained in the settlement agreements, the Union, by letter dated May 17, requested that the Respondent ''make dates available for bargaining in Sioux Falls as soon as possible.'' By letter dated June 16, the Union again cited ''the recent NLRB settlement'' and reiterated its request that ''you make dates available for bargaining in Sioux Falls as soon as possible.'' The letter continued: ''We would be discussing all aspects of the contract including the change in your trucking operation . . . .''

By letter dated June 21, the Respondent's attorney rejected the Union's requests for face-to-face bargaining. Specifically, the Respondent's June 21 letter stated, inter alia:

> If you believe that there are still some outstanding issues, questions, concerns, etc. [about the elimination of the trucking operation], we would like to hear from you in writing what you think they are so that we could review that and, if appropriate, make arrangements to meet to discuss those issues.

The letter concluded by stating that ''we have not understood that there was any need to meet to discuss anything'' and that the Union should first communicate its concerns ''in writing.'' The Respondent

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

No exceptions have been filed to the judge's dismissal of 8(a)(3) complaint allegations concerning the increase in the amount of truck driving work assigned to a subcontractor and the resultant reduction in truck driving work available to bargaining unit truckdriver Ralph Hansen, and an 8(a)(5) allegation concerning the Respondent's alleged refusal to execute a written agreement.

[2] We have modified the judge's recommended Order and notice to include a standard narrow injunctive provision, as well as a *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), backpay provision and an affirmative bargaining order as discussed in the remedy section of the judge's decision.

[3] All dates hereafter are in 1993 unless otherwise specified.

[4] The judge discussed this issue in a section of his decision entitled, ''Post Settlement Allegations.'' In addition, the judge stated that he found that the Respondent ''violated Sec. 8(a)(5) as alleged in par. 12 of the complaint.'' That complaint paragraph alleged, inter alia, that the Union has requested to meet and negotiate with the Respondent concerning the effects of the elimination of the trucking operation ''[s]ince on or about March 19, 1993, and continuing to date,'' and that the Respondent refused to meet with the Union ''[s]ince in March 1993, and continuing thereafter.''

would thereafter ''evaluate those concerns'' and make arrangements to meet ''if appropriate.''

The Respondent's June 21 letter clearly constituted a refusal of the Union's request to bargain in person over the effects of its decision to eliminate the trucking operation. Contrary to the position the Respondent expressed in the June 21 letter, the ''statutory obligation [to bargain collectively] is not satisfied by merely inviting the union to submit any proposition they have to make in writing where either party seeks a personal conference.'' *NLRB v. U.S. Cold Storage Corp.*, 203 F.2d 924, 928 (5th Cir. 1953). By refusing to meet and confer with the Union, the Respondent breached the affirmative bargaining provision of the settlements and violated Section 8(a)(5) and (1) of the Act.[5] Therefore, the settlement agreements were properly set aside.[6] Accordingly, the General Counsel's prosecution of a complaint in Cases 18–CA–12248 and 18–CA–12502, as well as the judge's consideration and disposition of those presettlement allegations, was appropriate.[7]

2. The judge found that the Respondent violated Section 8(a)(1) by assisting an employee in the filing of a decertification petition. The Respondent excepts, inter alia, to the judge's granting the General Counsel's motion to amend the complaint at the hearing to allege unlawful assistance with the decertification petition. The Respondent argues that this complaint allegation is not supported by a timely filed charge and that, in any event, it did not provide any unlawful assistance to the decertification effort.

On December 1, 1993, at the opening of the hearing in this case, counsel for the General Counsel moved to amend the complaint to allege that since about June 15, 1993, the Respondent ''initiated, sponsored, and assisted an employee in filing a decertification petition.''[8] After considering the Respondent's objections to the General Counsel's motion, the judge granted the General Counsel's motion to amend, and postponed the hearing indefinitely so that the Respondent could prepare a defense to the unlawful assistance allegation. The hearing was reconvened on January 13, 1994, fully 6 weeks later, and the Respondent presented its defense relating to the amended complaint.

Contrary to the Respondent's assertions, the allegation of unlawful assistance with the decertification petition is encompassed by the charge in Case 18–CA–12773, filed August 11, which is within the 6-months' limitations period. This charge alleged that the Respondent violated Section 8(a)(1) and (5) by the following conduct:

> Union accepted the Company offer. Company is refusing to sign the contract.
>
> Union willingness to accept the Company offer was prior to the decertification petition that was cooked up in the Sioux Falls office.

Thus, this charge expressly alleged that the Respondent concocted or ''cooked up'' the decertification petition. The amended charge in Case 18–CA–12773, filed September 23, alleged that the Respondent violated Section 8(a)(1) and (5) by the following conduct:

> Since on about July 15, 1993, the above-named Employer has failed and refused to sign a contract accepted by the Union after collective bargaining.
>
> Since in or about March, 1993, the above-named Employer has failed and refused to bargain in good faith with the Union by refusing to meet and bargain with the Union regarding the effects of the Employer's elimination of its trucking operation, and by insisting that negotiations on this matter take place over the telephone.

Although the amended charge did not specifically refer to the decertification petition, we do not find that its omission, in the particular circumstances of this case, means that that allegation was withdrawn. Indeed, the Respondent does not even advance such an argument in its exceptions. In comparing the two charges, we find that the effect of the charge amendment was to rephrase the refusal-to-execute allegation in more artful language and to add the refusal-to-bargain-in-person allegation discussed above. Certainly, the General Counsel viewed the ''cooked up'' allegation in the original charge as viable, because he saw no need for the filing of a new charge before moving at the hearing to amend the complaint to allege unlawful assistance with the decertification petition, even

[5] In finding that the Respondent violated Sec. 8(a)(5) and (1) by its insistence on receiving written statements of position before agreeing to a face-to-face meeting with the Union concerning the effects of the termination of the Sioux Falls trucking operation, we note that the circumstances here are distinguishable from those in *Holiday Inn Downtown-New Haven*, 300 NLRB 774 (1990), on which the Respondent relies. In that case, unlike here, the parties had engaged in numerous face-to-face bargaining sessions and had reached impasse on the subject of subcontracting. The respondent employer declined to meet again unless the union communicated at least some specifics of a proposal that might break the impasse. Here the Respondent refused to attend even an initial face-to-face meeting without advance written proposals from the Union.

[6] Member Stephens does not rely on the refusal to engage in face-to-face bargaining as a basis for setting aside the settlement agreements. He relies instead on the unlawful assistance to the decertification effort discussed below. Such pervasive management assistance in an effort to unseat the bargaining representative is clearly a violation of a settlement in which the Respondent promised to bargain in good faith with the Union and not to engage in actions aimed at undermining it. Because the settlement agreements could properly be set aside on that basis, he agrees that all the presettlement conduct can be alleged and litigated as unfair labor practices.

[7] We agree with the judge's finding that the Respondent unlawfully interrogated employees Willard and Conger, threatened to withhold, and actually did withhold, employees' regular wage increases in May 1992, and reduced overtime work for plant employees, as well as his finding that the Respondent unlawfully insisted on bargaining by telephone prior to the settlements.

[8] Case 18–RD–2001.

though the 10(b) period for the filing of a charge concerning this conduct had not yet expired. Because the original charge allegations remained pending, and because the conduct in issue occurred within 6 months of the filing of the original charge, the complaint allegation of unlawfully assisting the decertification petition is not barred by Section 10(b) of the Act.

We acknowledge that even when Section 10(b) is no bar, a belated complaint amendment may in some circumstances constitute a violation of due process. We find no such violation here. As noted above, after allowing the amendment, the judge adjourned the hearing for 6 weeks and the Respondent presented its defense after that adjournment. The Respondent has not argued in its exceptions that it was prejudiced by this procedure, and under the circumstances, we see no evidence of any prejudice.

Accordingly, we find, for the reasons stated by the judge, that the Respondent violated Section 8(a)(5) and (1) by assisting an employee with filing a decertification petition. This unlawful conduct also warranted the General Counsel's revocation of the settlement agreements, and the judge's consideration of presettlement allegations.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Twin City Concrete, Inc., Sioux Falls, South Dakota, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(h).

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

2. Insert the following as paragraphs 2(a) and (b) and reletter the subsequent paragraphs.

''(a) On request, meet and bargain collectively with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit described below with respect to wages, hours, and other terms and conditions of employment, including the effects of the decision to discontinue the trucking operation, and reduce to writing and sign any agreement reached as a result of such bargaining. The appropriate bargaining unit is:

> ''All full-time and regular part-time production and maintenance employees, including truck drivers, employed at its Sioux Falls, South Dakota facility; but excluding office clerical employees, professional employees, managerial employees, sales employees, guards and supervisors as defined in the Act.

''(b) Pay limited backpay to Ralph Hansen in the manner set forth in the remedy section of the judge's decision.''

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

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate our employees regarding their activities on behalf of, membership in, or feelings about International Union, Allied Industrial Workers of America, AFL–CIO or any other labor organization.

WE WILL NOT threaten to withhold regularly scheduled wage increases because of the Union.

WE WILL NOT initiate, sponsor, or assist employees in filing a decertification petition.

WE WILL NOT withhold regularly scheduled wage increases from employees in order to discourage union activities.

WE WILL NOT limit or reduce the amount of overtime work for employees because of their union activities.

WE WILL NOT implement unilateral changes in the employee health insurance program without giving the Union prior notice and an opportunity to bargain over the changes.

WE WILL NOT insist that the Union bargain by telephone over the effects of our decision to eliminate the truckdriver position.

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

WE WILL, on request, meet and bargain collectively with the Union as the exclusive collective-bargaining representative of our employees in the appropriate unit described below with respect to wages, hours, and other terms and conditions of employment, including the effects of our decision to discontinue the trucking operation, and reduce to writing and sign any agree-

ment reached as a result of such bargaining. The appropriate bargaining unit is:

> All full-time and regular part-time production and maintenance employees, including truck drivers, employed at our Sioux Falls, South Dakota facility; but excluding office clerical employees, professional employees, managerial employees, sales employees, guards and supervisors as defined in the Act.

WE WILL pay limited backpay to Ralph Hansen, plus interest, as required by the Board's Order.

WE WILL make whole, to the extent we have not already done so, Doug Schoenfelder, Darren Willard, and Ralph Hansen for any loss of earnings and other benefits resulting from our withholding of regularly schedule wage increases, reducing the amount of overtime work made available to them, and unilaterally implementing changes in the health insurance program, plus interest.

TWIN CITY CONCRETE, INC.

David M. Biggar, for the General Counsel.
Dayle Nolan and *Bruce J. Douglas (Larkin, Hoffman, Daly & Lindgren)*, of Bloomington, Minnesota, for the Respondent.
Stan Frank, of Sioux Falls, South Dakota, for the Union.

DECISION

STATEMENT OF THE CASE

JAMES S. JENSON, Administrative Law Judge. I heard these matters in Sioux Falls, South Dakota, on December 1 and 2, 1993, and January 13, 1994. The charge in Case 18–CA–12248 was filed on May 18, 1992, and a complaint issued on August 31, 1992. The charge in Case 18–CA–12502 was filed on January 8, 1993, and amended on February 16, 1993. On August 11, 1993, the charge in Case 18–CA–12773 was filed and on September 23 was amended. On September 27, 1993, a complaint consolidating the three cases issued. It was amended at the hearing over the Respondent's objection. The consolidated complaint, as amended, alleges violations of Section 8(a)(1), (3), and (5) of the Act, all of which are denied by the Respondent. All parties were given full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Extensive briefs were filed by both the General Counsel and Respondent and have been carefully considered.

On the entire record in these matters, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

It was alleged, admitted, and is found that the Respondent, a Minnesota corporation with an office and place of business in Sioux Falls, South Dakota, is engaged in the manufacture, sale, and distribution of concrete products and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

As the record establishes that International Union Allied Industrial Workers of America, AFL–CIO is an organization in which employees participate and that exists for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work, it is found that it is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Setting*

Twin City Concrete, Inc., the Respondent, manufactures and distributes cement and concrete products with operations in the States of Minnesota, North Dakota, South Dakota, Iowa, and Nebraska. The Sioux Falls, South Dakota facility, the only one involved in these proceedings, consists of a warehouse and mixing facility employing four bargaining unit employees consisting of two plant men, Doug Schoenfelder and Darren Willard, truckdriver Ralph Hansen and maintenance man Kelly Conger. Plant Manager Wes Eidem, an admitted supervisor, and a clerical employee complete the Sioux Falls complement. Hammond Becken is the chief executive officer of the Company, whose main office is in Minneapolis, and Mike Fritz, also located in Minneapolis, is Respondent's president. Dayle Nolan is Respondent's attorney and one of its negotiators. Stan Frank and Phyllis Bitterman, both International union representatives, were the Union's principal negotiators. Unit employees Schoenfelder, Willard, and Hansen also participated in negotiations. The record shows that Respondent's business is seasonal and weather dependent and that its high or busiest time is from April to November during which time temporary employees may be hired.

On April 24, 1992, the Board conducted an election among Respondent's two production and maintenance employees and the truckdriver, which the Union won. The Union was certified on May 1, 1992. On May 18, 1992, and January 8, 1993, respectively, the Union filed the charges in Cases 18–CA–12248 and 18–CA–12502.[1] April 28, 1993, the Regional Director approved informal settlement agreements in those cases containing nonadmission clauses that provided for the posting of the notices and certain reimbursements to employees. Both settlement agreements provide, inter alia, that the Respondent will bargain collectively with the Union. Those cases were closed on compliance with the settlement agreements on July 30, 1993, with the caveat that ''If in the future compliance with the provisions continues, no further action will be taken.'' On August 11, 1993, the charge in Case 18–CA–12773 was filed and on September 23 it was

[1] The charge in Case 18–CA–12248 alleges Respondent intimidated and interrogated employees, reduced working hours, denied scheduled pay increases to employees because of their union interests, and provided extra benefits to nonunion employees in an effort to discourage union employees from working for Respondent. The charge in Case 18–CA–12502, as amended, alleges unilateral changes in insurance and a 401(k) plan, discontinuance of its trucking operation and unilateral changes in health insurance.

amended.[2] Concluding that the settlement agreements in the earlier cases had been breached, on September 27, 1993, the Regional Director revoked his approval and set aside the settlement agreements and issued a complaint consolidating the three cases for hearing. In light of further Act violations found, I conclude that the Regional Director's action was appropriate and that Respondent's entire course of conduct is relevant.

B. *Presettlement Allegations*

1. Paragraph 5(a) alleges that on or about April 16, 1992, Eidem interrogated an employee concerning union activities, membership, and desires.

Employee Willard, who was hired in May 1991 and was still employed by Respondent at the time of the hearing, testified that prior to the April 24, 1992 election, Eidem approached ''and asked me how I felt about the Union.'' After telling Eidem that he ''was for it,'' he testified Eidem said, ''why do we need a second party involved.'' Although Eidem denied asking how Willard felt about the Union, he acknowledged asking him ''why he thought we needed third party intervention.''

Conger, who commenced working for Respondent as a maintenance man on April 15, 1992, testified that at his preemployment interview, Eidem told him about the forthcoming election and asked how he felt about unions. Conger's response was that ''I wasn't very keen on unions.'' Eidem testified he told Conger that a union petition was pending and he didn't know whether or not Conger could vote because it depended on the date he was hired, and that Conger replied, ''he didn't think much of unions.'' He denied he asked Conger how he felt about unions. Although the complaint fails to separately allege the conversation with Conger as a violation of the Act, in his brief the General Counsel moved to amend the complaint to allege the interrogation as a separate violation and that a specific finding be made regarding it. As the issue was fully litigated and is closely related in time to similar conduct alleged in complaint paragraph 5, the motion to amend is granted. I conclude that Willard and Conger were more credible than Eidem. As the evidence fails to show either employee was a vocal or open union supporter, that Eidem was the highest ranking company official in the Sioux Falls facility and that he later used the information obtained from Conger with respect to the filing of a decertification petition, it is found that the questioning involved an unlawful intrusion into their union sentiments and that the General Counsel has proven the allegations of unlawful interrogation of both Willard and Conger.

2. Paragraph 5(b) alleges that, on or about April 22, Chief Executive Officer Becken threatened to withhold regularly scheduled wage increases because of employee union activity; and paragraph 6(a) alleges Respondent withheld May 1 regularly schedules wage increases because of employee union activity.

Truckdriver Hansen started working for Respondent on a part-time basis in July 1989 and became full time in January 1990. He testified that when he started, he was told by the former driver that raises were usually given in May. He testified that while he didn't remember whether it was when he became full time or in May 1990, he received a raise that year. He was given a raise in May 1991 but none in 1992. Plantman Schoenfelder was hired in January 1991. He testified that in December of that year he asked Eidem about a raise and was told that if raises were to be given, they were to be given out in May. He received a 75-cent raise effective May 1, 1991, but none in 1992. Plantman Willard started working for Respondent on May 17, 1991. He testified that when he was hired, Eidem told him that ''there was wage increases once a year, May 1st was the cost of living raise,'' He received a 60-cent-per-hour wage increase in September of that year and a 35-cent-an-hour increase in May 1993, but none in 1992. Conger was hired as maintenance man and started working April 15, 1992. He testified Eidem told him that new employees received raises after 3 months, 6 months, and 1 year, and that a cost-of-living raise was given every May. Although Becken denied Respondent had a policy of granting pay increases in May of each year, he admitted that if wage increases were granted, ''it has been around May 1st, although we have given raises in June and September.'' Becken testified that he reviews Eidem's recommendations regarding pay raises. Eidem denied Respondent had a policy or practice of giving cost-of-living annual wage increases to employees in the Sioux Falls plant. He testified that during the interview process he tells new employees that there will be a ''90-day review period'' and that ''we try to review hourly wages in the spring and salaried or office employees in the fall.'' The record also shows that employees in Respondent's Spencer, Iowa plant, which is under Eidem's charge, received a wage adjustment in ''about May or the spring of 1992,'' as well at the Sioux Falls plant office secretary. The foregoing convinces me that it was Eidem's practice to recommend wage adjustments to become effective in May of each year and that this information was conveyed to the employees.

CEO Becken met with Schoenfelder, Willard, and Hansen 2 days before the April 24 election. Eidem was also present. According to Schoenfelder, following a statement by Becken that the Company didn't approve of a Union in the Sioux Falls plant, Hansen asked, ''if we were going to get any kind of a pay increase in May like we normally would get,'' and that Becken responded that nothing would be done about the ''payscale or pay raise until after this Union thing was settled.'' Willard testified that Becken's response to Hansen's question was that ''We wouldn't be receiving our May 1st raises until everything was negotiated out in the contract.'' Hansen's recollection was that Becken said, ''that there would be no raises until the contract was negotiated or settled.'' Athough Eidem claimed Becken's response to Hansen's question was that ''that could not be discussed,'' Beckon testified he told them ''that I could not answer that question, that it all depended on the outcome of the election. If the Union won, then we would have to negotiate with the Union on any wage increase.''

The General Counsel argues that having created the expectation that employees would receive wage increases in May, Becken's linking the increases to the outcome of the election amounted to ''a clear threat to deny their wage increases if the Union won the election,'' and the fact the employees still

[2] The charge, as amended, in Case 18–CA–12773 alleges the Respondent's refusal to sign a contract containing its final offer, and insisting that bargaining over the effects of the elimination of its trucking operation, take place over the telephone.

voted for the Union is of no consequence. The Respondent contends that Becken's remarks were ''nothing more than truthful statements of Board law'' and that there is no evidence on which a finding of a threat, intimidation, or coercion of any kind could be grounded. Respondent notes further that the issue of pay increases was settled and the employees fully made whole for their alleged losses (without admitting liability) in the settlement agreement that the Company fully performed. It is also claimed that to the extent a practice or policy was in place with respect to pay raises, it was that, as a general matter, employees received a review and possibly a merit increase at or near the anniversary of their date of hire.

It is clear on the record that newly hired employees were informed that wage increases were given in May. Thus, Hansen, who started part-time in July 1989 and full-time in January 1990, was told by a former driver that raises were usually given in May, and while he didn't remember whether a 1990 raise was given in January when he became full-time or in May of that year, he received one in May 1991. Schoenfelder received a pay raise in May 1991, and in December was told by Eidem that if raises were to be given, it would happen in May. Willard was also told when hired by Eidem that raises were given in May as was Conger. Further, the Sioux Falls office secretary received an increase in May 1992 as did the Spencer, Iowa employees that were under Eidem's charge.

The Board has consistently held that an employer who withholds pay raises from employees who have chosen a union as their bargaining representative violates the Act if the employees otherwise would have been granted the raises in the normal course of the employer's business. *Florida Steel Corp.*, 220 NLRB 1201 (1975), enfd. 538 F.2d 324 (4th Cir. 1976). The evidence shows that similar wage increases were granted in 1991 and 1993, and with the exception of the employees in the Sioux Falls plant that had selected the Union as their representative, were granted to other employees under Eidem's jurisdiction in 1992. As wage increases are clearly a condition of employment, Respondent was legally obligated to follow its normal practice of granting the wage increases in May even though the Union had won the recent election. Thus, Becken's statement to the employees that pay raises, in his words, ''depended on the outcome of the election. If the Union won, then we would have to negotiate with the Union on any wage increase,'' amounts to an implied threat to withhold raises, if the Union wins, until such time as the Union and Respondent reach agreement, a process that could take many months, if ever. Thus, Respondent held out to employees a wage raise that, but for the upcoming election, they would receive in May. During an organizing campaign, an employer, in granting or withholding benefits, ''is supposed to act as though the union were not present.'' *NLRB v. Industrial Erectors,* 712 F.2d 1131, 1135 (7th Cir. 1983). Thus, it is well settled that an employer violates the Act by attributing its failure to grant promised wages and benefits to the presence of the union or a pending election. *America's Best Quality Coatings Corp*., 313 NLRB 470 (1993). Accordingly, it is found that the General Counsel has proven the allegation in paragraphs 5(b) and 6(a) of the complaints.

3. Paragraph 6(b) alleges that since on or about April 24, 1992, Respondent has limited and reduced the amount of overtime work made available to Schoenfelder and Willard for reasons related to the Union.

The election, which the Union won by a vote of 3 to 0, was held on April 24, 1992. Both Schoenfelder and Willard testified that prior to the election they worked approximately 4 to 8 hours of overtime a week, but that in early May, Eidem posted a notice to the effect that employees would work only 8 hours a day from 7:30 a.m. to 4:30 p.m. Consequently, they claimed, their hours of overtime work were reduced substantially, which coincided with Respondent's use of more temporary employees. Invoices showing hours worked by temporary employees and pay records for Schoenfelder and Willard showing payment for overtime hours in 1991 and 1992 are attached hereto as Appendix A and disclose clearly that overtime for both Willard and Schoenfelder decreased precipitously in May 1992 from the previous months and when compared with overtime in 1991. The figures also disclose that hours worked by temporary help from May through December in 1992 increased more than 10 times the comparable period in 1991. The records do not reflect, as Respondent claims, that Willard and Schoenfelder worked about the same amount of overtime hours both before and after the election or when compared to the prior year. Further, changing their work hours and reducing their overtime, while at the same time increasing substantially the number of hours worked by temporary employees, seems inconsistent with the claim that it was done to reduce costs.

Casting further doubt on the legitimacy of the reduction in overtime is the fact the Twin City facility had ''an incredibly busy month'' in May, as evidenced by the parent Company's June 1992 newsletter.[3] Respondent failed to notify the Union of its intent to change the hours of work or to discuss the overtime of the two unit employees while at the same time utilizing temporary workers in their place. In sum, I find that the General Counsel has proven by a preponderance of the evidence that the reduction in overtime work available to Schoenfelder and Willard was related to the Union and violated Section 8(a)(3) and (1) of the Act as alleged in paragraph 6(b) of the complaint.

4. Paragraph 6(c) alleges that from about April 24, 1992, until about June 15, 1992, Respondent increased the amount of truck driving made available to a subcontractor and thereby reduced the amount made available to truckdriver employee Hansen for reasons related to the Union.

Hansen missed work in April, May, June, and part of July 1991 because of heart surgery. On returning in July, he informed Eidem that the doctor had told him to slow down ''and probably not do the long hauling.'' Accordingly, his driving was limited the next couple of months to short hauls. He testified that RM Trucking started hauling in the spring of 1991, apparently at the time he was out for surgery, and continued into the fall when business started slowing down, at which time he took over the hauling himself.[4] He testified RM Trucking resumed hauling in April 1992. Hansen's pay was based on an hourly rate plus a stipulated amount for each mile he drove. General Counsel's Exhibit 42 shows that from April 23, 1992, through June 12, 1992, the 7-week pe-

[3] G.C. Exh. 53.

[4] RM Trucking did almost twice the amount of hauling in 1991 than in 1992.

riod covered in complaint paragraph 6(c). Hansen worked a total of 180.5 hours and drove 2926 miles, while in the previous 7 weeks, March 5 through April 23, he worked 243.75 hours and drove 6933 miles. Although the rate per mile and number of miles driven by RM Trucking is not in the record, it submitted invoices covering March in the amount of $967, April in the amount of $1435, May in the amount of $5480, and the entire month of June for $7700, for a total of $15,582 as contrasted $17,756 for the like period in 1991. A compilation of the RM billing for the entire year 1992 shows it was paid $24,994, down from $48,505 in 1991.

Hansen testified that during the week of May 7, 1992, he asked Eidem for more hours and trips and was told that the Company owed the owner of RM Trucking, who received no company benefits, some loads too, whereas Hansen was being compensated along with insurance and a 401k plan. There was unrefuted testimony that several key accounts that Hansen made deliveries for, were lost in late 1991 and 1992. On these facts, particularly the fact that the amount of hauling RM Trucking did in 1992 was down substantially from 1991, it is concluded that the preponderance of the evidence does not prove the allegation in paragraph 6(c) and its dismissal is recommended. *America's Best Quality Coatings Corp.*, 313 NLRB 470 (1993).

5. Paragraph 11 of the complaint alleges that in about January 1993, Respondent implemented changes in its health insurance program affecting the coverage and cost without prior notice to the Union.

On December 28, 1992, the Respondent, without prior notice to the Union, notified bargaining unit employees of changes in the cost and coverage of their existing health insurance coverage, to be effective January 1, 1993. On January 8, 1993, the Union filed the charge in Case 18–CA–12502, later amended, alleging the unilateral change. During 1992 the bargaining unit employees were covered by a ''cafeteria plan'' consisting of three levels of benefits, designated plans, A, B, and C, which Respondent and related companies offered to all nonunion employees, numbering approximately 160. Each of the three plans had a different cost factor each year and were bid on by major carriers. Respondent selected the carrier with the best coverage and lowest price, decided how much it would contribute to the plan and then calculated the remaining rates that the employees were to pay. The plan requires that employees make an annual election about which plan, A, B, or C, they wish to come under. It was pursuant to this requirement that Respondent notified employees on December 28, 1992, of the changes in the plans and asked that they make their elections.

The record shows that during the contract negotiations, the Respondent had proposed another plan, plan S, whereas the Union sought plan A under the cafeteria plan. Frank testified that on learning of the changes, he noted that the changes were to plan A, the plan the Union had sought in bargaining.

The General Counsel argues that because health insurance is a mandatory subject of bargaining, and the unit employees were represented by the Union, it was unlawful for the employer to make any changes in the plan without first affording the Union an opportunity to bargain over the changes. The Respondent argues that the procedures followed in setting the premiums and co-pays, and determination of coverage, was the same as had been followed in prior years, was dictated by the terms of the plan and Federal law, and in any event was cured by the settlement agreement disposing of the charge, including reimbursing unit employees for their extra costs for coverage. Having concluded it was within the Regional Director's authority to withdraw his approval of the settlement agreement, and as health coverage is a mandatory subject of bargaining, it is found that Respondent violated the Act as alleged in paragraph 11 by implementing changes with the health plan without first notifying the Union and affording it an opportunity to bargain with respect to the changes.

C. *Postsettlement Allegations*

1. Paragraph 12 alleges that on March 8, 1993, Respondent notified the Union of its intention to eliminate its Sioux Falls trucking operation, that on March 19, the Union requested to meet and negotiate about the effects of the elimination, and that the Respondent refused to meet but rather insisted that negotiations occur by telephone, thereby violating Section 8(a)(5).

By letter dated March 8, 1993, Respondent notified the Union that because of the imposition of a 43-percent increase in the cost of leasing the truck used in making deliveries, which it was unable to recover from customers, it had decided, effective March 31, 1993, to discontinue the truck lease and delivery of its products by trucks. The letter goes on to state:

> The Company is willing to negotiate with you via telephone conference at a mutually convenient scheduled time regarding the effects of this business decision on the members of the bargaining unit. After you have had a chance to discuss this with your membership please call me to arrange a time for a telephone conference to negotiate the effects.

By letter dated March 19, 1993, the Union declined to negotiate over the phone and requested dates for negotiations in Sioux Falls. On March 30, Fritz, on behalf of Respondent, wrote Frank a letter that acknowledges the Union's rejection of the proposal to negotiate the effects of the decision to discontinue the truck operation by telephone conference, and goes on to state:

> This letter contains Twin City Concrete Products Company's proposal concerning the effects of the decision to discontinue the trucking operation:
>
> 1. The driver position will be eliminated effective end of business day April 9, 1993.
>
> 2. On April 12, 1993 the individual holding the driver position will become a plant man.
>
> 3. Because three plant men are not needed at this time, the lowest man on the seniority list will be laid off effective April 12, 1993.
>
> You can reach me at 612–688–9292 during normal business hours if you wish to discuss the proposal or offer a counter proposal.

The Union responded with a request to meet in person. By letter dated April 12, 1993, Respondent wrote the Union in which ''we restate our proposed offer of March 30, 1993 and would extend the dates to April 16, 1993 for the elimination of the driver position . . . and April 19, 1993 for the layoff date'' again offering to discuss the proposal or a counter-

proposal by phone. The Union responded with another request for dates to meet in person. Hansen, who was the driver, retired effective April 19, having made the Respondent aware of his desire to retire in December 1992.

The General Counsel argues that a party engaged in collective bargaining may not lawfully insist that negotiations be conducted over the phone or by mail when the other party seeks to meet in person, citing *U.S. Cold Storage Corp*., 94 NLRB 1108 (1951), enfd. 203 F.2d 924 (5th Cir. 1953), and *Alle Arecibo Corp*., 264 NLRB 1267, 1273 (1982). Therefore, it was unlawful for Respondent to insist on negotiating the effects of the discontinuation of the trucking operation over the phone instead of meeting face-to-face as the Union wanted. The Respondent argues the amendment adding the refusal of the Respondent to meet to bargain over the effect of the elimination of the trucking operation is barred by Section 10(b) because the Union had knowledge of the discontinuance on or about March 8 and the amendment adding that allegation to the charge was made on September 23, more than 6 months later. The argument lacks merit. By its March 8 letter, Respondent informed the Union of its decision to discontinue the lease effective March 31, and expressed a willingness to negotiate via telephone. The Union's March 19 letter clearly rejects the proposal to negotiate over the phone and suggests meeting in person. In a letter of March 30, the Respondent notes the Union's ''outright rejection of our proposal to have a telephone conference to attempt to negotiate over the effects'' made its own proposal and suggested the Union call ''during business hours if you wish to discuss the proposal or offer a counter proposal.'' In its letter to the Union date April 12, Respondent again noted the Union's refusal to negotiate over the phone, restated its proposal of March 30 that extended dates and again suggested the Union call ''during normal business hours if you wish to discuss the proposal or offer a counter proposal.'' Respondent's insistence or negotiating by telephone on both March 30 and April 12, in face of the Union's request to meet in Sioux Falls to negotiate, are within the 10(b) period. Respondent's argument that the Union at no time requested bargaining over the effects of the Respondent's action also lacks merit, as does the statement in its brief that ''there were no 'effects' over which bargaining would have made any difference.'' One wonders then why the offer was made to negotiate ''via telephone conference . . . regarding the effects of this decision on the members of the bargaining unit.'' The decision did indeed have an ''effect'' on the bargaining unit in the elimination of one job. By insisting that negotiations occur by telephone, Respondent violated Section 8(a)(5) as alleged in paragraph 12 of the complaint.

2. Paragraph 5(c) alleges that on or about June 15, 1993, Respondent, through Eidem, initiated, sponsored, and assisted an employee in filing a decertification petition.

Conger commenced working for Respondent as the maintenance man on April 15, 1992. He testified that at his preemployment interview, Eidem told him he thought a union election was coming up and asked how he felt about unions. Conger's response was that ''I wasn't very keen on unions.'' Eidem testified he told Conger that a union petition was pending and he didn't know if he could vote or not, that it depended on the date of hire and that Conger replied, ''he didn't think much of unions.''

Conger missed work from August 4, 1992, until February 4, 1993, because of a back injury and surgery. He testified that he was alone in the lunchroom in mid-June 1993, when Eidem came in and asked if he ''had heard anything about what was going on with'' the Union, and that after he responded in the negative, Eidem asked him how he felt about getting rid of the Union by applying ''for decertification'' with the ''Labor Board'' who would set up a decertification hearing and conduct another election ''whether or not to have'' the Union. Conger responded that he could do it, and Eidem gave him telephone numbers for the Board's Regional Office in Minneapolis. Using Respondent's phone, Conger call a Board agent and was told a petition couldn't be filed for 90 days for a reason Conger didn't understand. Conger reported the conversation to Eidem. Sometime later in July, Eidem told Conger that he didn't have to wait the 90 days but could call the Board at that time and apply for decertification. Conger call the same Board agent who agreed to send him the necessary forms. On receipt of the forms, which were sent to his home, Conger call Eidem and told him of their receipt but that he didn't understand them. Eidem told him to bring them to work and he would look at them. The following morning Conger left the forms on Eidem's desk. Later in the day, Eidem returned a petition form that he had completed in his own handwriting, including instructions on the back regarding a signed statement that had to accompany the petition.[5] Conger then copied the information on to a blank form, completed the showing of interest statement that Eidem had written on the reverse side of the petition he had completed, placed it all in an envelope, and gave it to Eidem to mail. The decertification petition was filed July 26, 1993.

Eidem's version differs in material respects. He testified that on several occasions in the spring of 1993, Conger asked him what was going on with the Union and that each time he responded that ''there were negotiations going on and he would have to talk to the local business agent to find out where they were.'' He also testified that in the spring of 1993, Conger asked about a pay raise and that he responded that negotiations were going on and that nothing could be done. In making an assessment of Eidem's credibility, I note that Eidem had participated in the negotiations and that no negotiating had taken place since November 23, 1992. He claimed that in late May or early June, after Conger had asked him what was going on with the Union, and he had told him to check with the local business agent, Conger stated there must be something else that could be done. Although he contends he didn't respond, he called Fritz in Minneapolis and told him of Conger's concern. Fritz told him ''there might be some other options'' and gave him the telephone numbers of the Board's Regional Office that he could give Conger. According to Eidem, he told Conger, ''If you are not getting anywhere the way you are going, here is a couple of telephone numbers you can call and ask some questions.'' Conger later told him that he had called the Board but that nothing could be done for 60 to 90 days. Eidem reported this to Fritz who said he would check into it. A few days later Fritz called back and told him that there must have been a misunderstanding and that ''You could mention that to Kelly [Conger], and he can call them again

[5] G.C. Exh. 41.

if he wants to.'' Eidem testified he told Conger ''if he wanted to ask some more question or find anything out, he could call the NLRB again.'' Conger later reported he had called the Board, and still later that he had received the petition forms that he didn't understand. Eidem stated Conger could bring them in and that he would look at them. Conger did so and Eidem kept a blank petition form that he faxed to Fritz, and which they discussed. Fritz told him how to fill in the form, which he did in longhand and gave to Conger, stating, ''That is the answer to some of your questions, and there is what needs to be filled in different areas'' and ''You have to write a separate summary showing that you are 30 percent of the employees.''

The record shows that while a notice of hearing on the petition issued, it was dismissed on October 22, 1993, following issuance of the instant consolidated complaint.

Conger, I find, was more credible as a witness than Eidem, and I therefore credit his testimony regarding the initiation of the decertification petition and the assistance given him by Respondent that was far more than ministerial assistance as Respondent claims. It is abundantly clear from the credited testimony that the idea of a decertification petition originated with, and was fostered by Eidem, who then with the additional assistance of Fritz guided Conger through the process of contacting the Board on two occasions, completing the decertification petition form in longhand as a guide, and instructing Conger in submitting the supporting 30-percent showing-of-interest statement. As I have indicated, the evidence shows Respondent went beyond simply advising Conger of his legal rights or responding to employee dissatisfaction. Eidem's assistance included the suggestion of a specific course of action that he followed up with other aid. Instigating or promoting the filing of a decertification petition constitutes more than ministerial aid and violates Section 8(a)(1) of the Act. Accordingly, it is found that the Respondent violated Section 8(a)(1) as alleged in paragraph 5(c) of the consolidated complaint. *Craftool Mfg. Co.*, 229 NLRB 634 (1977). Determining Conger's feelings about the Union gave Eidem the lead to fostering the decertification petition.

3. Paragraph 13 alleges that on or about July 15, 1993, the Union and Respondent reached complete agreement on a written contract and that since that date Respondent has refused to execute it.

Following certification, the Union requested the Respondent meet and negotiate. The first of eight negotiation meetings took place in Sioux Falls on June 26 and the last on November 23, 1992.

Several days prior to the November 23 meeting, the Respondent arranged for its contract proposal to be hand delivered to Frank's office in Sioux Falls.[6] The covering letter listed other documents being furnished along with its proposal and states in pertinent part as follows:

> *The company views this proposal as its final offer*. Although, as always, we are willing to negotiate about the language of the provisions and would be willing to listen to any proposals from the Union, on November 23, 1992, for a re-allocation of the economic package proposed, it is our firm belief that these negotiations should be able to be wrapped up, if at all, during this eighth session, particularly given the substantial movement that the company has made in agreeing to all but a couple of the Union's proposed contract provisions.
>
> In the hopes that the Union, employees, and company can reach agreement, *the company proposes, for the November 23, 1992 session only*, that it would agree to make the proposed wage increases effective May 1, 1992. This retroactivity would apply to hourly wage only. *This proposal, as with the rest of the proposal, is only offered for the November 23, 1992 session*. [Emphasis added.]

The November 23 negotiating meeting lasted from about 4:50 until about 11 p.m. Notes taken by Union Negotiator Bitterman disclose that following a break in negotiations from 7 until 7:45 p.m., at which time Respondent modified its original proposal, Nolan stated that the ''proposal in on the table tonite only.'' At about 10:15 p.m., following another break, the Union made a counterproposal, concluding with the statement, ''This is an offer by the union only being made this evening 11/23/92 to settle all outstanding issues and have agreement on a two year contract running to May 1, 1994.'' According to Frank, the Respondent then withdrew its ''strike proposal,'' stated the union had its final proposal and would like to have it submitted to the employees for a vote.[7] Although Frank testified Respondent stated they thought an impasse had been reached, a note appended to the end of the notes taken by Bitterman during negotiations states, ''No one from the company ever mentioned the word impasse.'' Notes taken by Eidem during negotiations contain the following statement that is attributed to Nolan in response to Frank's inquiry about when they could meet again, ''We are sorry, but we thought we made it clear that we are done meeting and this is our offer. We suggest you ask committee to vote on proposal before end of meeting or it will be withdrawn.'' It is clear that the offer was rejected without a committee vote.

On November 27, 1992, the Union filed a charge in Case 18–CA–12475, alleging the Respondent refused to meet further and had engaged in surface bargaining.[8] Fritz testified, without contradiction, that the charge was withdrawn following a determination by the Region that the charge lacked merit.

On April 28, 1993, the Regional Director approved informal settlement agreements containing nonadmission clauses in Cases 18–CA–12248 and 18–CA–12502, providing for the posting of notices. Both settlements provide, inter alia, that the Respondent will bargain collectively with the Union.

By letter of May 17, 1993, and again on June 16, 1993, Frank requested that Fritz ''make dates available for bargaining in Sioux Falls as soon as possible.'' On June 21, Nolan wrote Frank summarizing negotiations and the exchange of letters and other information since the last negotiation meeting on November 23, 1992. The final paragraph reads:

> We received a copy of a letter that you wrote to the National Labor Relations Board date June 3, 1993, stating that you have repeatedly asked this company for

[6] Although Respondent claimed the proposal was hand delivered on November 18, Frank claimed he didn't receive it until November 22.

[7] Two of the three unit employees were present at the meeting.

[8] The charge was signed on November 24, the day following the November 23 meeting.

> negotiating dates. While we may quarrel with your characterization of what you have done, we have not understood that there was any need to meet to discuss anything, nor have you ever informed us of any issues you wanted or felt needed to be discussed or addressed. If you believe that there is a substantial change in bargaining position, any unaddressed terms and conditions of employment that need to be discussed, if you are concerned that the employer has made any unilateral changes (which we have not) or if there is anything else warranting discussion, we would encourage you to communicate in writing and be specific so that we may evaluate those concerns and, if appropriate, make arrangements to meet to discuss any or all of your issues. We will wait to hear from you.

On July 15, 1993, Union Representative Frank wrote Fritz that ''we will make the offer to accept your last contract proposal.'' Fritz responded by letter of July 29, asserting that Respondent's last contract proposal was offered only for the November 23, 1992 negotiating session and was withdrawn at the end of that evening when impasse was reached. Noting that a decertification petition had been filed in the interim, Fritz stated the Respondent remained ''willing to sit down with you and attempt, once again to negotiate,'' and asked that Frank contact him regarding available dates.[9]

Whether the Respondent's final offer of November 23, 1992, was on the table and susceptible to acceptance by the Union on July 15, 1993, is the question. The General Counsel argues that it was, and the Respondent argues that the offer was specifically limited to the November 23 meeting and was specifically withdrawn after the Union rejected it when the meeting ended. The General Counsel argues that the Respondent's position that the offer was good only for the evening of November 23 was an afterthought created to enable decertification of the Union through Conger and that from the reading of the November 18 letter transmitting the final offer, it is clear that it was referring only to the retroactivity aspect of its wage proposal. I do not agree. Although the November 18 letter indeed states that for purposes of the November 23 session only it would agree to make the proposed wage increases retroactive to May 1, it goes on to state that the retroactivity would apply to hourly wages only and that ''This proposal, as with the rest of the proposal, is only offered for the November 23, 1992 session.'' [Emphasis added.] Also Bitterman's notes disclose a company proposal made during the negotiations on November 23 was ''on the table tonite only.'' Not surprisingly, there is a testimonial disagreement over whether Nolan stated, at the end of the meeting, that the committee should vote on it before the end of the meeting or it would be withdrawn. Notes of the meeting taken by Eidem relate that Nolan stated, ''We suggest you ask committee to vote on proposal before end of meeting or it will be withdrawn.'' Although Fritz's investigatory affidavit does not contain that statement, he testified to that fact. Nolan, Respondent's attorney did not testify. Frank denied she stated, at the end of the meeting, that the employees should vote on it that night or it would be withdrawn, as did Schoenfelder, Willard, and Bitterman. In my view, whether or not Nolan stated at the end of the meeting that the Respondent's final proposal should be voted on before the end of the meeting or it was withdrawn, is not really dispositive of the issue. The Union had been put on notice in writing in the letter of November 18 transmitting the final proposal, and also during the November 23 session when Respondent changed its proposal, that the offers were only for the November 23 negotiating session. Thus, I conclude there was no outstanding proposal susceptible to acceptance on July 15 when Frank notified Respondent that the Union was making ''the offer to accept your last contract proposal.'' Accordingly, I recommend the dismissal of paragraph 13 of the complaint.

To recap my findings, the General Counsel has proven the following complaint allegations: paragraphs 5(a), 5(b), 5(c), 6(a), 6(b), 11, and 12(c). He has failed to prove the following allegations: paragraphs 6(c) and 13.

IV. THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. I shall recommend that to the extent it has not already done so, Respondent make whole employees Doug Schoenfelder, Darren Willard, and Ralph Hansen for any losses they may have suffered as a result of the unfair labor practices found to have been committed in complaint paragraphs 6(a), 6(b), and 11. With respect to paragraph 12, the insistence that the Union bargain over the effects of the elimination of the trucking operation by telephone, in addition to a bargaining order, the General Counsel seeks a backpay remedy with respect to Hansen analogous to that set forth in *Transmarine Navigation Corp*., 170 NLRB 389 (1968). As it is impossible at this time to reestablish a situation equivalent to that which would have prevailed had the Respondent fulfilled its statutory obligation to bargain with the Union about the effects of the elimination of the trucking operation, and guided by the principle that the wrongdoer, rather than the victims of the wrongdoing should bear the consequences of the unlawful conduct, it is concluded that a *Transmarine* remedy is appropriate. Therefore, in order to assure meaningful bargaining, it is recommended that the order to bargain over the effects of the elimination of the trucking operation be accompanied with a limited backpay requirement designed both to make Hansen whole for losses suffered as a result of the violation and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent.

Accordingly, it is recommended that Respondent bargain with the Union, on request, about the effects on Hansen of its discontinuance of the trucking operation, and pay Hansen the amount of earnings he would have received had Respondent not discontinued the trucking operation, at the rates when last in Respondent's employ from 5 days after the date of this decision until the occurrence of the earliest of the following conditions: (1) the date Respondent bargains with the Union on the effects of the elimination of the trucking oper-

[9] By letter dated July 30, 1993, the Region informed the parties that ''In view of compliance with the Settlement Agreements, these cases [18–CA–12248 and 18–CA–12502] are being closed. If, in the future, compliance with the provisions continues, no futher action will be taken.'' On September 27, 1993, however, the Regional Director revoked his approval and set aside the settlement agreements, and issued the complaint consolidating the three cases for hearing.

ation; (2) a bonafide impasse in bargaining; (3) the Union failure to request bargaining within 5 days of this decision, or to commence negotiations within 5 days of Respondent's notice of desire to bargain with the Union; (4) the Union's subsequent failure to bargain in good faith; provided, however, that in no event shall this sum be less than Hansen would have earned for a 2-week period at the rates he was paid when last in Respondent's employ. Any backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(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. All full-time and regular part-time production and maintenance employees, including truckdrivers, employed at its Sioux Falls, South Dakota facility; but excluding office clerical employees, professional employees, managerial employees, sales employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times since April 24, 1992, the Union has been, and is now, the exclusive representative of all the employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. Respondent has committed unfair labor practices in violation of Section 8(a)(1) of the Act by:

(a) Interrogating employees regarding their union activities, membership, or desires.

(b) Threatening to withhold regularly scheduled wage increases because of their activities on behalf of the Union.

(c) Initiating, sponsoring, and encouraging an employee to file a decertification petition.

6. Respondent has committed unfair labor practices in violation of Section 8(a)(3) and (1) of the Act by:

(a) Withholding regularly scheduled wage increases from employees Ralph Hansen, Doug Schoenfelder, and Darren Willard to discourage them from engaging in union activities.

(b) Limiting and reducing the amount of overtime work of Doug Schoenfelder and Darren Willard because of their union activities.

7. Respondent has committed unfair labor practices in violation of Section 8(a)(5) and (1) of the Act by:

(a) Implementing changes in the employee health insurance program without prior notice to and affording the Union an opportunity to bargain over the changes.

(b) Insisting that the Union bargain by telephone over the effects of the decision to eliminate the truckdriver position.

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

9. Respondent has not engaged in the unfair labor practices alleged in paragraphs 6(c) and 13 of the consolidated complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, Twin City Concrete, Inc., Sioux Falls, South Dakota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees regarding their Union activities, membership, or desires.

(b) Threatening to withhold regularly scheduled wage increases because of the Union.

(c) Initiating, sponsoring, and assisting employees in filing a decertification petition.

(d) Withholding regularly scheduled wage increases from employees Ralph Hansen, Doug Schoenfelder, and Darren Willard to discourage them from engaging in union activities.

(e) Limiting and reducing the amount of overtime work of employees because of their union activities.

(f) Implementing changes in the employee health insurance program without prior notice and affording the Union an opportunity to bargain over the changes.

(g) Insisting that the Union bargain by telephone over the effects of the decision to eliminate the truckdriver position.

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

(a) Make Doug Schoenfelder, Darren Willard, and Ralph Hansen whole, to the extent it has not already done so, for any losses they may have suffered as a result of having withheld regularly scheduled wage increases, reducing the amount of overtime work made available to them, and implementing changes in the health insurance program.

(b) Preserve and, make available to the Board and its agents 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.

(c) Post at its Sioux Falls, South Dakota facility copies of the attached notice marked ''Appendix B.''[11] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

---

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If 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.''

IT IS ALSO ORDERED that the consolidated complaint be dismissed insofar as it alleges violations of the Act not found herein, specifically paragraphs 6(c) and 13.

APPENDIX A

	Willard		*Schoenfelder*		*Temporary Help*[1]	
	1991	*1992*	*1991*	*1992*	*1991*	*1992*
January		3.25	.25	3.75	16.00	82.25
February		11.50	16.75	15.50	0	0
March		25.75	23.75	28.00	0	128.75
April		31.00	26.50	40.00	15.50	157.50
May	[2]3.5	4.75	50.00	5.00	34.75	372.25
June	16.75	15.75	36.00	13.25	34.50	307.50
July	8.75	11.00	32.25	7.25	0	327.50
August	38.75	2.92	36.50	2.35	0	247.50
September	43.50	4.88	53.25	2.24	16.75	94.25
October	61.00	3.75	66.50	2.25	83.75	191.75
November	23.75	1.25	25.50	.50	20.50	5.50
December	9.25	0	8.00	0	[3]193.00	0
May-Dec. Totals	205.25	44.30	308.00	32.84	349.75	1546.25
Year Total					414.75	1914.75

[1] Based on invoice dates.
[2] Willard was hired May 17, 1991.
[3] Includes work performed in 1991 and paid in January 1992.