International Paper Company *and* United Paperworkers International Union and its Locals 265, 337, 1940, 2650 *and* International Brotherhood of Electrical Workers and its Local Union 1315. Cases 15–CA–10384, 15–CA–10501, 15–CA–10703, 15–CA–10423, and 15–CA–10704

December 18, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND TRUESDALE

On September 1, 1992, Administrative Law Judge Nancy M. Sherman issued the attached decision. The Respondent filed exceptions and a supporting brief, to which the General Counsel filed an answering brief. The General Counsel filed cross-exceptions and a supporting brief; the Charging Parties filed a cross-exception and a brief in support of its cross-exception, and in opposition to the Respondent's exceptions. The Respondent filed a consolidated answer and reply brief to the briefs and cross-exceptions of the General Counsel and the Charging Parties. The General Counsel and the Charging Parties filed reply briefs to the Respondent's consolidated answer and reply brief. The Industrial Union Department of the American Federation of Labor and Congress of Industrial Organizations filed a brief as amicus curiae in support of the General Counsel's cross-exception number one. The Respondent filed an answer brief in response to the amicus 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, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions for the reasons explained below and to adopt the recommended Order as restated and set forth in full below.

I. INTRODUCTION

This case presents an issue of first impression before the Board: May an employer that has lawfully locked out its bargaining unit employees and has lawfully subcontracted their work on a temporary basis take the further step of subcontracting their work on a permanent basis in order to bring economic pressure to bear in support of its bargaining position in contract negotiations? We find that such conduct is unlawful under Section 8(a)(3) of the National Labor Relations Act because it is inherently destructive of employees' Section 7 rights and because the asserted business justification does not outweigh the harm to those rights.

We additionally find that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing its proposal to subcontract permanently bargaining unit work and by failing to supply to the Unions herein requested information relevant to the parties' collective-bargaining negotiations. We further find that a backpay remedy is appropriate for all the locked-out bargaining unit employees during the period that the Respondent permanently subcontracted bargaining unit work.[2]

As set forth in full below, after negotiations for a new collective-bargaining agreement proved unsuccessful, the Respondent locked out the bargaining unit production and maintenance employees and continued operations with temporary workers provided by a nonunion firm under a temporary subcontracting arrangement. Thereafter, the Respondent made a contract proposal under which it would be permitted to subcontract permanently bargaining unit maintenance work; the Unions requested information regarding that proposal. The Respondent subsequently unilaterally implemented its proposal and entered into a permanent subcontract for the performance of bargaining unit maintenance work. The permanent subcontract was effective for approximately nine months and was thereafter voluntarily rescinded by the Respondent. During the entire 9-month period during which the permanent subcontract was effective, the bargaining unit employees remained locked out and the parties unsuccessfully sought to negotiate a new collective-bargaining agreement. Following the rescission of the permanent subcontract, the parties continued to bargain and approximately 5 months later reached agreement on the terms of a new collective-bargaining agreement, at which time the lockout was ended and all bargaining unit employees returned to work.

Accordingly, the issues in this case addressed below are:

(1) Did the Respondent violate Section 8(a)(5) and (1) of the Act by failing to supply information requested by the Unions?

(2) Did the Respondent violate Section 8(a)(3) and (1) of the Act by permanently subcontracting bargaining unit maintenance work at a time when the bargain-

[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.

The Respondent additionally argues in its exceptions that the judge was biased against the Respondent's position in this case. We have carefully reviewed the record and find no basis for a finding of bias.

[2] The judge also found that by its conduct the Respondent violated Sec. 8(a)(5), (3), and (1) of the Act, and that a backpay remedy was appropriate for all the locked-out unit employees during the period that the Respondent permanently subcontracted bargaining unit work. While we make these findings as well, we do so only for the reasons stated below, and we adopt the judge's rationale only to the extent consistent with this Decision and Order.

ing unit production and maintenance employees were lawfully locked out by the Respondent?[3]

(3) Did the Respondent violate Section 8(a)(5) and (1) of the Act by unilaterally implementing its proposal regarding the permanent subcontracting of bargaining unit work?

(4) Is a backpay remedy appropriate for the bargaining unit production and maintenance employees for the period during which the Respondent permanently subcontracted bargaining unit maintenance work?

II. FACTUAL BACKGROUND[4]

The Respondent, which is engaged in the manufacture, sale, and distribution of paper-related products, operates over 100 production facilities throughout the United States. The United Paperworkers International Union is party to approximately 80 collective-bargaining agreements with the Respondent, representing approximately 28,000 employees of the Respondent.

The labor dispute at issue in this case arose at the Respondent's primary papermill in Mobile, Alabama. The production and maintenance employees at the Mobile mill have been jointly represented for over 40 years by the United Paperworkers International Union and its Locals 265, 337, 1940, 2650 (the Paperworkers) and the International Brotherhood of Electrical Workers and its Local Union 1315 (the IBEW).[5] The Unions and the Respondent were parties to successive collective-bargaining agreements at the Mobile mill, including an agreement that expired on January 31, 1987. That agreement provided for premium pay for Sunday work, and contained a provision that valued every hour worked on a Sunday as one and one-half hours for purposes of calculating weekly employee overtime pay.

Premium pay for Sunday work had been the longstanding norm in the U.S. paper industry. Beginning in the mid-1980s, the Respondent and other paper companies sought to eliminate premium pay for Sunday work at many of their locations. By January 1987, at which time negotiations commenced for a new collective-bargaining agreement at the Mobile mill, the Respondent had eliminated Sunday premium pay in 37 of its collective-bargaining agreements with the United Paperworkers International Union (UPIU).

A. *The Respondent Proposes Elimination of Premium Pay for Sunday Work at the Mobile Mill*

On January 19, 1987, the parties held their first negotiating session for a new collective-bargaining agreement at the Mobile mill to succeed the agreement set to expire on January 31, 1987. The Respondent's bargaining proposals included, inter alia, the elimination of premium pay for Sunday work and holiday work and no weighted valuation for Sunday or holiday work when calculating employee overtime. The parties met frequently but made little progress in reaching an agreement. On February 10, 1987, the Respondent notified the Unions that, pursuant to the provisions of the expiring collective-bargaining agreement, it was terminating that agreement effective February 21, 1987.

On February 11, 1987, the parties met and the Unions requested that the Respondent abandon its proposal to eliminate premium pay for Sunday work. The Respondent declined and asserted its need to reduce costs in order to remain competitive. At a negotiating session held shortly thereafter, the Respondent rejected the Unions' proposal to accept the elimination of premium pay for Sunday work in exchange for a seven and one-half percent employee wage increase.

On February 20, 1987, the Respondent gave the Unions its ''best and final'' offer. This offer included the Respondent's prior proposals to eliminate premium pay for Sunday and holiday work, and to give lower wage increases than those proposed by the Union. The Respondent additionally declared its intention to lock out bargaining unit employees if the Respondent's offer was not accepted. The Unions' membership rejected the Respondent's proposal.

The Respondent thereafter made a contract offer on March 2, 1987, which was substantially similar to its prior offer of February 20, 1987. The Respondent advised the Unions that it planned to implement its March 2, 1987 offer if the Unions rejected that offer. The Unions' membership rejected the proposal, and the Unions advised the Respondent that the contract was rejected because of the elimination of Sunday and holiday premium pay. On March 7, 1987, the Respondent unilaterally implemented its March 2, 1987, contract proposal.[6]

B. *The Respondent Locks Out Its Employees and Continues Operations with Temporary Workers*

By letter dated March 12, 1987, the Respondent notified the Unions that it would ''temporarily replace'' the bargaining unit production and maintenance employees if a new contract was not reached by March 21, 1987. On March 21, 1987, the Respondent locked out the approximately 915 production employees and

[3] The lockout itself is not alleged to be unlawful in this proceeding.

[4] The labor dispute at issue in this proceeding lasted over 1-1/2 years. The factual background of this proceeding is accordingly voluminous and is set forth in full detail in the judge's decision. The relevant facts are set forth herein.

[5] The Paperworkers and the IBEW, as joint representatives of the bargaining unit employees, will be collectively referred to as the ''Unions,'' unless individually denominated.

[6] The implementation of the March 2, 1987 offer is not alleged to be unlawful.

approximately 285 maintenance employees represented by the Unions. The Respondent's officials testified that they commenced the lockout in order to pressure the Unions to agree to a contract and to avoid a coordinated strike by the UPIU at several of the Respondent's locations.

Following the commencement of the lockout, the Respondent continued to operate the Mobile mill with workers supplied by BE&K Construction Company (BEK), a nonunion firm.[7] The Respondent had previously entered into contracts with BEK to supply workers on a temporary basis during work stoppages at several of the Respondent's other production facilities. In October 1986, BEK submitted at the Respondent's request a proposal to provide such services on a temporary basis in the event of a work stoppage at the Mobile mill. In January or February 1987, the Respondent paid to BEK a $25,000 premobilization fee set forth in the proposal. Approximately 10 days prior to the commencement of the lockout, BEK personnel entered the Mobile facility and began preparations to assume the duties regularly performed by the bargaining unit production and maintenance employees. Following the commencement of the lockout, BEK personnel were required to live in a so-called ''man-camp'' which the Respondent set up on the premises of the Mobile mill, as it was required to do under the temporary subcontract. Sometime after March 21, 1987, the Respondent and BEK executed their subcontract for BEK to perform production and maintenance functions on a temporary basis during the course of the lockout.[8]

C. *The Respondent Proposes to Permanently Subcontract Bargaining Unit Maintenance Work*

The first negotiating session following the lockout occurred on May 8, 1987. The Respondent stated that during the lockout it had observed from its use of BEK temporary subcontract personnel that it could operate the Mobile mill efficiently with an employee complement smaller than the bargaining unit. The Respondent accordingly informed the Unions that it had requested contractors to submit proposals to subcontract maintenance on a permanent basis.

At the parties' negotiating session on May 21, 1987, the Respondent stated that the prime issue between the parties was still premium pay and that the parties were deadlocked as to that issue.[9] The Unions remarked that they would not make concessions on premium pay or the subcontracting of jobs. The Respondent advised the Unions that its experience with contract maintenance with BEK was outstanding. The Respondent explained that it had favorably reviewed proposals to subcontract bargaining unit maintenance work on a permanent basis, and accordingly proposed the following contract language denominated as item 11:

> Notwithstanding any provision of this labor agreement, ''A Report To Our Employees,'' past practice, grievance answers, or any other consideration, the company may, at its option, contract out any or all mill maintenance work on a temporary or permanent basis.

The Respondent did not at this time incorporate item 11 into its bargaining proposals but merely introduced the proposal into negotiations.

Shortly following the Respondent's introduction of item 11, the Unions made the following request for information at the negotiating session:

> The Union requests the company to provide it with the following information: Any and all documents, including without limitation, contracts, reports, schedules, studies, books, records, prints, charts, evaluations, ledgers, expense vouchers, checks, drafts, recommendations of any kind, measurements, graphs, time studies, papers, recordings, photographs or writings of any kind, relating to or concerning the Mobile Mill, and which supports, justifies or tends to provide the basis for company proposals 9, 10, and 11.[10]

On May 21, 1987, the Unions filed an unfair labor practice charge against the Respondent, alleging in essence that the Respondent's introduction into negotiations of its permanent subcontracting proposal—after it had implemented its best and final offer some 2

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[7] The Respondent also used, inter alia, supervisors, loaned personnel from the Respondent's other facilities, and employees of other contractors. One such contractor was Instrument Control Services, Inc. (ICS), which performed the maintenance of certain computer equipment in the Mobile mill.

[8] The Respondent's use of temporary subcontract personnel is not alleged to be unlawful.

[9] Throughout the duration of the labor dispute, the parties frequently expressed in public pronouncements and to each other that they would never compromise on the issue of premium pay. Thus, in April 1987, the Unions declared that they were at war with the Respondent over the issue of premium pay. The Unions expressed their opposition to concessionary bargaining in a multifaceted corporate campaign against the Respondent which included, inter alia, appeals to public officials, notification to Respondent's customers of the labor dispute, and various press conferences and press releases. The Respondent likewise frequently expressed its adamant position on eliminating premium pay and frequently stated its position in the labor dispute in newspaper advertisements and public pronouncements. The elimination of premium pay was also a central issue in bargaining negotiations between the Respondent and the UPIU at many of the Respondent's facilities nationwide.

[10] At the May 8, 1987 negotiating session, the Respondent had proposed item 9, which called for the reduction of 34 unit production and maintenance jobs by, inter alia, eliminating the ''beater room'' and reducing the manning of the ''extruder,'' and item 10, which called for permission to subcontract certain computer work previously performed by bargaining unit maintenance employees. There is no contention that the Respondent unlawfully failed to provide information with respect to item 9. Item 10 was eventually subsumed within item 11, the permanent subcontracting proposal.

months earlier—was unlawful. This charge was dismissed by the Board's Regional Office on July 7, 1987, and the Unions' appeal of the dismissal was denied on September 30, 1987.

D. *The Paperworkers Announce Their Pooled Voting Procedure*

Additionally at the May 21, 1987 negotiating session, the Paperworkers announced to the Respondent their pooled voting procedure. This procedure had been formulated by the Paperworkers representing the bargaining unit at the Mobile mill along with the UPIU locals representing employees at the Respondent's locations in DePere, Wisconsin; Jay, Maine; and Lock Haven, Pennsylvania, which locations were also engaged in contract negotiations. UPIU officials testified that the pooled voting procedure operated as follows: each of the four locations would vote on contracts negotiated at their respective locations; the votes would be sent to UPIU headquarters and pooled; the votes would not be tallied until all four locations had voted; and if a majority of the pooled votes approved the contracts, the individual locals would then be free to ratify their contracts. This pooled voting procedure was agreed to, and advocated by, UPIU President Wayne Glenn, who stated in a UPIU publication that ''by sticking together and coordinating our efforts, we can defeat [the Respondent's concessionary] demands.''[11] The UPIU thereafter sent a letter to its various locals, including those at the Mobile mill, stating that Glenn would refuse to sign any contract with the Respondent ''unless they resolved all the issues on givebacks.''

The Respondent repeatedly questioned the Unions regarding the operation of the pooled voting procedure at the May 21 and May 22, 1987 negotiating sessions. At the latter session, the Respondent also requested clarification as to the Unions' request for information.

E. *The Respondent Seeks to Reduce Its Costs Under the Temporary Subcontract with BEK*

Shortly after the commencement of the performance by BEK of the maintenance work at the Mobile mill under the temporary subcontract, the Respondent contacted BEK in an effort to decrease its costs under the contract. BEK agreed to reduce the ''multiplier''—the contractual figure by which BEK's hourly costs were multiplied to determine the Respondent's payment to BEK—on May 18, 1987, and again on June 1, 1987. BEK responded to the Respondent's requests for additional cost reductions by stating that additional reductions could be obtained by executing a permanent subcontract for performance of the maintenance work at the Mobile mill.

[11] The IBEW was not a participant in the pooled voting procedure.

Upon the Respondent's request, BEK forwarded to the Respondent on May 8, 1987, a proposed permanent subcontract. In May 1987, the Respondent assembled an in-house team to analyze BEK's proposal and they completed a cost analysis of the proposal. The judge found that the cost study was comprised of 11 pages and was completed by May 23, 1987. The cost study led the Respondent to the conclusion that it could achieve substantial savings by permanently subcontracting the bargaining unit maintenance work to BEK—due to reduced manning levels projected under the permanent subcontract—rather than by performing that maintenance work with the Respondent's bargaining unit employees.

F. *The Bargaining Sessions Leading up to the Respondent's Implementation of Its Permanent Subcontracting Proposal on August 11, 1987*[12]

1. The May 27, 1987 bargaining session

At this bargaining session, the Respondent gave the Unions, in response to their information request, a copy of BEK's proposed permanent subcontract for the performance of the bargaining unit maintenance work, as well as pages 1 through 6 of the Respondent's cost study of that proposal. The Unions briefly reviewed these documents and stated that the Respondent had not satisfied the Unions' information request. The Respondent stated to the Unions, as it did repeatedly throughout the negotiations, that the Respondent had provided the Unions with all the documentation that it possessed.[13]

The Unions stated their belief that the Respondent did not have the right to change its bargaining position—after implementing its best and final offer on March 2, 1987—by introducing its proposal regarding permanent subcontracting. This was the position advanced by the Unions in their unfair labor practice charge filed on May 21, 1987. The Unions added, however, that ''we won't be rude, you can say anything you want to say and we'll listen, provided you are willing to negotiate on [the elimination of premium pay.]''

[12] The Respondent contends that the Unions refused to bargain over the permanent subcontracting proposal at the negotiating sessions leading up to the Respondent's implementation of that proposal. The parties' conduct at these sessions is accordingly set forth in some detail in order to fully consider the Respondent's contention.

[13] The complaint alleges that the Respondent unlawfully failed to provide to the Unions, pursuant to their information request, the following documents: (1) pp. 7, 8, and 11 of the cost study; (2) the temporary subcontract between the Respondent and BEK; (3) a memorandum dated May 27, 1987, memorializing BEK's agreement to reduce the multiplier under the temporary subcontract; (4) a memorandum dated July 17, 1987, from BEK to the Respondent regarding manpower reductions requested by the Respondent during the temporary subcontract; and (5) documents relating to the subcontracting of computer maintenance work to ICS.

The Respondent expressed its belief that it lawfully introduced the permanent subcontracting proposal. The Unions responded, ''[We] don't agree that you can add items and we're not interested in anything you have to say[,]'' and that they were still waiting for the Respondent to satisfy their request for information.

Both the Unions and the Respondent stated that they would bargain as to the issue of premium pay, and the Unions reiterated their earlier proposal suggesting a 7-percent employee pay raise in exchange for the elimination of premium pay. The Respondent rejected this as too costly.

The Respondent queried whether the Unions were ready to discuss the permanent subcontracting proposal, to which the Unions responded by asking whether the Respondent was willing to change its position on premium pay. The following exchange then took place, as paraphrased by the judge:

> Respondent: [Are you] refusing to meet and bargain unless Respondent changed its position on items 1, 2, and 3 [premium pay] . . . .
>
> Unions: [We are] not refusing to meet, and were prepared to bargain ''on all items''. . . . [W]hen Respondent was willing to change its position on items 1, 2, and 3, ''we'll be ready to sit down and talk about the other items.''

2. The June 11, 1987 bargaining session

The Respondent stated at this bargaining session that it was unwilling to change its position on premium pay and inquired of the Unions' position regarding the permanent subcontracting proposal. The Unions responded that because of their unfair labor practice charges pending before the Board, ''we will listen to anything you have to say, but we will not agree to [the permanent subcontracting proposal].'' The Unions added: ''We are willing to listen to anything you have to say, but we have charges with the NLRB. We are here to bargain on your original eight items . . . and you have no changes on [premium pay]. We are demanding that you negotiate and change your position on [premium pay].'' The Respondent asked whether the Unions' intention was not to meet until their unfair labor practice charges were ruled on. The Unions replied that they had not said that, and that ''we are demanding'' that Respondent change its position on premium pay. The Respondent again inquired as to the Unions' intention regarding the Respondent's subcontracting proposal, and the Unions responded, ''[We] told you we'd listen, but we are not going to agree on [the permanent subcontracting proposal].''

3. The July 16, 1987 bargaining session

On July 7, 1987, the Board's Regional Office dismissed the Unions' charges that the Respondent had unlawfully introduced the permanent subcontracting proposal. The Respondent accordingly announced at the July 16, 1987 bargaining session that since those charges had been dismissed, the Respondent was making the permanent subcontracting proposal part of its voting package. The Respondent stated its intent to subcontract maintenance work, as well as its view that the Unions had been refusing to discuss the permanent subcontracting proposal on the ground that they were awaiting the disposition of the charges filed with the NLRB.

The Respondent stated that ''it is our intent to contract maintenance. You need to believe that. We are as serious as a breath of air. We implore you to bargain about the impact and effect of item 11 [permanent subcontracting].'' The Unions replied that it was ''ridiculous'' to think that the Unions were going to agree that the Respondent could contract maintenance, and added, ''[D]o you think that we are going to give up 280 jobs? We want to stay alive. You're going to get us killed.'' The Respondent reiterated that its intent was to contract maintenance. The Unions stated that the question of whether the Unions were willing to agree to contract maintenance was the ''silliest question a grown man could ask,'' and that ''we wouldn't agree to give up our jobs.'' The Respondent replied by repeating its intent to contract out maintenance.

The following exchange also took place between the parties as paraphrased by the judge in sec. II, J, of her decision:

> UPIU vice president Langham said that the Unions had appealed the dismissal of the charges, and that until that appeal had been disposed of, the Unions were taking the position that items 1, 2, and 3 were the major issues between the parties. [Respondent's negotiator] Vandillon said that Respondent was unwilling to wait on the appeals, that it had a right to bargain on item 11, that this issue was important to both parties, and that as to item 11 the parties were deadlocked if the Unions were not going to bargain about it that day. Langham said that the Unions felt that they still had the right to wait on the appeal of the dismissal of the NLRB charges; that until the decision on the appeal, the Unions took the position that items 1, 2, and 3 were the major items standing between the parties; that the Unions did not ''agree unilaterally that [Respondent had] the right to add to [Respondent's] original proposal;'' but that the Unions would ''have to listen'' to what Respondent had to say. Vandillon asked whether this meant that the Unions were not going to address the subcontracting issue. Langham denied saying that the Unions would not negotiate, and said that Vandillon was ''putting words in [Langham's] mouth.'' He further said that he was not saying the parties were dead-

> locked on item 11, and that the NLRB had not ruled that Respondent had the legal right to put it on the table. [Footnotes omitted.]

By letter dated July 28, 1987, the Respondent notified the Unions that it intended on August 10, 1987, to sign a subcontract with BEK to perform bargaining unit maintenance work on a permanent basis. On August 11, 1987, the Respondent executed the permanent subcontract with BEK. The Respondent's officials testified that they executed the permanent subcontract to save money with respect to the performance of maintenance work during the lockout.

G. *The Course of Negotiations from the Respondent's Execution of the Permanent Subcontract with BEK on August 11, 1987, Until the Respondent's Rescission of the Permanent Subcontract on May 3, 1988*

The parties' next bargaining session occurred on August 24, 1987. The Unions repeatedly queried the Respondent as to the status of the bargaining unit maintenance employees in light of the permanent subcontract and whether the ''maintenance jobs [had] been permanently replaced.'' In response to the Unions' question whether the maintenance employees would have a job if the parties' reached a settlement regarding the permanent subcontracting proposal, the Respondent replied, ''No, not under the contract [with BEK].'' The Unions continued to express concern about the fate of the maintenance employees. Local 2650 President Funk stated, ''How in the hell do you ever expect to get an agreement out of this now?''

On August 28, 1987, the Respondent placed on its telephone information line to employees the message that because about 280 hourly employees were involved in maintenance work in the mill, about that number of jobs would be eliminated as a result of the Respondent's contract with BEK. The Respondent further advised employees that ''[u]nder the terms of the expired labor agreement, maintenance employees could use their applicable seniority to bump-back into base-rate [production] jobs.''

At the October 26, 1987, bargaining session, the Unions commenced the session by stating that they wanted to talk about the relocation of the extruder, how items 9 and 11 had been added, and the contracting of maintenance. The majority of the session, however, involved discussion of the Respondent's expressed concern whether an agreement could be reached since the Mobile mill was linked to the three other locations via the pooled voting arrangement. As discussed below, the Respondent frequently expressed this concern at the bargaining table, and stated that it needed some assurance that if an agreement was reached at the bargaining table at Mobile it would be executed by the Unions and not be held up awaiting the application of the pooled voting procedures. The Unions replied that they were there to negotiate regarding the Mobile mill, and that if an agreement was reached and the Mobile bargaining unit employees voted to accept it, they would petition UPIU president Glenn to sign the agreement notwithstanding the pooled voting procedure. The Unions typically responded to the Respondent's frequently expressed concern regarding the pooled voting procedure by stating that they would petition to have UPIU President Glenn execute any agreement that was reached at Mobile.[14] At the conclusion of the October 26, 1987 session, the Respondent reviewed several concerns expressed by the Unions, including ''what happens to the maintenance people?'' The Unions emphasized that that was one issue which needed to be resolved.

The parties' November 5, 1987 negotiating session involved continued discussion of the pooling issue. The Unions stated:

> We have to start [negotiating] somewhere. We can start here in Mobile and it is as good a place as any to start. . . . We know less here of our status than we do at other places. We have to start somewhere before we ever get the pooled voting issue settled. . . . [We] don't know the status of the Mobile mill. And [we] don't know the status of the two hundred and eighty maintenance jobs.

The parties also discussed the possibility of a productivity bonus in lieu of premium pay.

At the December 4, 1987 bargaining session, the Respondent asked for a response regarding its proposal to remove the extruder, and noted that it had no intention of dropping item 11 (permanent subcontracting), but that it was willing to discuss cash payments at the end of the contract if certain productivity and quality goals were achieved. The Unions responded by asking whether they could reach an agreement on putting the bargaining unit maintenance employees back to work at the Mobile mill. The Unions additionally stated that they would change their position on premium pay if the Respondent would withdraw its permanent subcontracting proposal. The Respondent replied that if the Unions would agree to item 11, the Respondent was willing to discuss cash payments if productivity and quality goals were achieved. The Respondent again stated that it had no intention of dropping items 9 and 11, that it was totally satisfied with BEK's performance, and that it was too costly to perform the maintenance work ''in-house.''

[14] At the December 4 and 17, 1987 bargaining sessions, the Unions' negotiators did state that they had full authority to settle an agreement, and that they were not going elsewhere for approval. As noted, however, the Unions usually stated that they would need to petition UPIU President Glenn to sign any agreement that was reached.

1. The Respondent's proposed transition agreement

At the December 17, 1987 bargaining session, the Respondent distributed a proposed transition agreement to govern the operation of the Mobile mill immediately following the end of the lockout. The Respondent's negotiators testified that they introduced the transition agreement at that time, even though the labor dispute was not anticipated to be resolved quickly, because the Respondent was aware of how difficult the issue would be of returning unit employees working side by side with BEK employees under the permanent subcontract. The Unions stated that the parties needed a contract before they could reach a transition agreement, and that the Respondent's transition proposal put ''the cart before the horse.''

The Respondent stated that under its transition proposal some locked-out maintenance employees with seniority could return to work by bumping into production jobs of less senior employees, that the more junior production employees would be laid off, and that the failure to recall employees would be a nongrievable matter.[15] The Unions queried whether the BEK employees would remain following the end of the lockout and the Respondent replied affirmatively. The Unions asked how many of the unit employees would be laid off if the contractors stayed in the plant. The Respondent replied that it did not know, but assumed that some of the maintenance employees would come back under the bump-back provisions. The Unions stated that ''[o]ur position is and always has been that all of them [the bargaining unit employees] will have to come back before item 11 is removed.'' The Respondent stated that it had no intention of dropping item 11, and if the parties did not reach a transition agreement, then in effect all the maintenance employees would be laid-off. The Unions stated that until item 11 was resolved and dropped, there would never be any harmony at the mill.

The next bargaining sessions held on December 21, 1987, and January 4 and 29, 1988, principally concerned the Respondent's proposed transition agreement. At the December 21 session, the Unions presented a counterproposal on transition which provided, inter alia, that ''[a]ll employees who desire to do so will be scheduled to return to work . . . .'' The Respondent asked whether it could use contractors under that counterproposal. The Unions replied, ''[I]f all the Unions' represented people came back, Respondent could have all the contractors it wanted.''

At the January 29, 1988 bargaining session, the Respondent introduced a proposed revised transition agreement which provided, inter alia, for a 75-day transition period in which the Respondent could assign work on nonprecedent-setting basis, and again provided that some maintenance employees might not be recalled. The Unions stated that that proposal was acceptable if the transition period was reduced to 14 days and ''our folks'' were back to work.

At the February 18, 1988 bargaining session, the Respondent replied to written questions the Unions had previously submitted regarding the permanent subcontract with BEK. The first question was ''whether company items 9 and 11 were still a company proposal or was the permanent replacement of unit employees final . . . .'' The Respondent replied that items 9 and 11 remain company proposals; that it had not permanently replaced anybody; that it had subcontracted the maintenance work to BEK; and that ''it is not our intention to rescind that contract.'' The Unions nevertheless continued to press whether the maintenance employees had been replaced by BEK employees. The Respondent replied to the Unions' query regarding maintenance employees and severance pay by stating that most maintenance employees had sufficient seniority to remain by bumping into the jobs of less senior employees who ''would be subject to layoff or reassignment'' and that any maintenance employees who were laid off would have to exercise their severance pay rights and would be terminated.[16]

At the conclusion of the February 18, 1988 session, the Unions stated that they would be agreeable to submitting for a vote the Respondent's offer of March 10, 1987—which did not include the permanent subcontracting proposal—provided that holiday premium pay remained intact and a profit sharing plan was implemented in lieu of Sunday premium pay. At the March 11, 1988 bargaining session, the Respondent rejected the Unions' proposal because, inter alia, it maintained holiday pay, and did not address elimination of the extruder or the Respondent's ''high maintenance costs.'' In regard to the Unions' suggestion of a profit-sharing plan in return for the elimination of premium pay, the Respondent stated that it had not made such a trade off when it eliminated premium pay at certain other locations.

2. The Respondent's Louisville proposal

Between March 28 and April 15, 1988, representatives of the Respondent and union negotiators representing the Mobile, DePere, Jay, and Lock Haven locations met in Louisville, Kentucky, to formulate a framework for the settlement of the disputes at each of

[15] The proposed transition agreement also called for, inter alia, a 3-month ''no jurisdiction'' period in which the Respondent could assign work to employees or contractors as it wished on a nonprecedent setting basis.

[16] The Unions also asked, inter alia, ''What has been the cost to the Company to replace the represented employees?''

the four locations.[17] The Respondent made a contract proposal for the Mobile mill which provided for, inter alia: (1) the elimination of Sunday and holiday premium pay; (2) senior maintenance employees to apply for early retirement benefits; (3) extra severance pay for those maintenance employees who resigned by the end of June 1988; and (4) a so-called ''total flexibility'' proposal allowing up to 200 bargaining unit maintenance employees to return to work but without a commitment to maintain any level of unit maintenance employees in the future and putting no restrictions on the Respondent's use of outside contractors.[18] The Respondent also made contract proposals for the other three locations.

The Respondent pressed UPIU President Glenn to allow individual votes at each of the four locations; Glenn responded that he would adhere to the pooled voting arrangement. A ratification vote was held at each of the four locations. The votes were thereafter tallied at each location and forwarded to UPIU headquarters, where the votes were pooled and the proposed contracts overwhelmingly rejected.

H. *The Respondent Terminates the Permanent Subcontract with BEK and Withdraws Its Permanent Subcontracting Proposal*

On May 3, 1988, the Respondent terminated its permanent subcontract with BEK. The judge found that the Respondent did so as a result of being informed that the instant complaint would issue alleging the permanent subcontract to be unlawful. Consequently, the Respondent and BEK entered into a temporary subcontract to perform the maintenance work. The terms of the May 1988 temporary subcontract—including the costs to the Respondent—were essentially identical to those of the preceding permanent subcontract save for the duration of the agreement.

By letter dated May 3, 1988, the Respondent advised the Unions that it had cancelled its permanent subcontract with BEK and was withdrawing item 11 from the bargaining table. The Respondent further advised the Unions that it was making a contract proposal which provided for, inter alia: (1) the return to work of all bargaining unit maintenance employees; (2) elimination of premium pay for Sunday and holiday work; (3) the ''total flexibility'' proposal regarding subcontracting contained in the Respondent's Louisville proposal; (4) a 60-day transition period at the end of the lockout; and (5) a 2-percent wage increase for maintenance employees in the third year of the contract.

At the next bargaining session held on May 13, 1988, the Respondent requested that the Unions put its May 3, 1988 proposal to a vote. The Unions declined and observed that the May 3 proposal was a starting point, expressing dissatisfaction with the total flexibility proposal,[19] the length of the transition period, and the elimination of premium pay. The Unions in addition requested backpay for the period of the permanent subcontract for all the locked-out employees, which the Respondent characterized as ''ridiculous.'' The Respondent asked whether Mobile was still part of the voting pool, and the Unions replied, ''That's a fair statement.''

I. *The Course of Negotiations Until October 1988 When the Lockout Is Ended and a New Contract Is Reached*

At the June 24, 1988 bargaining session, the Unions stated that a vote had not been held on the Respondent's May 3, 1988 proposal because it was less advantageous to employees than the Respondent's Louisville proposal of April 13, 1988. The Respondent replied that it had moved with respect to its proposal that no maintenance employees come back. The Unions also stated that ''[w]e are a part of the pool and we chose to be part of it, but that does not preclude an agreement here in Mobile.'' The Unions asked the Respondent—as they did periodically throughout the negotiations—to end the lockout, allow the membership to return to work, and to continue negotiations.

At the July 15, 1988 bargaining session, the parties primarily disputed the length of the transition period, with the Respondent seeking up to 60 days and the Unions proposing 14 days. The Unions further suggested that they were willing to discuss the elimination of premium pay in exchange for a 401(k) plan, which the Respondent rejected. The Respondent queried

[17] The UPIU had gone on strike at the DePere, Jay, and Lock Haven locations in June 1987. The Respondent permanently replaced the employees at these locations.

[18] The ''total flexibility'' proposal provided, in pertinent part:

> The parties agree that the need to reduce mill maintenance costs is a primary concern . . . . It is not the Company's intent to eliminate mill maintenance crews . . . . [Unit maintenance] employees who elect to remain at the Mobile Mill will return to work . . . up to a maximum of 140 General Mechanics and 60 Instrument-Electricians. If more . . . desire to return to work, junior employees within each group will bump into non-maintenance jobs in accordance with the seniority provisions of the Labor Agreement. It is understood and agreed that these initial staffing levels in no way constitute a commitment of any maintenance manning for the future. It is further understood and agreed that there will be no work jurisdictional restrictions between any classifications in the Mobile Mill . . . . Any employee may be assigned to perform any work which he or she is qualified to safely perform. It is further understood and agreed that there will be no restrictions on the kinds and amounts of work that may be assigned to outside contractors, except that no mill employees will be laid off as a result. Any further reductions in the mill maintenance work force, beyond the initial staffing level, attributable to the provisions contained herein will be handled through normal attrition.

[19] The Unions observed that the total flexibility proposal, which had no restriction on the use of contractors, could completely erode the bargaining unit.

whether ''the best your side can do is petition Wayne Glenn if we reach a settlement.'' The Unions replied:

> Yes, but it should not be an impediment to reaching an agreement. . . . We need to work out an agreement and then see what we can do about getting a signature. First let's get that worked out, but don't use the pool as a crutch.

The Unions again asked for backpay for the period of the permanent subcontract. The Respondent rejected this, but agreed with the Unions that this could be disposed of by the NLRB and should not impede a settlement. The Unions asked the Respondent to end the lockout, to which the Respondent replied, ''As we have said all along, the way for the lockout to end is to ratify the contract and have the International Union execute it.''

1. The negotiations regarding the Respondent's mill in Vicksburg, Mississippi

About September 20, 1988, representatives of the Respondent and the UPIU met in negotiations concerning the Respondent's mill in Vicksburg, Mississippi, to address the issue of the elimination of premium pay. The parties agreed that any agreement as to the issue of premium pay at the Vicksburg location would serve as a pattern for settlements at other locations. The parties at Vicksburg agreed that in at least partial exchange for the elimination of Sunday premium pay, the Respondent would contribute to a 401(k) plan and increase employees' shift differential pay.

UPIU President Glenn asked that the Respondent end the lockout at Mobile and let the unit employees return to work while negotiations continued. The Respondent replied that it was not willing to end the lockout unless the parties had a ratified, executed contract at the Mobile mill. Glenn replied that he was not in a position to authorize the signing of a contract at Mobile as long as strikes at other locations were in progress, and continued his efforts to induce the Respondent to take back permanently replaced strikers at the DePere, Jay, and Lock Haven locations.[20] The Respondent also inquired as to the Unions' position on the Respondent's ''total flexibility'' subcontracting proposal, and the union representatives responded that the language was too open-ended and would allow the Respondent to eliminate the entire maintenance department over time through attrition.

By the conclusion of this bargaining session regarding the Vicksburg mill, the judge found that the parties ''felt reasonably comfortable that they could achieve a contract at Mobile on the basis of the Vicksburg agreement or some variation of it.'' The Respondent further stated, however, that it would not introduce the Vicksburg compromise at Mobile until it had assurance that if an agreement was reached at Mobile, the contract would be executed by UPIU President Glenn. The Unions referred to their earlier statement that they were not in a position to authorize contract execution at ''this point in time.'' The Respondent thus replied that ''there is no point in us going back to the bargaining table at this point.''

On October 8 and 9, 1988, negotiations were again held with respect to the Vicksburg mill. The Respondent at this time made proposals that the UPIU viewed as an effective trade off for the elimination of Sunday premium pay. UPIU President Glenn accordingly announced that he was releasing union representatives from the restriction against signing contracts without his approval. Also on October 8, 1988, the UPIU informed the Respondent that it was terminating the strikes at the DePere, Jay, and Lock Haven locations, and offered to return to work unconditionally at these facilities. Immediately after the decision was made to end the strikes, the Unions arranged for negotiations at the Mobile mill.

2. The parties reach agreement at Mobile

The Unions and the Respondent met on October 19, 1988, in an attempt to settle the Mobile dispute. At this bargaining session, the parties identified the major issues between them as the elimination of Sunday and holiday premium pay; elimination of jobs in the beater room; the removal of the extruder; the transition agreement; and, according to the Respondent, the Unions' ''inability to deliver a signed labor agreement.'' The parties then discussed the Respondent's ''total flexibility'' subcontracting proposal. The Unions questioned the Respondent's asserted need for additional flexibility in the assignment of maintenance work, and stated that it would destroy seniority in the bargaining unit. With respect to the conduct of maintenance work after the end of the lockout, the Unions stated, ''How do you expect [us] to work alongside BE&K while there is so much animosity between us?'' The parties continued to argue over the transition agreement and the total flexibility proposal.

The parties met again on October 20 and 21, 1988. At the latter session, the Respondent proposed a package which included, inter alia, the elimination of Sunday and holiday premium pay; a 401(k) plan similar to the Vicksburg plan; a transition period of 30 days; increases in the shift differentials to employees who worked every fourth Sunday; a 2-percent increase for all bargaining unit employees on the payroll on particular dates; and a compromise provision as to subcontracting based on the agreement reached at the Respondent's Natchez, Mississippi location. The Natchez language permitted the Respondent to use outside contractors but also committed the Respondent to maintain

[20] As noted above, the UPIU had been on strike at the DePere, Jay, and Lock Haven locations since June 1987.

a sufficient maintenance crew of unit employees in each department to perform the maintenance duties.

On October 28, 1988, the Mobile bargaining unit employees voted to accept the Respondent's October 21, 1988 proposal. UPIU President Glenn was apprised of the vote and approved the agreement. There was no pooling of votes. The Mobile agreement was executed by the Unions on October 29, 1988. Following the execution of the contract, the Respondent terminated the lockout and permitted all the bargaining unit employees to return to work.

III. THE JUDGE'S DECISION

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide the Unions with information, pursuant to their request of May 21, 1987, relevant to the parties' contract negotiations. The judge found, as alleged in the complaint, that the Respondent unlawfully failed to provide the Unions with: (1) pages 7, 8, and 11 of the Respondent's cost analysis of BEK's proposed permanent subcontract; (2) the temporary subcontract under which BEK performed the maintenance work from March 21, 1987, until August 11, 1987; (3) a memorandum dated May 27, 1987, from BEK to the Respondent memorializing a change in billing rates under the temporary subcontract; (4) a memorandum dated July 13, 1987, from BEK to the Respondent regarding manning reductions requested by the Respondent during the performance of the temporary contract; and (5) documents relating to the contract proposal by ICS to perform certain computer maintenance work for the Respondent.

The judge reasoned, in essence, that had these documents been forwarded to the Unions, they would have been apprised that the Respondent's motive for introducing the permanent subcontracting proposal was at least in part to reduce its costs during the lockout. The judge further reasoned that based on the information contained in these documents, the Unions would have been better able to dissuade the Respondent from adhering to the proposal by demonstrating that the Respondent would not in fact achieve significant cost reductions—as the Respondent asserted throughout negotiations—by entering into the permanent subcontract with BEK. The judge accordingly found these documents to be relevant to the parties' bargaining negotiations and to have been unlawfully withheld from the Unions.

The judge further concluded that the Respondent's unlawful failure to provide the Unions with relevant information precluded the existence of a legally cognizable impasse as to the Respondent's implementation of its permanent subcontracting proposal. The judge reasoned that the Unions were unable to fully evaluate and respond to the Respondent's permanent subcontracting proposal, in the absence of the information unlawfully withheld by the Respondent, and therefore no legally cognizable impasse could be reached as to that proposal. The judge accordingly found that the Respondent violated Section 8(a)(5) and (1) of the Act on August 11, 1987, by unilaterally implementing its subcontracting proposal in the absence of a legally cognizable impasse, and that this unfair labor practice continued until the permanent subcontract with BEK was rescinded on May 3, 1988.

The judge further reasoned that, in light of her finding that the Respondent had unlawfully implemented the permanent subcontracting proposal, the Respondent could not demonstrate that it was motivated to execute the permanent subcontract based on legitimate and substantial business justifications. The judge accordingly found that the Respondent's execution of the permanent subcontract for the performance of maintenance work constituted a violation of Section 8(a)(3) and (1) of the Act. The judge explained that, in view of her finding that the Respondent's unilateral implementation of the permanent subcontracting proposal was unlawful, it was unnecessary for her to pass on the complaint allegation that by executing the permanent subcontract the Respondent engaged in conduct inherently destructive of employee rights under Section 7 of the Act.

The judge finally concluded that a backpay remedy was appropriate for all the locked-out production and maintenance bargaining unit employees for the period during which the permanent subcontract was effective, August 11, 1987, to May 3, 1988. The Respondent argued that the unit employees would have remained locked out during this period even if the Respondent had not entered into the permanent subcontract, and accordingly that no backpay was appropriate. The judge rejected this argument and found that the record established that the Respondent would have terminated the lockout during the effective period of the unlawful permanent subcontract if the Respondent had not unlawfully executed that subcontract. The judge reasoned that any ambiguity as to what might have occurred must be resolved against the Respondent, in light of its unlawful conduct, and that accordingly a backpay award was appropriate.

IV. CONTENTIONS OF THE PARTIES

A. *The Respondent's Exceptions*

The Respondent contends that the judge erred in finding that it violated Section 8(a)(5) and (1) of the Act by failing to provide the Unions with requested information. The Respondent asserts that it was not required to furnish the Unions with information because the request was not made in good faith, and because the Unions refused to bargain over the Respondent's permanent subcontracting proposal pending disposition of their unfair labor practice charge. The Respondent

argues that by this conduct the Unions waived their right to receive information from the Respondent. The Respondent additionally asserts that the Unions did not specifically request most of the documents found by the judge to have been unlawfully withheld, and that accordingly the information request was not sufficiently specific to put the Respondent on notice of the information sought.

The Respondent further contends that the implementation of its permanent subcontracting proposal did not violate Section 8(a)(5) and (1) of the Act, even in the absence of a lawful impasse, because the Unions engaged in unlawful conduct during the bargaining negotiations. The Respondent asserts that the Unions unlawfully conditioned bargaining on their pooled voting strategy, as well as refused to bargain with respect to the permanent subcontracting proposal. The Respondent submits that it was privileged to unilaterally implement its permanent subcontracting proposal due to the Unions' unlawful conduct.[21]

The Respondent further contends that the judge's finding that it violated Section 8(a)(3) and (1) of the Act is derivative of the judge's finding that the Respondent unlawfully unilaterally implemented its permanent subcontracting proposal. The Respondent asserts that since the latter finding is erroneous, the derivative 8(a)(3) and (1) finding must be reversed.

The Respondent additionally submits that the permanent subcontracting here during a lawful lockout is not inherently destructive of employee rights, because of the Respondent's business goal of reducing its maintenance costs both during the lockout and in the long term. The Respondent argues further that it is unnecessary for the Board to reach the issue of whether the Respondent's conduct is inherently destructive of employee rights because no backpay remedy is appropriate in this case.

The Respondent argues that a backpay remedy is inappropriate because the lockout continued for over 5 months after the permanent subcontract was rescinded, based on the parties' continuing inability to resolve the premium pay issue. The Respondent observes that the lockout did not in fact end until resolution of the premium pay issue based on the compromise reached in October 1988 at the negotiations concerning the Respondent's Vicksburg, Mississippi facility. The Respondent further observes that the Mobile dispute could not have ended until the conclusion of the strikes at the other pooled locations of DePere, Jay, and Lock Haven, which did not occur until October 1988. The Respondent accordingly asserts that any backpay award for the period in which the permanent subcontract was in place is inappropriate because the bargaining unit employees would have remained locked out until the resolution of these issues some 5 months after the rescission of the permanent subcontract.

[21] The Respondent notes that its permanent subcontracting proposal was deemed a mandatory subject of bargaining by the Board's Office of Appeals in denying the Unions' appeal of the dismissal of their unfair labor practice charge.

B. *The Position of the General Counsel and the Charging Parties*

The General Counsel and the Charging Party Unions have cross-excepted to the judge's decision not to pass on the complaint allegations that the Respondent violated Section 8(a)(3) and (1) of the Act by, during the lockout, entering into the permanent subcontract with BEK to perform maintenance work previously performed by bargaining unit employees. The complaint alleges that by that conduct, the Respondent permanently replaced its locked-out maintenance employees, and thereby engaged in conduct which is inherently destructive of employee rights under Section 7 of the Act, and that such conduct was undertaken without any legitimate and substantial business justification. Both the General Counsel and the Unions argue that the Board should pass on these complaint allegations and find that the Respondent violated Section 8(a)(3) and (1) of the Act.

The General Counsel and the Unions contend that Board precedent establishes that it is unlawful for an employer to permanently replace locked-out employees, and that such conduct has been deemed inherently destructive of employee rights. They argue that it accordingly follows that permanent subcontracting of bargaining unit work previously performed by locked-out employees should likewise be found to be inherently destructive conduct because the effect of permanent subcontracting on employee interests is at least as severe as that of the permanent replacement of employees. The General Counsel and the Unions further contend that the Respondent's action constitutes inherently destructive conduct because it (1) obstructs the parties' collective-bargaining process; (2) discourages employees from exercising their statutory rights; and (3) diminishes the Unions' capacity to effectively represent the employees in the bargaining unit.

The General Counsel and the Unions additionally contend that the Respondent failed to argue before the judge its contention, now raised in its exceptions, that the Unions' pooled voting arrangement was unlawful and thereby privileged the Respondent to unilaterally implement its permanent subcontracting proposal. They argue that a contention raised for the first time in exceptions to the Board is ordinarily considered untimely raised and should thus be deemed by the Board to have been waived. The Respondent counters that it argued before the judge that the Unions engaged in unlawful conduct and that this argument is accordingly properly before the Board on exceptions.

The General Counsel and the Unions further dispute the Respondent's assertion that the Unions refused to bargain regarding the permanent subcontracting proposal. They contend that the Unions' position was one of firm opposition to the Respondent's proposal rather than a refusal to bargain. They additionally argue that the Unions' bargaining posture was caused by the Respondent's unlawful withholding of information relevant to the parties' negotiations.

The General Counsel and the Unions additionally contend that the appropriate remedy in this case is backpay for all locked-out production and maintenance employees during the period of the permanent subcontract. They argue that implementation of the permanent subcontract interfered with the parties' ability to reach an agreement as to the premium pay issue and therefore prolonged the lockout. They further argue that any uncertainty as to the effect of the Respondent's unlawful conduct on the duration of the lockout must be resolved against the Respondent, whose unlawful conduct rendered certainty impossible.

V. DISCUSSION

A. *The 8(a)(5) Information Allegations*

We agree with the judge, for the reasons set forth below, that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide the Unions, pursuant to their information request, with pages 7 and 8 of the Respondent's cost study of BEK's proposed permanent subcontract. Unlike the judge, however, we find it unnecessary to pass on the complaint allegations that the Respondent unlawfully failed to provide the Unions with the additional documents requested. We note that all the documents alleged to have been unlawfully withheld were in fact obtained by the Unions pursuant to subpoena during the course of these proceedings. There is thus no need in this case for an affirmative order directing the Respondent to furnish the Unions with the requested information. Accordingly, any finding that the Respondent unlawfully withheld the additional documents would be merely cumulative of our finding that the Respondent unlawfully failed to provide the Respondent with pages 7 and 8 of the cost study, and such an additional finding would not affect the Order in this case.

It is axiomatic that an employer has an obligation to furnish to a union, upon request, information relevant to the parties' contract negotiations. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). There can be no serious dispute regarding the relevance of pages 7 and 8 of the cost study to the parties' negotiations regarding the Respondent's permanent subcontracting proposal, as the Respondent plainly acknowledges that it relied on the cost study in deciding to introduce that proposal into contract negotiations. Indeed, the Respondent essentially conceded in its briefs to the judge the relevance of pages 7 and 8 to the Unions' evaluation of the Respondent's permanent subcontracting proposal.[22]

The Respondent thus does not dispute the relevance of pages 7 and 8, but rather argues in its exceptions that it was not required to furnish the Unions with those pages based on its defenses, also advanced before the judge, that the Unions refused to bargain over the permanent subcontracting proposal and that the information was not requested in good faith. The judge found, and we agree, that these defenses are without merit. We shall examine each defense in turn.

1. The refusal-to-bargain defense

It is settled that the pendency of unfair labor practice charges or other collateral litigation does not suspend the obligation to bargain. *Wells Fargo Armored Service Corp.*, 300 NLRB 1104, 1109 (1990). We have carefully reviewed the Unions' conduct with respect to the subcontracting proposal, and we cannot conclude that the Unions refused to bargain over that proposal. We find that the Unions never refused to meet and confer with the Respondent, but rather regularly met in negotiations and expressed their adamant opposition to the Respondent's proposal as well as their justification for taking such a bargaining posture. Adamant insistence on a bargaining position fairly maintained is not in itself a refusal to bargain in good faith. *Chevron Oil Co. v. NLRB*, 442 F.2d 1067, 1072 (5th Cir. 1971); *Commercial Candy Vending Division*, 294 NLRB 908 (1989).

There is no dispute that the Unions met regularly with the Respondent in bargaining sessions following the Respondent's introduction of its permanent subcontracting proposal on May 21, 1987. On that date, the Unions filed their unfair labor practice charges challenging the Respondent's introduction of that proposal. The Unions never refused to meet and confer with the Respondent, however, and the parties thereafter conducted bargaining sessions on May 22, May 27, June 11, and July 16, 1987, prior to the Respondent's implementation of its proposal on August 11, 1987. The Respondent does not contend that it wished to meet more frequently but that the Unions refused to do so. There accordingly can be no contention that the Unions refused to meet and engage in bargaining sessions with the Respondent pending disposition of the unfair labor practice charge.

Nor did the Unions preclude the Respondent from raising the issue of permanent subcontracting or refuse to discuss the issue at the bargaining table. Rather, the Unions conceded that they would ''have to listen'' to the Respondent's proposal *despite* their oft-mentioned

[22] The Respondent stated in its reply brief to the judge: ''In our initial brief [to the judge], we agreed that those pages [7 and 8] would have been subject to production under the [Unions'] May 21 data request if the Unions had been bargaining over subcontracting.''

belief that the proposal was unlawful. Thus, the Unions stated at the May 27, 1987 session their belief that the Respondent had unlawfully introduced the permanent subcontracting proposal, but added that ''we won't be rude, you can say anything you want to say and we'll listen, provided you are willing to negotiate on [the elimination of premium pay.''] The Unions similarly stated at the June 11, 1987 session that ''we will listen to anything you have to say, but we will not agree to [the permanent subcontracting proposal.''] Indeed, the Unions stated at the July 16 session that they did not ''agree unilaterally that [the Respondent had] the right to add to [the Respondent's] original proposal[ ]'' but that the Unions would ''have to listen'' to what the Respondent had to say. We find that these statements establish the Unions' recognition, albeit with reluctance, that they were obligated to bargain over the permanent subcontracting proposal despite their belief that the introduction of the proposal was unlawful.

The Unions further responded to the Respondent's proposal by expressing their adamant opposition to permanent subcontracting and conveyed to the Respondent that they would not agree to such a proposal because of the consequent loss of bargaining unit jobs. The Unions' firm opposition to the permanent subcontracting proposal—and the Respondent's equally adamant adherence to that proposal—is well illustrated by the parties' negotiating session on July 16, 1987. At that session, the Respondent stated that ''it is our intent to contract maintenance. You need to believe that. We are as serious as a breath of air. We implore you to bargain about the impact and effect of item 11.'' The Unions replied that it was ''ridiculous'' to think that the Unions were going to agree that the Respondent could contract maintenance, and added, ''Do you think that we are going to give up 280 jobs? We want to stay alive. You're going to get us killed.'' The Respondent reiterated that its intent was to contract maintenance. The Unions stated that whether the Unions were willing to agree to contract maintenance was the ''silliest question a grown man could ask,'' and that ''we wouldn't agree to give up our jobs.'' The Respondent replied by repeating its intent to contract out maintenance. We find that this exchange demonstrates that the parties were engaged in lawful hard bargaining with respect to the permanent subcontracting proposal. See *Chevron Chemical Co.*, 261 NLRB 44, 46 (1982).[23]

It is fundamental that the obligation to bargain pursuant to Section 8(d) of the Act does not ''compel either party to agree to a proposal or require the making of a concession.'' *NLRB v. American National Insurance Co.*, 343 U.S. 395, 404 (1952); *Barry-Wehmiller Co.*, 271 NLRB 471, 472 (1984). The Unions here were indeed unwilling to agree to the Respondent's permanent subcontracting proposal. They nevertheless regularly met in negotiations with the Respondent, listened to the Respondent's position with regard to permanent subcontracting, and explained—in visceral terms—the justification for their firm opposition to the proposal. A ''refusal to bargain cannot be equated with 'refusal to recede from an announced position' advanced and maintained in good faith.'' *Church Point Wholesale Grocery Co.*, 215 NLRB 500, 502 (1974) (citation omitted), affd. sub nom. *Atomic Workers International Union, AFL–CIO v. NLRB*, 538 F.2d 1199 (5th Cir. 1976). In these circumstances, we cannot conclude that the Unions refused to bargain over the permanent subcontracting proposal pending the disposition of their unfair labor practice charge.[24]

2. The bad-faith defense

We additionally find without merit the Respondent's assertion that the Unions' information request was made in bad faith. This argument is premised primarily on the Respondent's contention that the Unions refused to further clarify their information request despite the Respondent's entreaties that they do so. It is clear that no clarification of the Unions' request was required, however, to apprise the Respondent that pages 7 and 8 of the cost study were reasonably comprehended within the Unions' request for ''all documents[ ] including . . . studies . . . which support[ ], justif[y] or tend[ ] to provide the basis for [the] company propos-

[23] Indeed, the Unions had expressed their concern regarding job loss soon after the Respondent's introduction of the permanent subcontracting proposal. Thus, in late May 1987, Union Negotiator Dunaway telephoned Respondent's negotiator Gilliland to inquire whether the Respondent was serious about its permanent subcontracting proposal. Gilliland replied affirmatively and Dunaway asked ''how [the] Respondent could expect the Unions to agree to give up 285 jobs.'' Similarly, UPIU Local 2650 President Funk, who was a union negotiator, stated in a letter dated July 8, 1987, to Mill Manager Perkins, ''We still do not understand your statement about contracting out maintenance. How can you make an offer to take away our jobs?? If that is part of the offer, we reject that part now!!''

[24] In so concluding, we have carefully considered certain statements made by the Unions which the Respondent contends establish a refusal to bargain. At the May 27, 1987 session, the Unions stated that they ''don't agree that you can add items and we're not interested in anything you have to say.'' The Respondent also points to the judge's finding that the bargaining notes of Union Negotiator McDonald indicated that during the latter part of the June 11, 1987 bargaining session, the Unions said that until the NLRB had ruled on the legality of Respondent's adding items 9 and 11, the Unions had no need to recognize them as negotiable items and no need for a tour of the mill. ''In determining whether a party has negotiated in good faith it is necessary to scrutinize the totality of its conduct.'' *Eltec Corp.*, 286 NLRB 890, 893 (1987), enfd. 870 F.2d 1112 (6th Cir. 1989). These statements thus must be considered in the context of the Unions' attendance at regular negotiating sessions, discussion of the Respondent's position, and explanation of their adamant opposition to the Respondent's proposal. In these circumstances, we find that the totality of the Unions' conduct establishes that the Unions satisfied their bargaining obligation with respect to the Respondent's permanent subcontracting proposal.

als'' of permanent subcontracting. As noted above, the Respondent concedes that the cost study provided the basis for introducing the permanent subcontracting proposal. The Respondent acknowledges that it introduced the permanent subcontracting proposal based specifically on the conclusion of the cost study that manning levels for performing the maintenance function would be reduced under a permanent subcontract, with concomitant cost savings.

The manning levels under the permanent subcontract were thus integral to the Respondent's decision to introduce its permanent subcontracting proposal. The Respondent accordingly did provide the Unions with pages 1 to 6 of the cost study, which pages detail the total number of maintenance employees projected to be used in each of the 3 years of the permanent subcontract and the resulting cost savings. The Respondent did not provide, however, pages 7 and 8 of the cost study, which detail the specific breakdown of the number of maintenance employees, and their classification, anticipated to be employed in each maintenance area in the Mobile mill during the first year of the permanent subcontract with BEK. The Respondent accordingly provided the Unions with general information regarding projected manning levels, but failed to provide the specific manning information contained in pages 7 and 8. We conclude that the Unions' information request, which undisputedly encompassed the general manning information, reasonably comprehended in addition the detailed manning information contained in pages 7 and 8 of the cost study, and the Unions had no obligation to provide further clarification in order to demonstrate that at least those additional pages were reasonably comprehended within the Unions' request.

The Respondent further contends that the Unions' bad faith in requesting information is evidenced by the Unions' cursory review at the bargaining table of the documents the Respondent did provide, the Unions' failure to ask specific questions relating to those documents, and the Unions' failure to conduct a plant tour of the Mobile mill as they initially requested. These assertions, even if entirely accurate, are insufficient to establish that the information request was made in bad faith. The requirement that an information request be made in good faith ''is met if at least one reason for the demand can be justified.'' *Hawkins Construction Co.*, 285 NLRB 1313, 1314 (1987), enf. denied on other grounds 857 F.2d 1224 (8th Cir. 1988). The Unions have clearly satisfied this standard by seeking information which supported the Respondent's permanent subcontracting proposal under which, the Respondent repeatedly asserted, it could operate its maintenance function for less cost than by using unit employees. ''[T]he presumption is that the union acts in good faith when it requests information from an employer until the contrary is shown.'' Id. The Respondent has failed to show that the Unions engaged in conduct which rebuts the presumption of good faith. The Unions' brief review at the bargaining table—or few queries—regarding the information they did receive does not establish bad faith in requesting information relevant to the permanent subcontracting proposal. Rather, the record establishes that the Unions chose to oppose the permanent subcontracting proposal altogether, based on the information they did receive, rather than attempt to convince the Respondent that its estimate of cost savings and manning reductions was in error.[25] We conclude that the Respondent has failed to establish that the Unions' information request was made in bad faith.

We accordingly find that the Respondent violated Section 8(a)(5) and (1) by failing to provide the Unions with information relevant to the parties' collective-bargaining negotiations.[26]

B. *The 8(a)(3) Permanent Subcontracting Allegations*

As noted above, the principal issue presented in this case is whether the Respondent, after lawfully locking out its bargaining unit employees and lawfully subcontracting their work on a temporary basis, may take the further step of subcontracting their work on a permanent basis in order to bring economic pressure to bear in support of its bargaining position in contract negotiations.[27] The judge found it unnecessary to pass on this issue. We have carefully considered this issue and find that such conduct is unlawful under Section 8(a)(3) of the National Labor Relations Act because it is inherently destructive of employees' Section 7 rights and because the Respondent's asserted business justification for its conduct does not outweigh the harm to those important employee rights.

1. Analytic framework

a. *Supreme Court and Board precedent*

The Supreme Court has not had occasion to address the precise issue presented in this case, although several cases provide a framework for resolving this issue. The Court has explained that some employer conduct is so inherently destructive of employee interests that it may be deemed proscribed by Section 8(a)(3) of the Act without need for proof of an underlying improper

[25] We note that the Unions stated at the bargaining table that they would tour the Mobile mill at such time when the Respondent supplied the Unions with the requested information, in order to make such a tour useful. In light of our finding that the Respondent unlawfully withheld pp. 7 and 8 of the cost study, the Unions' position was not unreasonable.

[26] In so finding, we do not adopt the judge's statement that the ''Respondent has displayed a niggardly and dissembling approach to the Unions' request for documentation . . . .''

[27] As we noted supra, the Respondent's use of temporary subcontract personnel is not alleged to be unlawful.

motive. *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33 (1967); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 227–228 (1963). ''[T]here are some practices which are inherently so prejudicial to union interests and so devoid of significant economic justification that no specific evidence of intent to discourage union membership or other antiunion animus is required. In some cases, it may be that the employer's conduct carries with it an inference of unlawful intention so compelling that it is justifiable to disbelieve the employer's protestations of innocent purpose.'' *American Ship Building Co. v. NLRB*, 380 U.S. 300, 311–312 (1965). ''Thus an employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement. Concluding that encouragement or discouragement will result, it is presumed that he intended such consequence.'' *Radio Officers' Union v. NLRB*, 347 U.S. 17, 45 (1954).

The Supreme Court accordingly has articulated the following guidelines for assessing employer motivation in the context of asserted 8(a)(3) violations:

> First, if it can reasonably be concluded that the employer's discriminatory conduct was ''inherently destructive'' of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is ''comparatively slight,'' an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct.

Great Dane Trailers, 388 U.S. at 34 (emphasis in original). A finding that an employer's conduct is inherently destructive does not conclude the inquiry, however. Rather, the Board must additionally weigh in each case the asserted business justification against the invasion of employee rights in order to determine whether the employer has committed an unfair labor practice. The Board's task is to ''weigh[ ] the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and [to] balanc[e] in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct.'' *Erie Resistor Corp.*, 373 U.S. at 229 (footnote omitted). See *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 703 (1983).

The Supreme Court has on several occasions assessed whether employer conduct is inherently destructive of employee rights. In *Erie Resistor Corp.*, the Court found inherently destructive the employer's grant, during an economic strike, of 20 years' superseniority to all strike replacements and to those employees who abandoned the strike and returned to work. The Court noted that ''super-seniority by its very terms operate[d] to discriminate between strikers and nonstrikers, both during and after a strike, and its destructive impact upon the strike and union activity [could] not be doubted.'' 373 U.S. at 231. The Court agreed with the Board's finding that:

> Super-seniority renders future bargaining difficult, if not impossible, for the collective bargaining representative. Unlike the [right of an employer to hire permanent replacements for striking workers under *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938),] which ceases to be an issue once the strike is over, the plan here creates a cleavage in the plant continuing long after the strike is ended. Employees are henceforth divided into two camps: those who stayed with the union and those who returned before the end of the strike and thereby gained extra seniority. This breach is re-emphasized with each subsequent layoff and stands as an ever-present reminder of the dangers connected with striking and with union activities in general.

Id. The Court thus concluded that the Board could properly find that the employer's business purpose of keeping its plant in operation during the strike did not justify a means so damaging to the employees' right to engage in concerted activities. Id., 373 U.S. at 231–232.

In *American Ship Building*, supra and *NLRB v. Brown Food Store*, 380 U.S. 278 (1965), the Court addressed the concept of inherently destructive conduct in the context of a lockout. In each case the Court assessed the impact of the employer conduct on three employee rights protected by Section 7 of the Act: the right to bargain collectively, the right to strike, and the right to engage in union activities. The Court found in each instance that the impact of the employer conduct on these important employee rights was comparatively slight rather than inherently destructive, and that sufficient business justification for the employer conduct had been demonstrated.

In *American Ship Building*, supra, the Court held that the employer did not violate Section 8(a)(1) or (3) of the Act and did not engage in conduct inherently destructive of employee rights by locking out employees, following a bargaining impasse, for the sole purpose of bringing economic pressure to bear in support of a legitimate bargaining position. The Court emphasized that the employer's lockout reasonably served the legitimate business end of pressing good-faith bargaining demands. The Court then explained that the lock-

out was not in any way inconsistent with the employees' right to bargain collectively:

> The lockout may well dissuade employees from adhering to the position which they initially adopted in the bargaining, but the right to bargain collectively does not entail any ''right'' to insist on one's position free from economic disadvantage. Proper analysis of the problem demands that the simple intention to support the employer's bargaining position as to compensation and the like be distinguished from a hostility to the *process* of collective bargaining which could suffice to render a lockout unlawful.

380 U.S. at 309 (emphasis added). The Court further observed that the lockout in support of the employer's legitimate bargaining position was not inconsistent with the employees' right to strike because ''there is nothing in the statute which would imply that the right to strike 'carries with it' the right exclusively to determine the timing and duration of all work stoppages.'' 380 U.S. at 310. The Court in addition held that the lockout did not carry with it any necessary implication that the employer acted to discourage union membership. The Court noted that the lockout did not target only union members. Although employees might suffer economic disadvantage because of their union's bargaining position, ''this is also true of many steps which an employer may take during a bargaining conflict, and the existence of an arguable possibility that someone may feel himself discouraged in his union membership or discriminated against by reason of that membership cannot suffice to label them violations of § 8(a)(3) absent some unlawful intention.'' 380 U.S. at 312–313.

In *Brown Food Store*, issued the same day as *American Ship Building*, the Court held that nonstruck employers in a multiemployer bargaining association did not engage in inherently destructive conduct and did not violate Section 8(a)(1) or (3) of the Act by continuing operations with temporary replacements after lawfully locking out unit employees in response to a whipsaw strike against one association member. The Court again assessed the impact of the employers' conduct on employees' Section 7 rights. The Court observed that the use of temporary replacement personnel added only slightly to the impact of the lawful lockout on the employees' right to union membership in view of the temporary nature of the replacements. The Court explained that the ''replacements were expressly used for the duration of the labor dispute only; thus, the displaced employees could not have looked upon the replacements as threatening their jobs.''[28] The Court emphasized that the union membership could end the dispute and terminate the lockout at any time simply by agreeing to the employers' terms, resulting in their return to work on a regular basis and the departure of the temporary replacements. ''At most the union would be forced to capitulate and return its members to work on [the employers'] terms.''[29] The Court additionally held that the use of temporary replacements was not inherently destructive of the right to strike even if it doomed the whipsaw strike to failure. The Court accordingly concluded that the impact on employee rights resulting from the employers' use of temporary replacements during the lockout was comparatively slight and was a measure reasonably adapted to the achievement of the legitimate goal of remaining open for business and preserving the integrity of the multiemployer bargaining unit in the face of the whipsaw strike.[30]

The inherently destructive doctrine has most recently been applied by the Supreme Court in *Metropolitan Edison Co. v. NLRB*, supra, 460 U.S. 693 (1983). The Court there held that an employer engaged in conduct inherently destructive of employee rights by disciplining union officials more severely than other employees for participating in an unlawful work stoppage. The Court found that the employer's conduct directly penalized the protected Section 7 right to hold union office, and that the imposition of such discipline on union officials inhibited qualified employees from holding union office. 460 U.S. at 702–703. The Court concluded that the harmful effect of the discrimination inherent in singling out union officers for discipline was not outweighed by the employer's legitimate interest in ensuring compliance with its contractual no-strike clause. Id. at 703–705.

In 1986 the Board considered whether an employer's use of temporary replacements during an otherwise lawful lockout was inherently destructive of employee rights within the meaning of Supreme Court precedent. *Harter Equipment*, 280 NLRB 597 (1986) (*Harter I*), affd. sub nom. *Operating Engineers Local 825 v. NLRB*, 829 F.2d 458 (3d Cir. 1987). The *Harter* Board followed the Court's rationale in *Brown Food Store* and held that a single employer does not engage in inherently destructive conduct and does not violate Section 8(a)(3) or (1) of the Act absent specific proof of antiunion motivation, by hiring temporary replacements to engage in business operations during an otherwise lawful lockout of its employees. The Board explained that the use of temporary replacement employees had only a comparatively slight effect on employee rights:

[28] *Brown Food Store*, 380 U.S. at 288.

[29] *Brown Food Store*, 380 U.S. at 288.

[30] The Court expressly declined to pass on the issue of whether an employer engages in inherently destructive conduct by hiring permanent replacements for locked-out employees. *Brown Food Store*, 380 U.S. at 292 fn. 6.

> [A]ny adverse effect of the use of temporary employees on the right to belong to a union . . . represents, as in *Brown Food Store*, at most only a slight addition to the impact of the lockout itself. In every instance, the use of ''temporary'' employees means no threat to the permanent employee status of locked out employees. The Union or its individual members have the ability to relieve their adversity by accepting the employer's less favorable bargaining terms and returning to work.

Harter I, 280 NLRB at 600. The Board further observed that the use of temporary replacements had no greater adverse effect on the right to bargain collectively than did the lawful lockout itself—which had the impact on employees by removing them from the ranks of wage earners—and that the bargaining relationship continued while the parties could negotiate their good-faith demands. The Board concluded that the use of temporary replacement employees to remain in operation during the lockout was a measure reasonably adapted to the employer's fundamental interest in continuing its business operations.[31]

b. *Guiding principles for determining whether inherently destructive conduct has occurred*

The Supreme Court's development and application of the doctrine of employer conduct inherently destructive of employee rights may be distilled into several fundamental guiding principles. The Court has specifically directed that the severity of the harm to employees' Section 7 rights caused by the employer conduct must be determined. As one commentator has observed, this includes the severity of the harm suffered by the employees for exercising their rights as well as the severity of the impact on the statutory right being exercised.[32] Thus, as in *Erie Resistor Corp.*, an employer's policy of directly attaching penalties to participation in protected union activities is inherently destructive of the employees' statutory right to engage in those activities. See *Kansas City Power & Light Co. v. NLRB*, 641 F.2d 553, 557–560 (8th Cir. 1981); *Kaiser Engineers v. NLRB*, 538 F.2d 1379, 1386 (9th Cir. 1976). As the Fifth Circuit has stated, ''conduct inherently destructive of important employee rights is that which directly and unambiguously penalizes or deters protected activity.'' *NLRB v. Haberman Construction Co.*, 641 F.2d 351, 359 (5th Cir. 1981) (en banc).

A second consideration in determining whether inherently destructive conduct has occurred is the temporal impact of the employer's conduct. The Court in *Erie Resistor Corp.* emphasized the effect of the employer conduct upon future collective bargaining and union activity. ''[W]hether employer conduct is inherently destructive hinges on the 'distinction between conduct which merely influences the outcome of a particular dispute and that which is potentially disruptive of the opportunity for future employee organization and concerted activity.'''[33] Thus, conduct of a temporary duration which seeks to put pressure on union members to accept a particular management proposal is distinguished from conduct that has ''far reaching effects which would hinder future bargaining''[34] and conduct that ''creates visible and continuing obstacles to the future exercise of employee rights.''[35]

Third, we note that the Court specifically directed in *American Ship Building* that a distinction must be drawn between an employer's ''hostility to the process of collective bargaining'' and its simple intention to support its bargaining position as to compensation and other matters. 380 U.S. at 309. As the District of Columbia Court of Appeals has explained:

> Essential to understanding the Supreme Court's analysis . . . is its distinction between *substance* and *process* in collective bargaining. The Labor Act is process-oriented. It establishes and protects the employees' right to bargain, not their right to *a* bargain. Thus, the employer must negotiate but it need not agree. Employer ''hostility to the process of collective bargaining'' is intolerable in this regime, and constitutes a rejection of all that the law requires an employer to accept.

Boilermakers Local 88 v. NLRB, 858 F.2d at 763 (emphasis in original). The Seventh Circuit has accordingly observed that ''the label 'inherently destructive' may be applied only to conduct which exhibits hostility to the *process* of collective bargaining itself; actions which merely further an employer's *substantive* bargaining position in a particular contract negotiation are not 'inherently destructive' as long as the employer respects the employees' right to engage in concerted activity.'' *Esmark, Inc. v. NLRB*, 887 F.2d 739, 748

[31] *Harter I*, 280 NLRB at 600. The majority of circuit courts which have examined the issue have agreed with the Board that a single employer's use of temporary replacements during a lawful lockout does not violate the Act. See *Operating Engineers Local 825*, 829 F.2d at 458; *Boilermakers Local 88*, 858 F.2d 756 (D.C. Cir. 1988); *Inter-Collegiate Press*, 486 F.2d 837 (8th Cir. 1973). But see *Inland Trucking Co. v. NLRB*, 440 F.2d 562 (7th Cir. 1971), cert. denied 404 U.S. 858 (1971).

Member Browning expresses no view on the issue that divided the Board in *Harter*. In the instant case, the Respondent's use of temporary personnel during the lockout is not alleged to be unlawful. See fn. 8, supra.

[32] See Fick, *Inherently Discriminatory Conduct Revisited: Do We Know It When We See It?*, 8 Hofstra Labor L.J. 275, 308 (1991).

[33] *Boilermakers Local 88 v. NLRB*, supra at 756, 763, quoting Note, *Lockouts-Employer's Lockout with Temporary Replacements is an Unfair Labor Practice*, 85 Harv.L.Rev. 680, 686 (1972).

[34] *Portland Willamette Co. v. NLRB*, 534 F.2d 1331, 1334 (9th Cir. 1976).

[35] *Inter-Collegiate Press v. NLRB*, supra at 845, cert. denied sub nom. *Bookbinders Local 60 v. NLRB*, 416 U.S. 938 (1974).

(7th Cir. 1989) (emphasis in original). This solicitude for the collective-bargaining process reflects a recognition that that process and the promotion of an autonomous relationship between the parties is the fundamental construct of the National Labor Relations Act.[36] As the Court declared in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 674 (1981), ''Central to achievement of th[e] purpose [of the National Labor Relations Act] is the promotion of collective bargaining as a method of defusing and channeling conflict between labor and management.''

Fourth, conduct may be inherently destructive of employee rights if it ''discourages collective bargaining in the sense of making it seem a futile exercise in the eyes of employees.'' *Esmark, Inc. v. NLRB*, 887 F.2d at 749 (quoting *Boilermakers Local 88 v. NLRB*, supra, 858 F.2d at 764). An example of conduct falling within this category is a ''calculated repudiation of a collective bargaining agreement and prompt institution of less favorable terms'' because an employer thereby ''sends a signal to employees that despite their diligent efforts to organize and bargain collectively, their contract may be disregarded.'' Id.

We now turn to a consideration of the Respondent's conduct at issue in this case in the light of these principles.[37]

2. The inherently destructive issue presented here

We find that the Respondent's permanent subcontracting of bargaining unit work during the lockout in this case produced the harms to employees and their exercise of Section 7 rights that were avoided in *Brown Food Store* and *Harter I* because of the temporary nature of the replacements utilized by the employers during the lockouts in those cases.

First, it is undisputed in this case that the unit maintenance employees whose work was permanently subcontracted lost their jobs and would not have returned to perform maintenance work at the conclusion of the labor dispute.[38] The Respondent's conduct therefore imposed the most severe penalty unit maintenance employees could have suffered: permanent loss of employment and employee status. In contrast, ''the use of 'temporary' employees [in *Harter* meant] no threat to the permanent employee status of locked out employees.'' *Harter I*, supra, 280 NLRB at 600.

The Respondent's conduct here subjected unit production employees as well to the severe harm of loss of employment. Under the terms of the Respondent's transition proposals, more senior maintenance employees facing job loss as a result of the Respondent's permanent subcontracting could bump into the jobs of less senior production employees, resulting in the permanent layoff of those production employees. Accordingly, the harm suffered by both the unit maintenance and production employees as a result of the Respondent's conduct was most severe. The unit employees here could not end the dispute simply by agreeing to the Respondent's terms and then, as with the locked-out employees in *Brown Food Store*, ''return[ ] to work on a regular basis.''[39]

The impact of the Respondent's conduct was correspondingly severe on the unit employees' exercise of their Section 7 rights. By resisting the Respondent's bargaining proposals and adhering to the Unions' negotiating positions, the unit employees were exercising their fundamental statutory rights under Section 7 of the Act to assist the Unions and to bargain collectively through the Unions as their representative. The Respondent's permanent subcontracting rendered nugatory the exercise of these statutory rights by those unit employees faced with permanent loss of employment and employee status. There can, of course, be no greater obstacle to the exercise of employee rights than permanent loss of employment and employee status.

Second, the Respondent's conduct would also significantly adversely impact the exercise of Section 7 rights by those unit employees whose jobs were not lost as a result of the Respondent's conduct. Those employees who did return to work at the resolution of the labor dispute would perform their duties side by side with the BEK contract employees who were performing on a permanent basis the work of former unit members. Furthermore, the altered composition of the bargaining unit, caused by the loss of unit work and resulting bumping of employees into different unit positions, would be a new and continuing feature of the Respondent's workplace. Thus, the remaining bargaining unit employees need merely look at those working alongside them to be visibly reminded on a day-to-day basis of the most severe and feared consequence of engaging in collective bargaining and union activities: permanent job loss. These remaining employees would be on notice that exercising their Section 7 rights to assist the Unions by merely adhering to their Unions' collective-bargaining positions might be met not only

[36] Sec. 1 of the Act establishes, inter alia, that:

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining . . . .

[37] While the reasoning of the Board and court decisions may be distilled into the aforementioned four guiding principles for determining whether inherently destructive conduct has occurred, there is of course no requirement that conduct exhibit all four characteristics in order to be considered inherently destructive.

[38] The Respondent plainly conceded this fact at the August 24, 1987 bargaining session. The Respondent introduced at subsequent bargaining sessions its proposals that some unit employees could return to work by bumping into the jobs of less senior production employees, who in turn would be permanently laid off.

[39] *Brown Food Store*, 380 U.S. at 289.

with temporary deprivation of work, but also with the permanent loss of employment.

The severe impact on employees and the exercise of their Section 7 rights resulting from the permanent loss of bargaining unit maintenance work via permanent subcontracting thus clearly would not end at the conclusion of the instant labor dispute, in contrast to the limited impact of temporary replacement employees used for the duration of a labor dispute only. The Court emphasized in *Brown Food Store* that the impact on employees' rights due to the use of temporary replacements during a lawful lockout was comparatively slight because the union at most would be forced to capitulate and return its members to work on less favorable terms than sought. The use of permanent subcontracting here would do more than merely influence the outcome of the substantive terms of the instant labor dispute. The Respondent's conduct rather would result in permanent job loss, as well as additional employee dislocation, serving to chill the future exercise of employee rights by remaining unit members. The Respondent's conduct would accordingly have a continuing effect on the future exercise of employee rights—on both employees who returned to work and those who did not—well beyond the settlement of the instant dispute that ''stands as an ever-present reminder of the dangers connected with . . . union activities.'' *Erie Resistor Corp.*, 373 U.S. at 231. We cannot conclude, therefore, that the effect of the Respondent's permanent subcontracting on unit employees and the exercise of their statutory rights is at most only a slight addition to the impact of the lawful lockout, as the Supreme Court emphasized is the case with the use of temporary replacements. *Brown Food Store*, 380 U.S. at 288–289.[40] Rather, the Respondent's actions fall within that category of inherently destructive conduct that adversely affects the future exercise of protected employee rights. *Haberman Construction Co.*, supra, 641 F.2d at 359.

Third, we further find that the Respondent's implementation of its permanent subcontracting proposal had far reaching pernicious effects which impaired the parties' *process* of collective bargaining and therefore may be labeled ''inherently destructive'' for that reason as well. We have carefully reviewed the record evidence of the course of the parties' contract negotiations and find that the Respondent's conduct of implementing the permanent subcontracting proposal diverted the bargaining process away from negotiations regarding the basic issues separating the parties—Sunday pay, holiday pay, and even the lawful proposal itself of more permissive use of subcontracting—to a narrow focus on the consequence of the Respondent's implementation of the permanent subcontract: whether the unit maintenance workers would return to work at the end of the lockout.

The parties' first bargaining session, on August 24, 1987, following the implementation of the permanent subcontract was thus limited to the issue of the status of the maintenance workers in light of the permanent subcontract. The Unions repeatedly queried as to the fate of the unit maintenance employees, and the Respondent replied that the unit maintenance employees would not return to work under the contract with BEK. Local 2650 President Funk asked, ''How in the hell do you ever expect to get an agreement out of this now?''

The Unions opened the October 26, 1987, bargaining session by stating that they wanted to talk about the relocation of the extruder, how items 9 and 11 had been added, and about the subcontracting of maintenance. The parties then engaged in lengthy discussion of the pooling issue. The negotiations returned at their conclusion, however, to the issue of the status of the maintenance employees. The Respondent recognized the Unions' concern regarding what would happen to the maintenance people, and the Unions emphasized that that was one issue which needed to be resolved.

The parties' November 5, 1987 negotiating session involved the pooling issue and discussion of a productivity bonus in lieu of premium pay. The Unions continued to underscore their paramount concern regarding the fate of the maintenance workers, however, and accordingly stated: ''We know less here of our status than we do at other places. We have to start somewhere before we ever get the pooled voting issue settled. . . . [We] don't know the status of the Mobile mill. And [we] don't know the status of the two hundred and eighty maintenance jobs.''

The events at the next negotiating session on December 4, 1987, illustrate that the bargaining process had become entangled with the fate of the maintenance employees. Thus, when the Respondent asked for a response on the extruder issue and noted that it was willing to discuss productivity bonuses but that it had no intention of dropping permanent subcontracting, the Unions simply responded by asking whether the parties could reach an agreement on putting the maintenance people back to work at the Mobile mill. The Unions also stated that they would change their position on premium pay—the critical issue in negotiations—if the Respondent would withdraw the permanent subcontracting proposal. The Respondent replied that it would discuss productivity bonuses *if* the Unions would agree to items 9 and 11 (permanent subcontracting). Thus, both parties indicated a willingness to move on the critical premium pay issue, but each party conditioned such movement on the issue of permanent subcontracting.

[40] See *Boilermakers Local 88 v. NLRB*, 858 F.2d at 765 (''[T]he use of temporary replacements, unlike the initial lockout, does not itself deprive employees of work or otherwise impose a cost upon them.'').

The Respondent's implementation of the permanent subcontracting proposal further entangled the bargaining process when the Respondent introduced, at the December 17, 1987 session, its transition proposal to cover the operation of the mill at such time when the Respondent ended the lockout. As noted above, the Respondent's transition proposal provided for the return of some senior maintenance employees by bumping into the jobs of more junior production employees, but that other maintenance employees and some production employees would be permanently laid off. The Respondent's negotiators testified that they introduced the transition agreement at this session, even though final resolution of the Mobile dispute was not anticipated at any time in the near future, because they were aware of how difficult the issue would be of returning unit employees working side by side with subcontract employees. The Respondent's implementation of its permanent subcontracting proposal during the lockout thus concededly complicated the transition issue and prompted the Respondent to raise the issue well prior to the resolution of the substantive issues separating the parties, due to the Respondent's own concern about the impact on negotiations of its implementation of the permanent subcontract.

The Respondent's concern was well founded because the parties' December 17, 1987 bargaining session, as well as the next sessions held on December 21, 1987, and January 4 and 29, 1988, principally focused on the transition agreement. At the December 17 session, the Unions inquired whether the BEK employees were going to remain in the plant under the transition agreement and whether item 11 stayed intact. The Respondent replied affirmatively, but explained that some maintenance employees would return under the bump-back proposal. The Unions replied that ''[o]ur position is and always has been that all of them [the bargaining unit employees] will have to come back before item 11 is removed.'' The Respondent stated that it had no intention of dropping item 11, and if the parties ''had not talked about what to do with the maintenance people, then in effect the number that would be laid off would be the size of the maintenance department.'' Negotiations regarding permanent subcontracting—and the bargaining process in general—had thus devolved to simply the question whether the maintenance employees would return to work.

At the parties' December 21 session, the Unions made a counterproposal as to transition which provided, inter alia, that all employees who desired to return to work could do so and that the Respondent could assign work on a nonprecedent setting basis for a 14-day period. The Respondent asked whether the counterproposal prohibited the use of contractors, and the Unions replied that ''if all the Unions' represented people came back, Respondent could have all the contractors it wanted.'' The January 4 and 29, 1988 sessions were also primarily concerned with the transition issue. At the latter session, the Unions stated that ''the Respondent's January 29 proposed transition agreement was all right so long as the transition agreement was reduced to 14 days and 'our folks' were back to work.'' The parties' collective-bargaining process at this time had been thus diverted from a substantive discussion of the issues separating them to a concededly premature focus on the transition issue, which in turn primarily concerned whether the maintenance employees would return to work. This diversion of the bargaining process was a direct result of the Respondent's implementation of the permanent subcontract.

The parties' next negotiating session on February 18, 1988, again focused primarily on the status of the maintenance employees. The Respondent at this session replied to written questions the Unions had previously submitted regarding the permanent subcontract with BEK. The first question was ''whether company items 9 and 11 were still a company proposal or was the permanent replacement of unit employees final . . . .'' The Respondent replied, inter alia, that ''it is not our intention to rescind that contract.'' The Unions continued to press the question of whether the maintenance employees had been replaced by BEK employees. In addition, the Respondent replied to the Unions' question regarding severance pay by stating that most if not all of the maintenance employees would have sufficient seniority to bump into production jobs, and that any maintenance employees who were laid off would have to exercise their severance pay rights and would be terminated.[41]

At the final bargaining sessions prior to the rescission of the permanent subcontract, the Unions proposed a vote on the Respondent's March 10, 1987 offer, including, in addition, a profit-sharing plan in lieu of premium pay and excluding the permanent subcontracting proposal. The Respondent rejected that proposal because it did not address its concern regarding maintenance costs, and because it was unwilling to implement a profit sharing plan. The final bargaining sessions before rescission of the permanent subcontract concerned the Respondent's so-called Louisville proposal.

Thus, during the 9-month period of the permanent subcontract, negotiations focused to a significant extent on the return to work of the maintenance employees rather than on the substantive issues between the parties. The use of permanent subcontract employees ac-

[41] The Unions also posed the following two questions to the Respondent: (1) what savings has the company realized in the months since signing the permanent subcontract with BEK; and (2) what has been the cost to the company to replace the represented employees. These lines of inquiry indicate the focus of negotiations on the implementation of the permanent subcontract and its impact on unit employees.

cordingly had more than a slight impact on the labor dispute, unlike the use of temporary replacements, which does not threaten the jobs of locked-out employees, and thereby impede resolution of the dispute. Here, the tenure of the replacement employees and the resulting fate of the unit maintenance employees became inextricably entangled with the substantive issues separating the parties.[42] Indeed, the Respondent emphasized that it would not move on the issue of permanent subcontracting which it had already implemented. Resolution of the labor dispute thus became dependent on the Hobson's choice facing the union membership between resisting the permanent subcontracting demands and remaining entirely locked out or accepting the demands and returning to work absent nearly a quarter of the former membership. The parties' bargaining relationship thus did not continue without interruption during the lockout, as the Board emphasized in *Harter I* is the case with the use of temporary employees. Rather, the Respondent's implementation of its permanent subcontracting proposal placed diminution of the bargaining unit at the forefront of the bargaining process, operating as a virtual condition precedent to the settlement of the labor dispute.

Finally, as noted above, the Respondent's conduct was destructive not only of the ongoing bargaining process but also was likely to hinder the parties' future collective bargaining. The altered composition of the bargaining unit would come into play regarding future layoffs and other employer action implicating employee seniority; and any future contract negotiations would be overshadowed by the specter of the possible loss of more unit jobs as a result of lockouts and permanent subcontracting.

3. The business justification issue

We now turn to the Respondent's asserted business justification for its inherently destructive conduct, because the Supreme Court has directed the Board ''to strike the proper balance between the asserted business justifications and the invasion of employee rights'' in determining whether an employer's conduct is so inherently destructive of those rights as to warrant finding a violation of Section 8(a)(3) and (1) in the absence of direct proof of discriminatory motivation. *NLRB v. Great Dane Trailers*, 388 U.S. at 33–34. See also *NLRB v. Truck Drivers Union*, 388 U.S. 87, 96 (1957) (in determining lawfulness of temporary lockout, the ''ultimate problem is the balancing of the conflicting legitimate interests.'').

According to the Respondent's principal witness on the business justification issue—its mill manager, Perkins—it implemented the permanent subcontract during the lockout ''to reduce the cost, specifically the maintenance cost, during the lockout.''[43] The Respondent introduced no evidence, however, that such a cost reduction—even assuming that it represented a significant reduction of costs below those incurred under the temporary subcontract with BEK—was essential to continuing its operations during the lockout. It is undisputed that the Respondent was able to secure the services of BEK under a temporary subcontract both to undertake preparatory operations before the lockout and to carry on operations without interruption thereafter.

The Respondent also boasted to the Union at a May 21, 1987 bargaining session and in subsequent letters to the locked-out employees that the performance of the maintenance work by the BEK employees operating under the temporary subcontract more than met the Respondent's expectations. The Respondent showed nothing even approaching exigent circumstances for entering into the permanent subcontract with BEK.

The absence of any evidence showing that converting the temporary maintenance subcontract to a permanent one was essential to the Respondent's maintaining operations during the lockout is a critical flaw in its business justification defense. Thus, ''continuation of [an employer's] business operations'' during a labor dispute was recognized by the Board in *Harter I*, 280 NLRB at 599, as a business justification for locking out employees and hiring temporary replacement; but there is no authority for the proposition that an employer's ability to achieve some cost savings is, by itself, such an important interest as to justify a severe incursion on the rights of employees to maintain their collective-bargaining positions during a labor dispute. Accrual of additional cost savings is, in short, insufficient to constitute ''an overriding business purpose justifying the invation of union rights'' that flow from the

[42] We are mindful to distinguish between the impact on the bargaining process of the Respondent's introduction into negotiations of its permanent subcontracting proposal—which is not alleged to be unlawful—and the impact of the Respondent's implementation of that proposal. While the introduction of the proposal was indeed a contentious issue between the parties, it was the implementation of the proposal which caused the return to work of the maintenance employees to become a focal point in resolving the labor dispute.

[43] Perkins' testimony in this regard was echoed by the Respondent's counsel at the hearing, who explained: ''[The permanent subcontracting proposal] was implemented to save costs during the lockout and to reduce the multiplier and to bring down overtime and all these other factors. And that is the only business justification in this case.''

We note the Respondent's contention in its exceptions that, contrary to the judge's finding that it implemented the permanent subcontract to reduce the maintenance cost during the lockout, the permanent subcontract was implemented to achieve long-term savings by performing the maintenance function less expensively with subcontract personnel as compared with unit employees. The judge specifically found, however, that the record evidence established that achievement of this latter goal was not the reason the Respondent entered into the permanent subcontract.

Respondent's conduct. *Erie Resistor Corp.*, 373 U.S. at 231.

The Respondent advances several additional arguments purporting to justify its conduct of permanently subcontracting unit work during the lawful lockout. The Respondent contends that its conduct cannot be deemed inherently destructive of employee rights because in permanently subcontracting unit work it did not distinguish between employees who engaged in union activity and those who did not. In the ''inherently destructive'' conduct case, however, the making of distinctions on the basis of union activity is only one element among several relevant factors to be considered in evaluating whether employer conduct is inherently destructive. The absence of this one element cannot ameliorate or otherwise justify the destructive impact on the collective-bargaining process and the exercise of employee rights by *all* the unit employees caused by the Respondent's conduct, as set forth in full above. We cannot agree with the Respondent's contention that an employer can never be found to have engaged in inherently destructive conduct so long as it was careful to treat all employees alike, no matter how destructive of employee rights its conduct may be.

We additionally find without merit the Respondent's characterization of its implementation of the permanent subcontract as a fundamental change in its business operations that need not have been postponed during the lockout. The record plainly shows that the Respondent did not in fact enter into the permanent subcontract to effect an operational change but rather, as Mill Manager Perkins testified, to reduce its maintenance cost during the period of the lockout.

The Respondent further asserts in defense of its conduct that it did not take the extreme step of permanently replacing unit employees during the lockout in this case but rather merely permanently subcontracted unit work. We note that strong doubts have been expressed as to the lawfulness of the use of permanent replacements during a lockout,[44] although the Supreme Court has expressly declined to pass on this issue[45] and it is not before us today. We can discern no basis, however, for concluding, as the Respondent suggests, that the destructive impact on employee rights in this case was appreciably diminished by the fact that the Respondent opted to deprive the locked-out employees of their jobs by permanently subcontracting their work rather than by permanently replacing them with other employees working directly for the Respondent.

Indeed, in certain respects the permanent subcontracting of the unit maintenance work was more harmful to employee rights and the collective-bargaining process than permanent replacement of union maintenance employees would be. A permanently replaced worker retains his status as an employee and is subject to recall in the event of a vacancy. *Laidlaw Corp.*, 171 NLRB 1366, 1369–1370 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). The replaced employee further may vote in any representation election conducted within 12 months after commencement of a strike. *Wahl Clipper Corp.*, 195 NLRB 634 (1972). In contrast, an employee displaced by the permanent subcontracting of unit work has no recall or voting rights. In addition, a permanent subcontract diminishes the bargaining unit by the scope of the subcontract. See *Alexander Linn Hospital Assn.*, 244 NLRB 387, 390 (1979), enfd. mem. 624 F.2d 1090 (3d Cir. 1980). The Respondent's distinction that it permanently subcontracted unit work rather than permanently replaced locked-out employees accordingly does not alter our calculus of the harmful impact on employee rights flowing from the Respondent's conduct.

The Respondent suggests, moreover, that it would be anomalous for the Board to hold that it is unlawful for it to have permanently subcontracted unit work during the course of the lockout while under the rule in *Mackay Radio & Telegraph Co.*, 304 U.S. at 333, the Respondent may take the step of permanently replacing striking employees. The Respondent's attempt to justify its conduct within the parameters of *Mackay* is unavailing, however. The rationale underlying *Mackay* of protecting the ''right [of the employer] to protect and continue his business by supplying places left vacant by strikers''[46] is entirely inapplicable to the Respondent here, whose interest in protecting and continuing its business was fully protected by the lawful use of temporary subcontracting. Furthermore, the equation of a locking-out employer with a struck employer neglects important distinctions between the two situations.[47] Thus, although it may be possible for an employer to provoke a strike in a particular case, it is still the employees who must decide whether to choose to strike and risk permanent replacement. In contrast, the decision to lock out rests entirely with the employer, albeit in response to either actual or potential union conduct. The District of Columbia Court of Appeals has thus questioned the application of the *Mackay* rule in the context of a lockout because ''a

[44] See *Brown Food Store*, supra, 380 U.S. at 293 (Goldberg, J., concurring) (''There would be grave doubts as to whether the act of locking out employees and hiring permanent replacements is justified by any legitimate interest of the nonstruck employers . . . .''); *Harter Equipment, Inc.*, 293 NLRB 647, 648 (1989) (*Harter II*) (''[T]he Employer in [*Harter I*] locked out the bargaining unit in support of its bargaining demands and they were not, and could not lawfully be, permanently replaced.''). See also Oberer, *Lockouts and the Law: The Impact of American Ship Building and Brown Food*, 51 Cornell L.Q. 193, 224–225 (1966).

[45] See *American Ship Building*, supra, 380 U.S. at 308 fn. 8; *Brown Food Store*, supra, 380 U.S. at 292 fn. 6.

[46] 304 U.S at 345.

[47] See Oberer, *Lockouts and the Law: The Impact of American Ship Building and Brown Food*, 51 Cornell L.Q. at 221–222.

lockout, followed by permanent replacements, might too easily become a device for union busting, successfully disguised as an effort to protect the employer's bargaining position and his legitimate interest in maintaining operations.'' *Boilermakers Local 88 v. NLRB*, 858 F.2d at 769 (quoting Meltzer, *The Lockout Cases*, 1965 Sup.Ct.Rev. 87, 104). We are additionally mindful that *Mackay* did not deal with the issues raised here of permanent subcontracting in the context of a lockout, or with the consequent effect on the Section 7 rights of all the unit employees and the collective-bargaining process. Accordingly, as the Supreme Court stated in *Erie Resistor Corp.* in rejecting the employer's reliance on *Mackay*, ''[w]e have no intention of questioning the vitality of the *Mackay* rule, but we are not prepared to extend it to the situation we have here.'' 373 U.S. at 232.

Accordingly, for all these reasons, we conclude that the Respondent engaged in conduct inherently destructive of employee rights and violated Section 8(a)(3) and (1) of the Act by subcontracting bargaining unit work on a permanent basis in order to bring additional economic pressure to bear in support of its bargaining proposals after it had lawfully locked out the bargaining unit employees and subcontracted their work on a temporary basis.[48]

C. *The 8(a)(5) Implementation Allegations*

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing its permanent subcontracting proposal, reasoning that the Respondent's unlawful failure to furnish the Unions with requested information precluded the existence of a legally cognizable impasse. In its exceptions, the Respondent argues, inter alia, that any violation it may have committed with respect to its withholding of information did not taint the negotiations over subcontracting prior to the implementation of its proposal. Referring to the complaint allegation (admitted in its answer) that its permanent subcontracting proposal was a mandatory subject of bargaining, the Respondent contends that after bargaining to impasse it was privileged to implement the proposal. We affirm the judge's unfair labor practice finding, but we find it unnecessary to rely on her rationale.

It is of course true, as the Respondent argues, that as a general rule an employer, after bargaining to a good-faith impasse, may unilaterally institute changes in terms and conditions of employment that are reasonably comprehended within its preimpasse proposals. E.g., *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), petition for review denied sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). Because the Act only compels bargaining, not agreement, the impasse rule frees an employer to make changes necessary to the running of the business enterprise once negotiations have reached a deadlock. However, as discussed in the preceding section, the change the Respondent implemented in the instant case violated Section 8(a)(3) and (1) of the Act because it was inherently destructive of employee statutory rights and was not justified by business considerations.

Although the Board has frequently held that an employer is not exempt from bargaining over an employment-related decision that violates Section 8(a)(3) and (1) of the Act, e.g., *Hydro Logistics*, 287 NLRB 602 (1987), enfd. sub nom. *NLRB v. Wizard Method, Inc.*, 897 F.2d 1233 (2d Cir. 1990); *Strawsine Mfg. Co.*, 280 NLRB 553 (1986), the Board does not appear to have addressed the question of whether after engaging in such bargaining an employer may unilaterally implement its decision without violating Section 8(a)(5). Having been squarely presented with the issue here, we have little difficulty in concluding that the Respondent was not free to implement unilaterally its permanent subcontracting proposal under the impasse rule, because the implementation was not a legitimate change in employee terms and conditions of employment but rather an independent violation of the Act. Conduct violative of Section 8(a)(3) of the Act cannot be equated with a lawful business decision.[49]

Further support for our finding of an 8(a)(5) implementation violation is provided by Supreme Court precedent explaining that in cases of unilateral action ''the real injury . . . is to the union's status as bargaining representative.'' *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 429 fn. 15 (1967). Here, the nature of that injury has been extensively examined in the preceding section. In sum, because we have already found that the implementation of the permanent subcontracting proposal violated Section 8(a)(3) on the ground that it was inherently destructive of employees' statutory right ''to bargain collectively through rep-

[48] In so concluding, we are mindful that the Board's role is not to function as an ''arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands.'' *NLRB v. Insurance Agents*, 361 U.S. 477, 497 (1960). Rather, we have addressed the ''ultimate problem'' of balancing conflicting legal interests and concluded that the incremental business benefit sought by the Respondent here does not outweigh the significant harm caused to employee rights.

Nor can our holding today be construed as circumscribing the Respondent's legitimate employer prerogatives in any meaningful way. The Respondent may—as in this case—lawfully lock out its employees and press its bargaining demands by continuing to operate effectively its business via the use of temporary replacements or temporary subcontract. The Respondent, in addition, may lawfully subcontract bargaining unit work, after satisfying its bargaining obligations, following the resolution of the lockout. *Fibreboard Paper Products v. NLRB*, 379 U.S. 203 (1964).

[49] Cf. *Central Transport*, 306 NLRB 166, 167 (1992) (''Discrimination on the basis of antiunion animus cannot serve as a lawful entrepreneurial decision.''), enf. denied on other grounds 997 F.2d 1180 (7th Cir. 1993).

resentatives of their own choosing,'' it logically follows that the Respondent's unilateral action derivatively violated Section 8(a)(5) for the same reason.

We have carefully considered the Respondent's contention that it was nevertheless privileged to implement the permanent subcontracting proposal because the Unions unlawfully conditioned bargaining on their pooled voting strategy, citing in support the Board and court decisions in *Louisiana Dock Co.*, 293 NLRB 233 (1989), affd. in relevant part 909 F.2d 281 (7th Cir. 1990).[50] The Board held in *Louisiana Dock* that the union unlawfully conditioned bargaining on recognition of a single, multisite bargaining unit, where the parties' collective-bargaining agreement and bargaining history established that the union had rather been recognized as the representative in multiple, distinct units at several different facilities. The Board held that since the union conditioned bargaining on recognition of a unit other than the recognized unit, the employers had no duty to comply with this demand, and the Respondent's unilateral implementation of previously proposed changes in job classifications, wage rates, and other matters did not violate Section 8(a)(5) and (1) of the Act. The Seventh Circuit denied the union's petition for review and affirmed the Board's finding that the union had unlawfully conditioned bargaining.

The Respondent contends here that the Paperworkers' pooled voting strategy was unlawful, citing in support a Board decision finding unlawful a pooled voting arrangement employed by the UPIU against the Respondent at facilities not involved in the instant case. See *Paperworkers Local 620 (International Paper Co.)*, 309 NLRB 44 (1992).[51] The Respondent submits that the voting pool in the instant case is virtually identical to the one found to be unlawful, and that the Unions' insistence on the pooled voting arrangement as a condition of bargaining excused the Respondent from any obligation to bargain and privileged it to implement the permanent subcontracting proposal. We need not decide this issue, because we find that it was untimely raised.

The Respondent failed to raise before the judge its contention that the voting pool was unlawful. Our review of the proceeding before the administrative law judge, including the Respondent's 167-page opening brief and its 221-page reply brief, establishes that the Respondent did not argue that it was privileged to implement the permanent subcontracting proposal because the Unions unlawfully conditioned bargaining on the pooled voting arrangement. Nor did the Respondent even cite *Louisiana Dock*, upon which it so heavily relies on on its exceptions. Rather, the Respondent argued at length below that the pooled voting arrangement as a practical matter precluded execution of an agreement at Mobile pending resolution of the disputes at the other pooled locations. The crux of the Respondent's argument below was accordingly that the pooled voting procedure obstructed resolution of the Mobile dispute regardless of the effect of the permanent subcontract, rendering a backpay award inappropriate in this case. This contention was fully argued by the Respondent, opposed by the General Counsel and the Charging Parties, and considered and rejected by the judge.[52]

Thus, while the Respondent correctly argues that it has consistently objected to the assertedly obstructive effects of the voting pool, it did not argue that the pool was unlawful and privileged its implementation of the permanent subcontracting proposal.[53] This defense was accordingly not considered by the administrative law judge, and it is inappropriate to be considered for the first time upon exceptions to the Board. See *Auto Workers Local 594 v. NLRB*, 776 F.2d 1310, 1314 (6th Cir. 1985) (''Since the Union failed to raise this issue in a timely fashion before the ALJ, we hold that it waived this defense.''), enfg. 272 NLRB 705 (1984); *Operating Engineers Local 520 (Mautz & Oren)*, 298 NLRB 768 fn. 3 (1990); *Yorkaire, Inc.*, 297 NLRB 401 (1989) (''A contention raised for the first time in exceptions to the Board is ordinarily untimely raised and, thus, deemed waived.''), enfd. 922 F.2d 832 (3d Cir. 1990); *Camay Drilling Co.*, 254 NLRB 239, 240 fn. 9 (1981) (''[T]o determine an issue of this magnitude when it is raised for the first time [by the General Counsel] as a post-hearing theory would place an undue burden on Respondent and deprive it of an opportunity to present an adequate defense.''), enfd. sub nom. *Operating Engineers Pension Trust v. NLRB*, 676 F.2d 712 (9th Cir. 1982).

The Respondent argues, however, that the decision in *Paper Workers Local 620 (International Paper Co.)*, holding a pooled voting arrangement to be unlawful, did not issue until after the judge's decision in the instant case, somehow disabling the Respondent from raising before the judge the contention that the instant voting pool was unlawful. This argument is disingen-

[50] For the reasons set forth supra, we find without merit the Respondent's contention that it was privileged to implement the proposal because the Unions assertedly refused to bargain over the permanent subcontracting proposal.

[51] See also *Paperworkers Locals 1009, 1973 & 98 (Jefferson Smurfit Corp.)*, 311 NLRB 41 (1993).

[52] We note that, in the amended remedy section of this decision, we, too, fully consider the Respondent's central argument that the pooled voting stratagem prolonged the lockout and precluded a settlement until October 1988, thereby rendering a backpay award inappropriate.

[53] The Respondent cites only one reference—in a footnote—in its voluminous briefs below to demonstrate that it argued that the pool was unlawful. We note that even this single reference does not explicitly mention the pooled voting arrangement, but rather provides that ''[b]y refusing to sign a contract at Mobile until strikes terminated in *other* bargaining units, the UPIU was committing a blatant unfair labor practice.'' (Emphasis in original.)

uous, because the Respondent itself filed unfair labor practice charges challenging pooled voting in *Paper Workers Local 620 (International Paper Co.)* before the hearing closed in this case. Yet, the Respondent never raised this contention to the judge either before or after the hearing's close.[54] Thus, in light of the Respondent's failure to timely raise the issue, we need not decide whether the pooled voting arrangement was unlawful, and, if so, whether it would privilege the Respondent to unilaterally implement changes in employee terms and conditions of employment that violate Section 8(a)(3) and (1) of the Act.

VI. CONCLUSION

We accordingly find, for all the foregoing reasons, that the Respondent, by its conduct at issue in this case, violated Section 8(a)(1), (3), and (5) of the Act.

AMENDED REMEDY

The General Counsel seeks a backpay award for all the locked-out production and maintenance employees for the effective period of the unlawful permanent subcontract, August 11, 1987, to May 3, 1988. The Respondent argues that no backpay is appropriate here.

We find, for the reasons set forth below, that such a backpay order is appropriate in this case ''to vindicate the public policy of the [Act] by making the employees whole for losses suffered on account of an unfair labor practice.'' *Nathanson v. NLRB*, 344 U.S. 25, 27 (1952). The purpose of such a remedy is to restore, so far as possible, the status quo that would have obtained but for the wrongful act. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

The traditional remedy in cases in which the Board has found that an employer has unlawfully subcontracted bargaining unit work is discontinuance of the subcontracting arrangement, reinstatement of the unit employees whose work has been permanently subcontracted,[55] and backpay for the period of the permanent subcontract during which employees were deprived of employment. See, e.g., *Fibreboard Paper Products*, 379 U.S. at 215–216. Accordingly, the presumptively appropriate remedy for the Respondent's bargaining unit maintenance employees, whose jobs were lost when their work was unlawfully subcontracted, includes a backpay award for the period of the permanent subcontract.

With respect to the unterminated production employees, we find that the General Counsel has established prima facie that a backpay award is also appropriate for them because there is substantial record evidence supporting the complaint allegation that the Respondent's unlawful conduct prolonged the lockout. In this connection, we rely on our analysis in section V,B,2, supra, of how the Respondent's implementation of its permanent subcontracting proposal impaired the collective-bargaining process. There is no need to repeat that discussion in detail here, and we instead incorporate it by reference. In sum, we found there that the Respondent's conduct diverted the bargaining process away from a discussion of the substantive issues separating the parties to a focus on the consequence of the Respondent's unlawful conduct: the permanent loss of approximately 285 unit jobs. We find that the General Counsel has demonstrated that the Respondent's unlawful conduct was likely to, and in fact did, significantly interrupt and burden the course of bargaining resulting in the prolongation of the labor dispute and the lockout.[56]

[54] The Respondent further contends that, even assuming that it failed to timely raise its contention that the pool was unlawful, the operative facts underlying its theory were litigated before the judge. Although, as noted above, the facts concerning the operation of the pool were indeed litigated before the judge, the affirmative defense that the pool was unlawful was never raised by the Respondent or addressed by any of the parties or by the judge. The Respondent's tardy raising of this defense deprived the General Counsel and the Charging Parties of the opportunity to present evidence as to (1) whether the voting pool procedure was unlawful; and (2) whether an adequate nexus existed between the allegedly unlawful conduct of the Unions and the unilateral changes imposed by the Respondent. We cannot conclude in these circumstances that the Respondent's theory that the voting pool was unlawful was sufficiently litigated below to warrant consideration upon exceptions.

[55] Because the Respondent rescinded the permanent subcontracting arrangement and all unit employees have returned to work, these issues are not in contention.

[56] We find inapposite *Delhi-Taylor Refining Division*, 167 NLRB 115 (1967), enfd. sub nom. *Hess Oil & Chemical Corp. v. NLRB*, 415 F.2d 440 (5th Cir. 1969), cert. denied 397 U.S. 916 (1970), cited by the Respondent in support of its contention that the permanent subcontract did not prolong the labor dispute. The Board found in *Delhi-Taylor* that the employer's unlawful insistence on the exclusion of laboratory and warehouse employees from the bargaining unit did not impact upon the parties' collective-bargaining negotiations, and therefore did not render the employer's lockout unlawful. In so finding, the Board explained, inter alia, that (1) the parties' bargaining sessions were devoted ''almost wholly'' to discussions of the major issues between the parties rather than the unlawful exclusion of the employees; (2) the employer did not condition reaching a contract with the union upon an agreement to exclude those employees; (3) the union did not reject the employer's contract terms because they included the provision excluding those employees; (4) the parties were content to defer resolution of the issue until settlement of the substantive terms of the contract; and (5) this issue accordingly did not serve to frustrate bargaining on the other issues separating the parties. 167 NLRB at 116–117.

The record in this case is precisely the obverse of that in *Delhi-Taylor*, and indeed the decision in that case serves as a useful counterpoint for demonstrating how the Respondent's unlawful conduct impacted and prolonged the instant labor dispute. Thus, the record here establishes that (1) the negotiations were devoted in significant measure to the impact of the unlawful permanent subcontract; (2) the Respondent insisted that the permanent subcontract as implemented be a part of any agreement reached; (3) the Unions rejected the Respondent's contract terms in part specifically because those terms included the permanent subcontracting proposal as implemented; and (4) the parties were certainly not content to defer resolution of this

Continued

The General Counsel having established prima facie that a backpay remedy is appropriate for all bargaining unit employees, under established precedent the burden now shifts to the Respondent to prove its affirmative defense that even if its implementation of the permanent subcontract is found to be unlawful, no monetary award is warranted.[57] Specifically, the Respondent contends that even if it had not entered into the permanent subcontract, it would have maintained the lockout during the period from August 11, 1987, to May 3, 1988, and thereafter, due to the parties' inability to settle the critical premium pay issue. The Respondent submits that the lockout would have continued until October 1988, at which time the premium pay issue was settled based on the Vicksburg compromise, the strikes at DePere, Jay, and Lock Haven were terminated and, according to the Respondent, the voting pool ''collapsed.'' The Respondent accordingly contends that no backpay award is appropriate because the unit employees would have remained locked out until October 1988 regardless of the unlawful permanent subcontract.

''[T]he Board is faced here with a situation where it may be impossible to know with certainty what would have happened in the absence of the Respondent's unfair labor practice. In such a situation fashioning a remedy which approximates a return to the status quo is necessarily a difficult task.'' *Graphic Communications Local 4 (San Francisco Newspaper)*, 272 NLRB 899, 900 (1984), modified sub nom. *S.F. Web Pressman & Platemakers' Union v. NLRB*, 794 F.2d 420 (9th Cir. 1986). It is nevertheless the primary responsibility of the Board to devise remedies that effectuate the policies of the Act, and the Board is vested with broad discretion in that determination. *Sure-Tan Inc. v. NLRB*, 467 U.S. 883, 898 (1984); *Fibreboard Paper Products*, 379 U.S. at 215–216. We are guided in this case by the Supreme Court's instruction that ''[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.'' *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946). ''[I]t rests upon the tortfeasor to disentangle the consequences for which it was chargeable from those from which it [was] immune.'' *NLRB v. Remington Rand*, 94 F.2d 862, 872 (2d Cir.), cert. denied 304 U.S. 576 (1938); *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403 (1983).

The determination of what would have happened absent the Respondent's unfair labor practices logically commences with an evaluation of the effect of that unlawful conduct on the labor dispute, and an attempt to disentangle those effects from the calculus of events. We have established that the Respondent's unlawful implementation of its permanent subcontracting proposal diverted to a significant extent the parties' bargaining process away from a discussion of the substantive issues separating them. Instead, the parties expended great bargaining resources focusing on the consequence of the Respondent's unlawful conduct: whether unit maintenance employees would return to work. The Respondent concedes, for example, that the transition issue was complicated by its execution of the permanent subcontract, and that it raised that issue in negotiations earlier than it otherwise would have because of the unlawful permanent subcontract. In fact, five bargaining sessions over a 2-month period largely involved discussion of the transition issue—and the return of the maintenance employees—rather than the critical premium pay issue.

Absent the Respondent's unlawful conduct, the loss of 285 bargaining unit jobs as an accomplished fact would not have been an overarching consideration at the bargaining table. The transition issue would not have been raised prematurely and would have been significantly less disputatious. The ill will engendered by the Respondent's conduct, layered on an already heated dispute, would not have existed.[58] And the Unions' acquiescence to the Respondent's unlawful conduct would not have been a condition for settlement of the dispute during the effective period of the unlawful permanent subcontract. It is thus not speculative to find that, absent the impact of the Respondent's unlawful conduct, the parties would have had the opportunity at the bargaining table to address directly the substantive issues separating them without the jarring dislocation in the bargaining process caused by the execution of the permanent subcontract. We find that the parties would have had a vastly increased opportunity to resolve the dispute through the collective-bargaining process, during the period from August 1987 to May 1988, in the absence of the Respondent's unlawful conduct.

The Respondent contends that even had the parties had that opportunity to settle the dispute, only events occurring in October 1988 could have—and in fact did—result in the settlement of the dispute and the end of the lockout. There are, however, two analytical difficulties with the Respondent's intuitively appealing contention. First, the Respondent ignores the pivotal question of what would have transpired absent the unlawful permanent subcontract. Rather, the Respondent focuses on what happened *in the presence* of the unlawful conduct: the dispute was not settled until Octo-

issue but instead its resolution became an overarching consideration in the contract negotiations.

[57] See, e.g., *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 175 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966).

[58] As union negotiator Funk declared at the August 24, 1987, bargaining session following the Respondent's implementation of its permanent subcontracting proposal, ''How in the hell do you ever expect to get an agreement out of this now?''

ber 1988. That the dispute did not settle until October 1988 given the Respondent's unlawful conduct does not establish that the dispute would have continued until that time absent the unlawful conduct.

Second, the nature of the resolution ultimately reached was not a novel formula raised for the first time in the fall of 1988, such that settlement indeed only could have occurred at that time regardless of the Respondent's prior unlawful conduct. We cannot conclude that events in October 1988 operated as some type of temporal condition precedent to settlement of the dispute and the end of the lockout.

The Respondent is, of course, correct that the critical premium pay issue was not settled at Mobile until the Vicksburg negotiations in September and October 1988 were used as a model for a compromise trade off of a 401(k) plan in lieu of premium pay. The premise of a trade off for the elimination of premium pay had been broached from the earliest days of the instant labor dispute, however. As early as February 1987, the Unions had suggested a wage increase in exchange for the elimination of premium pay, and repeated this proposal at the bargaining session on May 27, 1987. Both the Respondent and the Unions suggested at the November 5, 1987 session, that the parties discuss a productivity bonus instead of premium pay. The Respondent again stated at the December 4, 1987 session, that it was willing to discuss cash payments for attaining productivity and quality goals. At the February 18, 1988 session, the Unions proposed, inter alia, a profit-sharing plan in lieu of Sunday premium pay. Thus, despite the parties' frequent and often heated pronouncements in public statements and at the bargaining table that they would never compromise regarding premium pay, both parties indicated at the bargaining table at Mobile during 1987 and early 1988 a willingness to consider a compromise on that issue and floated ideas that were not dissimilar in nature to the trade off ultimately achieved in October 1988.

Further, the record evidence persuades us that it was the Respondent's unlawful conduct that entangled the nascent discussions regarding a compromise on the premium pay issue. Thus, at the December 4, 1987 bargaining session, the Respondent stated that it had no intention of dropping the permanent subcontracting proposal, but that it was willing to discuss cash payments if productivity goals were reached. The Unions stated that they would change their position on premium pay if the permanent subcontracting proposal were withdrawn, and underscored their concern about the fate of the maintenance employees. The Respondent again stated that if the Unions would agree to the permanent subcontracting proposal, the Respondent was willing to discuss payments for productivity. The parties thus both suggested compromise on premium pay. The ability to pursue a settlement on this basis—as ultimately was achieved in October 1988—was stymied by the parties' adamant positions on the unlawful permanent subcontract and the resulting question of the return of the unit maintenance workers.

Nor can we conclude that the pooled voting arrangement precluded an end to the lockout prior to October 1988. Despite the Respondent's repeated concerns regarding the effect of the voting pool on the ability to reach agreement at Mobile, the Respondent continued to bargain with the Unions and press its bargaining position. The Unions repeatedly stressed to the Respondent that they were only addressing Mobile issues at the negotiations, and if an agreement could be reached at Mobile, they would petition UPIU president Glenn to sign it.[59] Thus, while the pooled voting arrangement certainly was a subject of heated debate and itself occupied a portion of bargaining resources, the Respondent has not established that the pooled voting arrangement precluded agreement until October 1988.

Rather, the core of the labor dispute in this case, as the Respondent emphasizes, was the issue of premium pay. Indeed, when a compromise on premium pay was reached between the parties tentatively at the September 20, 1988 Vicksburg bargaining session and then conclusively at the October 8 and 9, 1988 Vicksburg sessions, the strikes at the pooled locations were promptly called off, the Unions called for negotiations at Mobile, and a settlement was reached soon thereafter at Mobile without regard to the status of the facilities at DePere, Jay, and Lock Haven. Thus, the settlement of the premium pay issue negated the issue of the pooled voting arrangement and led to prompt resolution of the dispute at Mobile. There is nothing in the record to suggest that, absent the Respondent's unlawful conduct, the opportunity to reach an earlier compromise on premium pay would not likewise have been the key to settlement of the Mobile dispute.[60]

It is not dispositive that the dispute did not in fact settle until approximately 5-1/2 months after the termination of the unlawful permanent subcontract. Rather, it was at that time that the parties essentially were able to resume bargaining regarding the substantive issues between them unfettered by the Respondent's unlawful conduct. It is significant that the Respondent's key selling point on behalf of its contract offer of May 3, 1988, immediately following the rescission of the permanent subcontract, was that all maintenance employees would return to work at the conclusion of the dispute; in other words, a return to the situation that would have obtained but for the unlawful conduct effected nine months earlier. The May 3, 1988, offer

[59] We note that the judge found that in prior negotiations, the Unions likewise presented Glenn with a ratified agreement and petitioned him to sign the agreement.

[60] As the Respondent argues, the voting pool ''collapsed'' following compromise on the premium pay issue.

also included the elimination of premium pay and the Respondent's total flexibility subcontracting proposal, both issues which needed to be resolved—and ultimately were—through the collective-bargaining process. The parties thus only resumed discussing the difficult issues of premium pay and subcontracting—without being entangled with the loss of unit jobs—upon termination of the permanent subcontract. Termination of the permanent subcontract was accordingly the starting point for substantive negotiations that had been foreclosed to resume.

The instant labor dispute was indeed comprised of several causative forces. While we find that the record establishes that the Respondent's unlawful conduct impacted and prolonged the labor dispute in the manner set forth above, we cannot find with any meaningful degree of certainty that absent the unlawful conduct, other factors would likewise have prolonged the labor dispute and the lockout so as to render a backpay award inappropriate. In seeking to uphold the public interest and restore the status quo in this case,[61] the Board is accordingly entitled to place the burden of any uncertainty on the Respondent as the wrongdoer.[62] We thus find that the Respondent has not shown that a backpay award is inappropriate in this case for the locked-out bargaining unit employees for the effective period of the unlawful permanent subcontract.[63]

We shall accordingly order the Respondent to make whole the bargaining unit production and maintenance workers for any loss of earnings and other benefits suffered as a result of the discrimination against them during the effective period of the unlawful permanent subcontract, August 11, 1987, to May 3, 1988, with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, International Paper Company, Mobile, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Permanently subcontracting bargaining unit work after locking out the bargaining unit employees who previously had performed that work in the absence of an overriding business justification.

(b) Refusing to bargain with United Paperworkers International Union and its Locals 265, 337, 1940, and 2650, and International Brotherhood of Electrical Workers and its Local Union 1315, as the joint exclusive bargaining representative of the employees in the following bargaining unit, by refusing to furnish the Unions information that is relevant and necessary to their role as the joint exclusive bargaining representative of the unit employees, and by unilaterally changing employee terms and conditions of employment:

> All production and maintenance Employees in the Mobile Mill of the Company excluding Office Clerical Employees, Guards, and Supervisors as defined in Section 2(11) of the Labor Management Relations Act of 1947, as amended, and others as listed under section III, Representation of the February 1, 1987 through January 1, 1993 collective-bargaining agreement.

(c) 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.

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[61] We are mindful that a backpay remedy must be sufficiently tailored to expunge the actual rather than the speculative consequences of the unfair labor practices. *Sure-Tan*, supra, 467 U.S. at 900. The Court has explained that ''[w]hen the Board . . . makes an order of restoration by way of back pay, the order should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.'' *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346–347 (1953), quoting *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943).

[62] *Graphic Communications Local 4 (San Francisco Newspaper)*, 272 NLRB at 900.

[63] We note the Respondent's reliance, in asserting that a backpay award is inappropriate, on the General Counsel's denial of the Unions' appeal of the dismissal of their unfair labor practice charge alleging that the Respondent's failure to furnish requested information tainted the entire lockout from the time the request was made until the information was provided. In denying the Unions' appeal, the General Counsel's Office of Appeals stated, inter alia, that the Respondent's refusal to provide information on subcontracting did not taint the lockout because that refusal did not frustrate collective-bargaining on the other issues between the parties. The Respondent specifically points to the following statement in the General Counsel's denial of the Unions' appeal:

> Nor could it be shown that resolution of the subcontracting issue otherwise held up reaching an agreement so that denial of the information prolonged the lockout. Significantly, the lockout had been implemented in support of lawful bargaining demands at least two months before the permanent subcontracting proposal for which the information was sought had been introduced, and the parties remained far apart on key issues for several months even after that proposal had been withdrawn from negotiations.

The General Counsel's determination pertains solely to the dismissal of the charge alleging the lockout to be unlawful based on the Respondent's failure to provide information. It is fundamental that the dismissal of this charge pursuant to the General Counsel's exclusive prosecutorial discretion under Sec. 3(d) of the Act removed that issue from this proceeding, and it accordingly was not alleged in the complaint and is not before us. Rather, what is before us is the complaint allegation that the Respondent's implementation of the permanent subcontract violated Sec. 8(a)(3) and (1) of the Act. Having found merit in that allegation, the exclusive responsibility for fashioning an appropriate remedy for the Respondent's unfair labor practices rests with the Board pursuant to Sec. 10(c) of the Act. See *Kaumagraph Corp.*, 313 NLRB 624 (1993). Our review of the record establishes that the Respondent's unlawful permanent subcontract impacted and prolonged resolution of the labor dispute as set forth in full above. Any inference to the contrary that may be drawn from the General Counsel's denial of the Unions' appeal regarding the information request cannot materially impact our conclusions, based on our review of the entire record, pursuant to the Board's exclusive authority under the Act to fashion an appropriate remedy for unfair labor practices.

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

(a) Make the bargaining unit production and maintenance employees whole for any loss of earnings and other benefits suffered resulting from the discrimination against them, in the manner set forth in the amended remedy section of this decision.

(b) Preserve and, on request, make available to the Board or 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 mill in Mobile, Alabama, copies of the attached notice marked ''Appendix.''[64] Copies of the notice, on forms provided by the Regional Director for Region 15, 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.

[64] 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.''

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 permanently subcontract bargaining unit work after locking out the bargaining unit employees who previously had performed that work in the absence of an overriding business justification.

WE WILL NOT refuse to bargain with United Paperworkers International Union and its Locals 265, 337, 1940, and 2650, and International Brotherhood of Electrical Workers and its Local Union 1315, as the joint exclusive bargaining representative of the employees in the following bargaining unit, by refusing to furnish the Unions information that is relevant and necessary to their role as the joint exclusive bargaining representative of the unit employees, and by unilaterally changing employee terms and conditions of employment:

> All production and maintenance employees in the Mobile Mill of the Company excluding Office Clerical Employees, Guards, and Supervisors as defined in Section 2(11) of the Labor Management Relations Act, as amended, and others as listed under section III, Representation.

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 make you whole for any loss of earnings and other benefits resulting from the discrimination against you, plus interest.

INTERNATIONAL PAPER COMPANY

Dorothy D. Wilson, Esq. and *Jean Seibert Stucky, Esq.*, for the General Counsel.

Andrew E. Zelman, Esq., Nancy B. Schess, Esq., and *Jane Jacobs, Esq.*, of New York, New York, and *Joyce Margulies, Esq.*, of Memphis, Tennessee, for the Respondent.

Michael Hamilton, Esq. and *Lynn C. Ivanick, Esq.*, both of Nashville, Tennessee, for the United Paperworkers International Union and its Locals 265, 337, 1940, and 2650.

Robert D. Kurnick, Esq., of Washington, D.C., for the International Brotherhood of Electrical Workers and its Local 1315.

J. Roy Weathersby, Esq., of Atlanta, Georgia, for BE&K Construction Co., Inc., a subpoenaed corporation.[1]

DECISION

STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge. These consolidated cases were heard before me in Mobile, Alabama, and New Orleans, Louisiana, on 19 days between October 4, 1988, and July 31, 1990. The charges in Cases 15–CA–10384 and 15–CA–10501 were filed against Respondent International Paper Company (sometimes IP or the Com-

[1] At the hearing, Mrs. Schess made her appearance under her maiden name, Nancy B. Levine. During the hearing, Hamilton and Ivanick replaced Melinda J. Branscomb, Esq., and Lynn Agee, Esq., both of whom then maintained offices in Nashville, Tennessee, as counsel for the United Paperworkers International Union and its locals. After the close of the hearing, Kurnick replaced David Potts-Dupre, Esq., of Washington, D.C., as counsel for the International Brotherhood of Electrical Workers and its Local 1315.

pany) on August 4, 1987, and January 29, 1988, respectively, by United Paperworkers International Union (the UPIU) and its Locals 265, 337, 1940, and 2650; these Charging Parties are sometimes referred to as the Paperworkers. The charge in Case 15–CA–10423 was filed against Respondent on September 28, 1987, by International Brotherhood of Electrical Workers (the IBEW) and its Local Union 1315; these Charging Parties are sometimes referred to as the Electrical Workers. A consolidated complaint in Cases 15–CA–10384, 15–CA–10423, and 15–CA–10501 was issued on July 22 and amended on July 28 and August 30, 1988. The charge in Case 15–CA–10703 was filed by the Paperworkers against Respondent on October 5, 1988, and an amended charge in that case was filed on November 9, 1988. The charge in Case 15–CA–10704 was filed by the Electrical Workers against Respondent on October 5, 1988. The consolidated complaint in Cases 15–CA–10703 and 15–CA–10704 was issued against Respondent on April 21, 1989, and amended on October 16, 1989. All the foregoing cases were consolidated on May 22, 1989. The Charging Parties are sometimes collectively referred to as the Unions.

The conduct by Respondent attacked in the complaints here occurred during the course of a lockout at Respondent's mill in Mobile, Alabama, which began about March 21, 1987, and ended about October 24, 1988. The complaints do not allege that the lockout was unlawful at its inception or as of the time that the lockout ended. Taken together, the complaints allege that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act), by failing and refusing to furnish the Unions with certain information necessary for, and relevant to, the Unions' performance of their function as the exclusive representative of certain of Respondent's employees, and violated Section 8(a)(1), (3), and (5) of the Act by unilaterally subcontracting on a permanent basis about August 10, 1987, and until about May 3, 1988, maintenance work previously performed by employees in the unit, without having afforded the Unions an opportunity to negotiate and bargain. The April 1989 complaint also alleges that between August 10, 1987, and May 3, 1988, the lockout which Respondent began in March 1987 was in furtherance of, and/or prolonged by, Respondent's unilateral permanent subcontracting of unit work. The July 1988 complaint requests backpay for all locked-out unit employees between August 10, 1987, and May 3, 1988.

On the basis of the record as a whole, including the demeanor of the witnesses, and after due consideration of the opening briefs filed by counsel for the General Counsel (the General Counsel), the Respondent, the Paperworkers, and the Electrical Workers, the reply briefs filed by the General Counsel, Respondent, and (jointly) by the Unions, and the supplemental reply brief filed by the General Counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a New York corporation, with offices and facilities located throughout the United States, which manufactures, sells, and distributes paper-related products. During the 12-month period preceding the issuance of each of the complaints, Respondent sold and shipped from its facility in Mobile, Alabama, products, goods, and materials valued in excess of $50,000 directly to points outside Alabama. During the same periods, Respondent purchased and received at that facility products, goods, and materials valued in excess of $50,000 directly from points outside Alabama. I find that, as Respondent admits, Respondent is engaged in commerce within the meaning of the Act, and that assertion of jurisdiction over Respondent's operations will effectuate the policies of the Act.

The Unions are labor organizations within the meaning of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background; Creation of the March 1987 Contingency Contract with BE & K*

Respondent's Mobile mill is 1 of about 26 primary papermills, which make a finished sheet of paper from wood or pulp, operated by Respondent throughout the United States. Respondent also operates more than 100 converting plants, which convert primary mill products into an end-use product.

The Unions have jointly represented the production and maintenance employees at Respondent's Mobile mill for at least 40 years. During that period, the Unions and Respondent have been parties to a series of contracts whose duration has ranged between 1 and 4 years. At least after 1958, no contract had ever been agreed to before the expiration of its predecessor. At least during this period, a single strike had occurred, in 1965 for about 3 weeks. Then Mobile Human Resources Manager John Vandillon stated at a Mobile bargaining session on May 8, 1987, that ''it takes a two-thirds to get a strike vote.'' Although union-security clauses have been unlawful in Alabama at all times material here, and the union-security clauses in the 1983–1987 and 1987–1993 contracts are by their terms inapplicable in those States where such provisions are forbidden by law, as of October 1989 about 99 percent of the Mobile unit employees were union members.

A collective-bargaining agreement between Respondent and the Unions effective June 1, 1983, covered at the time of its execution employees at the Mobile mill and at Respondent's primary papermills in Moss Point (Mississippi), Natchez (Mississippi), Pine Bluff (Arkansas), Camden (Arkansas), and Bastrop (Louisiana). These six mills were collectively referred to as ''the multiple.'' About December 1984, Respondent and the Unions agreed to dissolve the multiple. Also, to further separate contract expiration dates, the parties agreed to extend, as to the Mobile mill only, the term of the June 1983 contract (initially due to expire by its terms on May 31, 1986) through January 31, 1987. During the negotiations for severing the multiple, Respondent told the Unions that if the multiple was severed, the stronger, more modern mills, like the Mobile and Bastrop mills, would be able to negotiate better contracts by not being tied to weaker, less profitable mills.

In 1984, a $340 million renovation project began at the Mobile mill. The mill's major general contractor for this project was BE&K Construction Company (BEK or BE&K). Work pursuant to BEK's contract for that project, referred to in the record as the reconfiguration contract, continued until at least 1987. By the late 1980's, Respondent had negotiated several contracts with BEK for the performance of ''contingency'' services—that is, services in the event of a labor dis-

pute—with respect to, inter alia, Respondent's plants in Moss Point, Mississippi; Lock Haven, Pennsylvania; DePere, Wisconsin (also referred to in the record as the Nicole plant); and Jay, Maine (also referred to in the record as the Androscossin or Andro plant).

Of Respondent's 26 primary papermills in the United States, 23 are represented by the UPIU and/or 1 or more of its locals; in some of these 23 mills, including the Mobile Mill, such representative status is shared jointly with the IBEW and/or 1 of its locals. As of December 1989, the UPIU and/or its locals had 70 to 80 contracts, covering between 26,000 and 28,000 employees, with Respondent. Between February 1, 1987, and October 30, 1988, due to expire by their terms were 13 of Respondent's collective-bargaining agreements to which the union parties included the UPIU, the IBEW, and/or various locals affiliated with them.[2] Among these contracts were a contract covering the Jay mill as to which the UPIU, the IBFO, and/or their respective locals were joint representatives, which contract was due to expire by its terms on June 1, 1987; and contracts which respectively covered two mills represented by the UPIU and/or its locals—the DePere mill, whose contract expired on May 31, 1987, and the Lock Haven mill, whose contract expired on June 20, 1987.

As discussed in detail infra, before the mid-1980's premium pay for Sunday work was paid by Respondent and other paper companies. The first paper company (other than Respondent) to eliminate such premium pay was Champion Paper Company, which eliminated Sunday premium at a mill in Pasadena, Texas, in late 1985. James W. Gilliland, who is Respondent's director of employee relations and is responsible for all of Respondent's labor relations in the United States, gave honest testimony that he received reports to the following effect: Champion had seven UPIU-represented mills coming up for bargaining in 1986, the first of them in January. By the middle of 1986, the UPIU had either rejected or failed to vote on Champion's best offer at four or five mills where the employees thereafter continued to work. At the end of the year, UPIU told Champion that unless an accommodation could be reached on the Sunday premium issue, Champion would be faced with seven strikes simultaneously. Thereafter, Champion signed as to all seven mills new contacts which continued Sunday premium.[3]

Further, Gilliland credibly testified that about late 1986, UPIU Regional Vice President Clifford King gave him a very similar account of the events at Champion, attached the seven-mill strike threat to a telephone conversation between a Champion representative and UPIU President Wayne Glenn, and suggested to Gilliland that the same thing was going to happen to IP.[4] Gilliland further testified that King is a ''big kidder,'' and that during this conversation, King may have said that he did not know what the Union was going to do and it might even try to get Gilliland fired.

In November 1986, at a meeting attended by all of Respondent's mill managers, Gilliland related what he had been told about what happened at Champion, and expressed the opinion that Respondent might very well expect the same thing from the UPIU in 1987.

In October 1986, more than 2 months before Respondent and the Unions began negotiations for a new bargaining agreement to replace the Mobile agreement which was due to expire at the end of January 1987,[5] Respondent's manager of contracted services, William W. Patrick, asked BEK's manager of maintenance operations, Martin Melton, to submit to Respondent a proposal to provide contingency services in the event of a ''work stoppage'' at the Mobile mill. Thereafter, Melton, whose office was in Birmingham, Alabama, and who had operating responsibility for BEK's industrial maintenance sector, conferred with Patrick on the telephone and also met with him and Devon Jones, who is maintenance superintendent at Respondent's Mobile mill. Later in October 1986, BEK submitted such a proposal, entitled ''Annual Service Agreement,'' which was very similar to proposals previously and subsequently submitted to Respondent by BEK for maintenance services during ''work stoppages.'' BEK had submitted proposals, to which Respondent agreed, for ''work stoppage'' services in Gardiner, Oregon, in 1984 and in Georgetown, South Carolina, in June 1986 Respondent accepted a contingency-services proposal submitted by BEK in August 1986 with respect to Respondent's Moss Point, Mississippi mill and, by January 13, 1987, the parties had agreed to apply to either the Mobile or the Most Point mill the permission in the Mobile contingency contract calling for a $4-per-man-hour deduction from the $100,000 to which Respondent agreed as a minimum fee. Similar provisions were included in Respondent's 1986 or 1987 contingency contracts with BEK covering Respondent's mills in Jay, Maine, and DePere, Wisconsin. In 1987 and 1988, Respondent and BEK executed contingency contracts with respect to 6 to 10 mills, not directly involved in the instant case, whose union contracts were approaching expiration.

[2] Of these contracts, four were with both the UPIU and/or its locals and the IBEW and/or its locals as joint representatives; six (including one which was automatically renewed) were with the UPIU and/or its locals; two were with both the UPIU and/or its locals and the International Brotherhood of Firemen and Oilers (the IBFO) and/or its locals as joint representatives; and one was with the IBEW and/or its locals.

[3] The General Counsel's reply brief moves to strike from Respondent's opening brief its recitations regarding Champion, on the ground that such recitations disregard the fact that on the General Counsel's hearsay objection, such testimony was offered by Respondent, and received by me, for motive purposes and not for the truth of what happened at Champion. Respondent's opposition to this notion admits that the General Counsel correctly stated the limitations on the receipt of such testimony, but contends that to strike such recitations would be ''extremely prejudicial'' to Respondent, and that I can and should use (as I have in fact used) this testimony as a basis for finding what IP ''understood'' as to the Champion situation. The General Counsel's motion to strike is denied; see also infra, fn. 4.

[4] In the instant case, this testimony by Gilliland is material to show the motive for Respondent's conduct at the Mobile mill. Respondent appears tacitly to admit that such testimony was received subject to the limitations discussed supra, fn. 3. If it was not objected to at all, it would likely be receivable to support the recitations by Respondent which the General Counsel has moved to strike. If such testimony was objected to on hearsay grounds, it would appear to be receivable for its truth as to the UPIU but not as to the Electrical Workers or, perhaps, the other Charging Parties. See *United Beef Co.*, 277 NLRB 1014, 1024–1025 (1985).

[5] However, on October 26, 1986, bargaining began with the Unions on ''local issues'' which did not need to be included in the collective-bargaining agreement. These issues were resolved before contract negotiations began.

A discussion between BEK and Respondent about manning at the Mobile mill took place in October 1986, and discussion involving minimum fees under a contingency contract took place on January 12, 1987. Although this contingency contract with BEK was not formally executed until after Respondent began the Mobile lockout on March 21, 1987,[6] Respondent never questioned BEK's assertion, in a letter to Patrick dated January 13, 1987, that the $25,000 premobilization fee set forth in the proposal as modified during the January 12 discussion ''is now due'' payable and nonrecoverable by (Respondent) except in the eventuality of a mobilization at either Mobile or Moss Point''; and Respondent paid BEK the $25,000 in January or February 1987. BEK is a nonunion concern, and such status is set forth in all of its sales literature on an undisclosed date before October 19, 1989, David Oskin, who in 1987 was Respondent's senior vice president of all aspects of human resources and had responsibilities for labor relations at all of Respondent's facilities, sent to Respondent's managers a copy of a presentation made by him at a management conference in Memphis, Tennessee, which stated, ''We have stated to our employees that we do not feel a union is necessary or in their best interest. We have also made sure our employees were aware of their right to elect not to be represented. Respondent's reply brief states at 160 (emphasis in original), ''IP—like most companies—has made such statements in *election campaigns* . . . and, like most companies, believes that its employees do not need unions.''[7] Patrick testified that in soliciting bids from contractors, Respondent does not care whether they are unionized, and that some unionized contractors had performed maintenance-type work in the Mobile mill both before and during the lockout.

The April 1989 complaint alleges that Respondent violated Section 8(a)(5) and (1) by failing to provide the Unions since May 21, 1987, with the BEK contingency contract covering the Mobile mill.

B. *Bargaining Negotiations Before Respondent Locked Out Its Employees*

Respondent admits that at all relevant times, the Unions have been the statutory representatives of an admittedly appropriate unit consisting of Respondent's Mobile mill production and maintenance employees. The bargaining agreement for that mill expired on January 31, 1987, and, by its terms, continued in effect thereafter subject to a 10-day notice of termination from either party. The first bargaining session for a new agreement took place on January 19, 1987. Between that date and March 20, 1987, the parties conducted a total of 20 bargaining sessions. On the Unions' side of the table during negotiations were various UPIU vice presidents and/or International representatives, IBEW International Representative John Coleman, and a joint negotiating committee consisting of employee members (many, and perhaps all, of them Local officers) of the relevant locals.

Respondent's Mobile mill operates around the clock, with occasional complete shutdowns, referred to in the record as ''cold shutdowns,'' to permit maintenance work which cannot be performed while the mill is operating. The expiring agreement called for premium pay for Sunday work as such, and for calculating every hour worked on Sunday as one and a half hours for purposes of determining whether the employee was entitled to overtime pay for weekday work.[8] Respondent's proposals included a proposal, referred to in the record as item (or company item) 1, calling for Sunday work to be paid for at the same rate as work on other days, and to be included like work on other days for purposes of determining whether the employee was to be paid overtime rates. The expiring agreement designated December 23–26 as ''no-work'' paid holidays during which most employees could not be required to work. Respondent had been following the practice of using these ''no-work'' holiday dates for ''cold shutdown'' purposes. However, Respondent disliked this limitation, partly because it resulted in ''cold shutdowns'' (whose expenses are not limited to lost production) even when maintenance work was not needed, partly because it limited Respondent's ability to adjust the dates of ''cold shutdown'' to market considerations, and partly because shutdown equipment is more vulnerable to damage from cold weather than is equipment which is in active operation. Respondent's proposal included a proposal, referred to in the record as item (or company item) 2, which dropped July 4, the Sunday before Labor Day, December 23, and December 26 as paid holidays;[9] and permitted Respondent, at its option, to work or not work its employees on all the days (Labor Day, Christmas Eve, and Christmas Day) described in Respondent's proposal as paid holidays other than personal holidays. The expiring contract required premium pay (in addition to holiday pay allowance) for work performed on holidays; and as to holidays other than no-work holidays, included every hour so worked as one and a half hours for purposes of determining whether the employee was entitled to overtime pay for nonholiday work.[10] Respondent's proposal included a proposal, referred to in the record as item (or company item) 3, which abolished premium pay for holiday

[6] This finding is based on the testimony of Patrick, who further testified that this contingency contract was executed before the end of March. I believe Respondent's counsel was in error when he stated, on the first day of the hearing, that this contingency contract was executed in January 1987.

[7] Respondent's reply brief further states at 44, ''Cumbersome work rules and grievance procedures do not exist in non-union environments. That is one of the reasons why many—indeed most—companies chose to campaign against unions.''

[8] For example, an employee who during a particular payroll week worked 8 hours on Sunday and 8 hours a day Monday through Thursday would be entitled to time and a half for each of his Sunday hours, plus 4 hours at time and a half on Thursday on the theory that after working his first 4 hours on Thursday he had worked 40 hours that week In other words, that week he would receive 48 times the straight hourly rate for working 40 hours.

[9] The proposal increased from one to five the yearly number of paid personal floating holidays.

[10] For example, if July 4 fell on a Tuesday, an employee who worked 8 hours a day July 3 through 7 would be entitled (in addition to 24 hours' straight-time pay for July 3 and 5–6) to 8 hours' pay at straight time as a paid Independence Day holiday; 8 hours' pay at time and a half for work performed on July 4; 4 hours' pay at straight time for July 7; and 4 hours' pay at time and a half for July 7 on the theory that after working for 4 hours that day, he had worked 40 hours that week. In other words, that week he would receive 54 times the straight hourly rate for working 40 hours. If July 4 fell on Sunday and he worked 40 hours from July 4 through 8, he would receive double time for working on July 4 and, therefore, a total for that week of 58 times the straight hourly rate.

work and counted only actual hours worked in determining whether an employee was entitled to overtime pay.[11]

At the time negotiations began at Mobile in January 1987, Sunday premium had been eliminated in 37 of the 47 contracts between Respondent and the UPIU and/or its affiliates; of these 37, 7 were primary papermills like Mobile, 4 more were continuous-process operations which worked 7 days a week, and others sometimes worked employees on Sunday. Also, Sunday premium had been eliminated in about 24 non-IP mills whose employees were represented by the UPIU and/or its affiliates.[12] Also as of January 1987, holiday premium pay had been eliminated in two IP mills whose employees were represented by the UPIU and/or its affiliates. Also as of January 1987, cold shutdown provisions had been eliminated in 12 such IP mills. Respondent states in its opening brief (Br. 145 fn. 87), ''even before the lockout, the Unions were willing to discuss Sunday premium in return for something else . . . . The issue at all times was what IP would pay for the elimination of Sunday premium. The Unions' position was that the Company had to pay for the elimination of Sunday premium. The Company was unwilling to do so . . . .''

Kenneth G. Perkins, who was the Mobile plant manager at all relevant times until the end of June 1988, testified that the matter of a contingency contract for maintenance was first brought up primarily for a strike because ''to the best of my knowledge, we had never had a lockout and certainly weren't planning one here.'' On an undisclosed date before February 2, 1987, but probably after January 26, an unidentified employee told an unidentified ''Paper mill Union official'' that ''Strategy is to drag it out until other mills are closer to negotiating so Union can gain leverage.'' On an undisclosed date before February 2, 1987, but probably after January 26, an unidentified employee told an unidentified supervisor that UPIU Vice President Donald Langham ''had recommended not to strike.'' Both of these employee statements were reported on February 2, 1987, to Diane Fayard, who was at that time the manager of industrial relations at the Mobile plant and was a member of Respondent's bargaining team. During negotiating sessions at Mobile, the possibility of a lockout was first mentioned on February 5, 1987, when Perkins interrupted a union caucus by accusing the Unions of dragging their feet; he went on to say that he did not want to have to lock the employees out, but that he was prepared to do so and mail the Union ''a package'' tomorrow (see infra, fn. 25 and attached text). However, at a ''for your information'' meeting of salaried Mobile supervisors between January 31 and February 9, 1987, Vandillon stated that ''we could go along without a contract. The Union could take a strike after a 10-day notice, or there is always the possibility that the Company does have the right to a lockout after a 10-day notice.''[13] By letter dated February 10, 1987, Perkins advised the Unions that pursuant to the termination provisions in the 1983–1987 bargaining agreement, Respondent was terminating that agreement effective February 21, 1987.

On February 11, 1987, committees for the UPIU and for Respondent met in Atlanta, Georgia, pursuant to a standing arrangement for semiannual meetings to discuss matters of mutual concern. Present for Respondent were its chairman and chief executive officer (John Georges), its president (Paul O'Neill), Vice President of Human Resources Oskin, and Director of Employee Relations Gilliland. Present for the UPIU were its president (Wayne Glenn) and three regional vice presidents (Al Dunaway, for the region which includes Mobile; Joe Bradshaw, for the region which includes Arkansas and Tennessee; and King). Glenn said that Respondent had bargained to eliminate Sunday premium in 1985 and 1986 because of ''terrible'' earnings years in 1984 and 1985; and that 1986 had been a relatively better earnings year because Respondent had earned $305 million. Glenn expressed the view that the need to eliminate Sunday premium no longer existed because Respondent's earnings had recovered to what Glenn believed was an acceptable level. Glenn asked Georges to abandon Respondent's position on Sunday premium for negotiations starting with Mobile and from that time forward. Georges replied that at least partly because of foreign competition, the need to reduce costs was a long-term situation. After some discussion of the matter, with each man adhering to him prior position, Glenn concluded the meeting by saying, ''well, then, by God, we will take your ass on.'' At a negotiating meeting with respect to the Mobile mill on February 16, 1987, the Unions stated that they would agree to item 1 in exchange for a 7-1/2-percent wage increase. Respondent rejected this proposal. At a negotiating session about February 19, Perkins told the Unions' negotiators that they knew what had happened at Georgetown, South Carolina, and that this could happen in Mobile; during negotiations with respect to Respondent's Georgetown mill, Respondent had announced in the summer of 1986 that it would lock out the employees on a certain date and made preparations to do so, but an agreement had been reached a few hours before the lockout was scheduled to begin.

Respondent had stated at the beginning of negotiations that once it made its best and final offer, the Unions should not expect Respondent to improve it. On February 20, 1987, Respondent gave the Unions what it characterized as its ''final'' or ''best'' offer. This proposal called for items 1, 2, and 3; wage increases for production workers, during the first 2 years of the 3-year contract, of 2 percent and 30 cents, respectively; a 2-percent wage increase for all workers in the third year; and ratification bonuses for both production and maintenance workers. On February 24, Respondent issued a memorandum to the Mobile supervisors, what were urged to share the information with their employees before they voted on Respondent's February 20 proposal, attributing to the Alabama chief of benefits operations the view that under Alabama law, an individual would not be eligible for total or partial unemployment compensation if he was unemployed because of a strike or a lockout. Further, Respondent told the Unions that ''the only way [Respondent] won't lock you out is you agree to our demands.'' Respondent's February 20 proposal was rejected by the membership on February 26.

By letter dated February 27, 1987, then Mobile Mill Manager Perkins advised the Unions that unless Respondent re-

[11] Respondent's proposed abolition of ''no-work'' holidays necessarily included abolition of double-time pay, and other special inducements, for work on such holidays.

[12] As of December 1989, this had been done in 90 to 100 non-IP mills.

[13] My finding as to the content of this statement is based on Perkins' testimony. My finding as to its date is based on inferences from the date on which the contact became terminable on 10 days' notice and the date on which Respondent gave such notice.

ceived official notification by March 6 that a contract had been ''ratified,'' Respondent would rescind its ratification-bonuses proposal. The letter further stated that Respondent intended to implement its February 20 proposal (except for ratification bonuses and the first-year wage increase) effective March 6. The letter requested that the Unions take prior to that date whatever action was necessary to obtain ''ratification'' of a new agreement. On March 2, Respondent gave the Unions another proposal which was virtually the same as Respondent's February 20 proposal, except for the elimination of the ratification bonuses and modification of the manner in which personal holidays could be taken. A few days later, the Unions advised Respondent that on March 6 its March 2 proposal had been rejected because it had included company items 1, 2, and 3.

Perkins testified that until such action by the Unions, he did not give serious consideration to a lockout. About March 7, Respondent unilaterally implemented its March 21 proposal, under whose terms the employees continued to work until Respondent locked them out on March 21.

By letter to the Unions dated March 12, 1987, Perkins stated, in part:

> [I]f a new labor contract has not been reached by . . . March 21, 1987, we will temporarily replace those employees working on jobs you represent, and continue operating the will with non-UPIU/IBEW represented hourly and non-exempt employees, salaried supervision, temporary employees and outside contractors hired on a temporary basis. This will continue until a new labor contract has been reached.
>
> [W]e must take this action, as we can no longer continue operating the mill with the uncertainty of not having a signed labor contract, and with the possibility of the unions calling a strike at a time best suited to their interest. Operating in this fashion is very difficult and potentially very costly. We must also protect our customer base by positioning the mill as a reliable long-term supplier of white papers.
>
> We request that you take whatever action is necessary to obtain a new labor contract by . . . March 21, . . . since after that time, employees working on jobs you represent will not be allowed to work until a new labor contract had been ratified.

Perking testified, ''When we implemented the lockout, we told the Union that we would end the lockout when we had a ratified and executed labor contract'' (cf. infra, ''The Remedy'').

By letter to the employees also dated March 12, and enclosing a copy of Perkins' March 12 letter to the Unions, Perkins said, in part:

> The company served notice today to [the Unions] that if we do not have a ratified labor contract by . . . March 21 . . . we have no acceptable alternative but to temporarily replace those employees working on jobs represented by these unions until an agreement is reached . . . .
>
> The company must take this action to eliminate the operating and economic uncertainties inherent in running without a signed labor contract. Also, it is absolutely essential that our customers recognize the Mobile Mill as a long-term, reliable supplier of white papers.
>
> . . . .
>
> I hope . . . a new labor contract is ratified by . . . March 21, 1987, since after that date, you will not be allowed to work until a labor contract has been ratified.

Respondent's opening brief (Br. 8) states that these letters advised the Unions and the employees that a lockout would be instituted if a contract were not ''ratified'' by March 21 (but see, infra, ''The Remedy''). On Sunday, March 15, Respondent inserted in the Mobile Press-Register an ''Open message to [IP] Employees'' stating, in part, ''As you know by now, we advised the Joint Group Bargaining Committee on Thursday that unless a new labor agreement is ratified by 3 p.m. Saturday, March 21,'' the unit employees would be locked out ''until a new labor agreement is ratified.'' The ''letter'' went on to say:

> Negotiations have reached an impasse The media have repeatedly reported union representatives as saying that no strike is planned at this time. This means that the mill could be operating without a labor agreement indefinitely. We cannot let this happen.
>
> A signed labor agreement provides certain assurances to both parties . . . . Without a signed labor agreement, we cannot guarantee our customers an assured supply, since the union is free to strike at any time.
>
> . . . .
>
> It is the company's hope that a new contract will be ratified soon, which will end the lockout.
>
> Our prime objective is for employees to ratify a labor contract . . . .

A company-prepared summary of this ''letter'' states, in part, ''Prime objective is for employees to ratify contract.''

During negotiations, the Unions had not taken a strike vote and had repeatedly told Respondent that they did not intend to strike. The past practice at the Mobile mill was for contract negotiations to continue past the expiration date of the contract.

About the same time that Perkins sent out the March 12 letters setting forth Respondent's intentions regarding a lockout, BEK actually brought its employees onto the Mobile mill site. Joint Negotiating Committee Chairman William Larry Funk (usually referred to the record as Larry Funk), who until 1989 was a maintenance department employee at the Mobile plant and the president of UPIU Local 2650,[14] credibly testified that prior to March 21, Respondent hired additional security guards, put up different fencing, erected some observation or camera towers, moved house trailers into the storage yard, and took in front of the plant some employment applications from quite a number of people.

At the negotiating session on March 17, Respondent told the Unions that they ''needed to vote again on [Respond-

[14] He was in Respondent's employ between 1958 and February 1989, and was president of the local between 1986 and February 1989. In February 1989, about 8 months before he testified, he became an International representative for the UPIU.

ent's] offer.'' The Unions replied that they had already voted on the offer. Human Resources Manager Vandillon replied, ''You haven't voted on a lockout yet.''

Respondent's opening brief (Br. 8) states, without a record reference, ''No labor agreement was ratified by March 21 and, accordingly, the lockout began.'' Director of Employee Relations Gilliland, who is responsible for all labor relations of Respondent in the United States, reports to Vice President Oskin, who in turn reports to Chief Executive Officer Georges. Gilliland testified that the final decision for the Mobile lockout was made by then Mobile Mill Manager Perkins.[15] Perkins testified as follows:

> Q. [By the General Counsel] Now, Mr. Perkins, going back to the lockout itself, the reason that you locked out the UPIU/IDEW employees was because the company was concerned about the effect of not having a signed labor agreement. Is that correct?
>
> A. No. There were—I mean, there was a couple of basic reasons that was implemented a lockout. The first reason was to put some pressure on the union to get a contract. The second reason—I had a lot of reasons to believe that it was the union's intention to line up or string out four or five—six mills or several mills without labor contracts and then strike all of them at the same time.
>
> And the reason for the lockout was to preempt that so that we would have one of our larger, more complex mills up and running on a regular and dependable basis should that occur.
>
> JUDGE SHERMAN: By one of the larger and more complex mills, do you mean the Mobile mill?
>
> THE WITNESS: The Mobile mill. Yes.

Gilliland testified that Respondent decided to lock out at Mobile (1) ''to put whatever pressure we could or provide a framework . . . for reaching an acceptable contract''; and (2) to remove from ''the union the opportunity to tie a bunch of mills together and call a massive strike at multiple facilities at a time that best suited their own purpose.'' When asked whether he considered that a lockout at Mobile might make the employees at Moss Point and other locations more interested in ratifying their contract offers for fear of being locked out too, Gilliland testified, ''That was not a major consideration on my part. No . . . I thought it might have that effect, but I wouldn't do it for that reason only.'' During the May 8, 1987 negotiating session, the first one held after Respondent began the lockout, Vandillon stated that Respondent had locked out the employees ''because of the leverage and everything that goes with it.''[16]

[15] However, Perkins testified at one point that the decision to lock the employees out at Mobile ''basically was made in a meeting [about March 6, 7, or 8] with Jim Gilliland and John Vandillon and myself:'' and at another point that ''it was my decision with [Gilliland's]—under his consultation.'' Perkins further testified that he had to get permission from his immediate superior, IP Vice President Wesley Smith, who gave Perkins permission over the telephone to lock out. Gilliland testified that before making the decision, Perkins consulted with Gilliland, that he consulted with Oskin, and that Gilliland assumed Oskin consulted with Georges.

[16] My findings in this sentence are based on the bargaining notes of UPIU Local 2650 negotiator Eddie McDonald. See infra, fn. 18.

C. *Respondent's Initiation of the Lockout*

On March 21, 1987, Respondent locked out the approximately 915 production employees and the approximately 285 maintenance employees represented by the Unions. However, throughout the lockout, Respondent continued to operate the mill by using temporary replacements, supervision, loaned personnel from other IP facilities, BEK employees, and employees of other contractors. During negotiations on October 20, 1988, Gilliland stated that ''it took more than two weeks for the temporaries to get on board, 99% were supervisors and retired supervisors and borrowed help.'' When Respondent began the lockout, BEK's hourly employees were required to live in a ''man camp'' which Respondent had set up on plant premises in accordance with requirements included in the contingency contract.

During the first week of March 1987, Vandillon told Gilliland that the question had come up as to whether a possible lockout would be confined to union members, or whether the lockout would be extended to the entire bargaining unit, including nonmembers. Gilliland was advised by counsel that ''you can't selectively lock out. You either lock out everybody or you don't lock out anybody.'' Gilliland testified that ''fairly early on; I don't remember exactly when,'' Perkins asked him whether locked-out employees could come into the mill for any reason, and that Gilliland expressed to him the opinion that they could not. Perkins testified to receiving inquiries from nonmembers as to whether they would be ''exempt'' from a lockout; and that when ''we'' checked with Gilliland and ''Legal,'' Gilliland said, ''If you lock one out, everybody is locked out. So . . . I assumed that since we couldn't selectively lock out, that you couldn't selectively let people in the mill.'' The parties stipulated that from the time Respondent began the lockout through early November 1987, Respondent's security guards, acting on directions from mill management, on several occasions prevented locked-out employees from entering the Mobile mill premises, including locked-out employees employed by outside contractors who were performing work on the mill premises. On three or four different occasions, lacked-out employees who tried to get into the mill while employed by contractors were denied entrance. On a date which may have been April 20, 1987 (see infra, fn. 17), locked-out employee David Kuhn came to the mill gate for the purpose of delivering materials to Respondent's storeroom on behalf of a firm (probably a delivery firm; see infra, fn. 17) for which he was then actively working. He was stopped at the gate. When he asked why he could not come in, be was told, ''Because you are a locked-out employee, and that is against our practice.'' He asked whether Respondent would let him in if he resigned from Respondent's employ. Respondent said, ''Yes. If he is not a locked-out employee, fine.'' Kuhn then resigned from Respondent's employ. On October 20, 1987, he filed a charge against Respondent (Case 15–CA–10436) which alleged that Respondent had violated Section 8(a)(1) and (3) of the Act in that ''Since on or about 20 April 1987, [Respondent] discriminated against David Kuhn, a locked out employee by preventing his performance of assigned duties on behalf of Redwing Carriers, a neutral employer, and by

constructively discharging him.''[17] Respondent thereafter reinstated Kuhn to his position of employment without prejudice to time lost, and with the same rights as he would have had if he had not resigned from Respondent's employ. Thereafter, on an undisclosed November 1987 date after November 12, 1987, the Kuhn charge was withdrawn. After the resolution of the Kuhn case, Respondent permitted locked-out employees who were working for contractors to enter mill property to deliver parts and materials. So far as the record shows, the bargaining unit employees were never notified of a change in the policy. Richard Schneider (usually referred to in the record as ''Mike'' Schneider), who on October 26, 1987, began to represent Respondent at the bargaining table with respect to the Mobile mill and who became that mill's manager of human resources on January 1, 1988, told the Unions during a bargaining session on February 18, 1988, that if a locked-out employee began to work for BEK (then performing the Mobile maintenance work), Respondent would not bar him from the plant; when IBEW Local 1315 President Roy Lynch (a unit employee) commented that Respondent had changed the policy followed in the Kuhn case, Schneider said that he was not familiar with that case.

A firm called Axis Welding & Machine Works, Inc. machined in its own machine shop certain parts for paper machines and other machines in the Mobile mill. About a week after Respondent began the lockout, Axis notified Respondent's purchasing department that two of the employees locked out by Respondent were working for Axis. Perkins testified that both he and Respondent's purchasing department were concerned about possible sabotage by Respondent's locked-out employees of parts sent to Axis by Respondent. Respondent advised Axis that it would not be allowed to perform work for Respondent if Axis continued to employ locked-out employees. In response, Axis terminated the locked-out employees, and then sent a letter to Respondent asking it to resume sending work to Axis. After Mobile Manager of Operations Louis Walker advised Perkins that a meeting about the matter was to be held between Walker or then Mobile Startup and Construction Manager Ronald Larry Crawford (usually referred to in the record as Larry Crawford), Respondent's ''purchasing people at the mill,'' and Axis, Perkins brought the matter to the attention of Gilliland, who said, ''Reinstate them without prejudice. Those people have a right to work there, and it is none of our business who he employs and we have no right to do what we are doing.'' Thereafter, within a week of Respondent's receipt of Axis' letter, Perkins reversed the decision not to use Axis while it employed locked-out employees. Axis then rehired the two locked-out employees and, perhaps, later hired one or two others. For at least a few weeks after Respondent resumed sending work to Axis, Crawford and one of Respondent's maintenance supervisors inspected each part from Axis. All the work was found to be good. Respondent continued to do business with Axis throughout the lockout. Perkins testified that he did not recall ever notifying the locked-out employees that Respondent had no objection to their working on the premises of Respondent's suppliers.

After Respondent began the lockout, the locked-out employees filed applications for unemployment compensation. After several months of litigation during which these applications were opposed by Respondent, the appeal board of the Alabama Department of Industrial Relations found in September 1987 that the locked-out employees were entitled to unemployment compensation.

D. *The Commencement of the UPIU-Coordinated Campaign*

At a UPIU executive board meeting on March 9, 1981, before Respondent announced the lockout at Mobile, UPIU Vice President/Regional Director Dunaway, whose region included the Mobile mill, expressed concern that if the Paperworkers agreed to concessions which Respondent was seeking at Mobile, such action would ''sweep across the union and affect other locations.'' The board voted to implement a corporate campaign strategy against Respondent. This decision was conveyed to all presidents of UPIU locals under contract with Respondent by a letter from UPIU President Glenn dated March 20, 1987, and stating that the UPIU executive board had ''approved launching a 'Coordinated Campaign' against [IP] for the purpose of communicating our strong objections to their attitude and actions towards our Union and its members.'' The letter stated that Glenn found it ''inconceivable'' that IP was attempting to ''wrench'' from the employees ''concessions in wages, premium time and fringe benefits'' at a time when, allegedly, IP was prospering and its stock had increased in price. The letter stated that in the near future, the UPIU would be enlisting the recipients' support in the campaign. In addition, the letter encouraged the recipients to attend a forthcoming IP stockholders' meeting on April 14; ''I am sure the IP board of directory would be interested in hearing your views on the state of labor relations in their company.'' Copies of this letter were sent by Glenn to the members of the UPIU executive board. In early April 1987, Glenn announced to a UPIU body called the International Paper Company Council, which consists of delegates from locals representing Respondent's employees, that the UPIU was about to embark on an all-out effort to stop Respondent's concessionary bargaining.

Respondent's April 14, 1987, stockholders' meeting was picketed by the UPIU; and was attended, on UPIU President Glenn's behalf, by Robert Frase, who was Glenn's executive assistant and had been designated by Glenn to deal with issues arising out of the dispute between UPIU and Respondent. At that meeting, Frase asked management the cost to Respondent of the events in Mobile. Management replied that it was basically a ''family squabble,'' that it would be resolved peacefully, and that nobody should worry about it. Frase said that ''the union would not stand for concessionary bargaining and that a state of war existed between the union and the company.''

About April 28, 1987, UPIU President Glenn sent to all 80 of the UPIU locals which had a bargaining relationship with Respondent a six-page questionnaire (prepared by the Kamber Group, an outside public relations consulting firm) which described its purpose as ''devising a winnable strategy against IP.'' The questionnaire requested detailed information which at least arguably might assist the UPIU and its affili-

[17] The charge was offered into evidence by Respondent, and received, without limitation or objection. The allegations in this charge are the only specific evidence in the record as to either the date of this incident, or the identity and business of the employer for which Kuhn was then actively working.

ates in pressing their economic position to Respondent directly, and in obtaining support from local political and community leaders and from the media. President Glenn's covering letter for this questionnaire stated, inter alia:

> [S]olidarity and knowledge of [the Respondent] are central to any effort to stop this cycle of concessionary bargaining . . . .
>
> . . . .
>
> The enclosed questionnaire requests information on . . . how [your plant] fits into IP's grand scheme.
>
> . . . .
>
> If your local papers have had articles on the IP Mobile lockout, please send them. This will give us insight into IP's media strategy.
>
> Together we can identify International Paper's vulnerabilities and effectively put pressure on them. International Paper's profits do not warrant further concessions.

A letter from Glenn requesting comments on draft copies of these documents referred to the UPIU executive board's ''commitment . . . to engage in an organized, all-out effort to stop IP's concessionary bargaining where there is no economic justification,'' and to the UPIU's desire to ''identify [Respondent's] pressure points for developing our strategy.'' Most of the locals did not respond to the questionnaire.

On May 3, 1987, Respondent inserted in the Mobile Press-Register an advertisement which stated, among other things, that Respondent's prime objective was to have the employees back on the job with a ratified agreement. At a UPIU staff meeting on May 7, 1987, the members present took the position that they would not come back for a vote ''unless there is a favorable and substantial change.''

E. *Bargaining Negotiations and Other Events Between May 8 and 22, 1987*

1. The May 8, 1987 bargaining session at Mobile[18]

On an undisclosed date, Respondent requested a bargaining session at Mobile which was held on Friday, May 8, 1987.[19] Respondent's opening brief states (Br. 143) that Respondent called this meeting, which was the first bargaining session after Respondent began the lockout, ''to discuss two new proposals—Company items 9 and 11''; as discussed infra, item 11 consisted of a proposal (not advanced to the Unions until May 21) that Respondent could, at its option, contract out any or all mill maintenance work on a temporary or permanent basis.

The parties reviewed the status of earlier proposals by each of them—as to whether such proposals had been agreed to, had been dropped, or were still in dispute UPIU International Vice President Dunaway stated that when the employees had twice voted to reject Respondent's prelockout proposed contract, they had been told by him that they would be locked out Vandillon said that Respondent wanted all its employees back and would rather run with its employees.[20] Perkins said that when operating during the lockout, Respondent had learned that it could operate efficiently and safely with a lot fewer people in some areas Dunaway said that he did not believe Respondent's production figures. Perkins said that Respondent could arrange a tour. He went on to say:

> We've asked contractors [cf. infra, fn. 85 and attached text] to put together a proposal to contract maintenance on a permanent basis for our consideration. We realize we are obliged to bargain with you on this matter. If the proposal looks good and it's as big cost reduction as we think it will be we'll come back to talk to you about it at the table.

At this point, Perking passed out two documents, referred to in the record as items or company items 9 and 10, respectively, which according to Perkins were based on ''experience-based facts.'' Item 9 called for a reduction of 34 production and maintenance jobs, including the elimination of the beater room (also referred to in the record as the furnish preparation progression division) and a reduction in the manning of the extruder and the pulpmill.[21] Item 10 would have permitted Respondent to subcontract ''Peripheral devices and power sources associated with computer maintenance including sensors, valves, conduit, wiring, etc.''; the work covered by item 10 had been performed by Respondent's maintenance employees. Item 10 was the first proposal from either party regarding changes in the subcontracting limitations set forth in the expired agreement; as discussed infra, item 10 was eventually subsumed within item 11, which Respondent proposed for the first time at the next bargaining session, on May 21. Inferentially in connection with item 10, UPIU Vice President Dunaway said that ''we don't like a threat'' and that this proposal constituted ''a threat of every maintenance

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[18] My findings as to the events at the negotiating sessions between May 8, 1987, and October 21, 1988, are based on a composite of the testimony of witnesses who attended and testified about these sessions; the handwritten notes (subpoenaed from union records) of Union Negotiators Richard Thomas from UPIU Local 337, Eddie McDonald from UPIU Local 2650, and Allen Sanders, and of other, unidentified individuals; and Respondent's typewritten notes. At least some, and perhaps all, of the notes obtained from the Union by subpoena were taken by Respondent's rank-and-file employees. Respondent's typewritten notes were transcribed by a secretary on the basis of a dictation process emanating from a group of two or three people whom Respondent had entrusted with the task of taking handwritten notes but who did not take shorthand. Occasional disagreements about what was said were resolved by then Manager of Industrial Relations Diane Fayard, who attended all the bargaining sessions and was responsible for reviewing the typewritten versions for accuracy. Although Fayard testified that an object of these notes was to get verbatim, as best the note takers could, every word that was being said, the time consumed by each of the sessions (as set forth in the notes) virtually requires the conclusion that management's notes omit part of the discussions. There is limited evidentiary conflict about what was said during these meetings. Unless otherwise indicated, quotations are from management's typewritten notes.

[19] In connection with the date of Respondent's request for a bargaining session, Thomas' bargaining dates state that Lee Skillman, a mediator from the Federal Mediation and Conciliation Service who attended the meeting, remarked during the meeting that he had been on vacation when he received Respondent's call asking for the meeting.

[20] My finding that Vandillon used the word ''all'' is based on Thomas' notes.

[21] Perkins claimed that eight of the jobs to be eliminated by item 9 could have been eliminated under the expired contract.

job being contracted out.'' Respondent asked the Unions to conduct a vote on Respondent's current proposal with the addition of company items 9 and 10. Dunaway replied that Respondent had just lost 200 or 300 votes, not even counting the maintenance employees, and that if Respondent came back with the same proposal tomorrow, it would not get 2 votes.

After a recess, UPIU Vice President Donald L. Langham told Perkins that Langham wanted to take him up on his offer of a mill tour. Perkins said he would take this under advisement, and asked when the Unions wanted to go. They replied that they were ready now. Vandillon said that Respondent would drop from its March 18 proposal the withdrawal of meal allowance, if the Unions would conduct an employee vote on the rest of that proposal. He further said that items 9 and 10 were not part of the proposal but that they were not going to be dropped from consideration, and that Respondent intended to negotiate with respect to them. Dunaway replied that no vote would be conducted until the parties had completed negotiations, and that Respondent's proposal of a ''teeny bit back'' did not warrant a vote; ''you are not gonna tell us when to vote.''

2. The Unions' May 13, 1987 request for a mill tour

During a grievance meeting on May 13, the Unions asked for an immediate tour of the mill. In response to Respondent's inquiries about why they wanted the tour, the Unions stated that they needed the tour in order to bargain intelligently about items 9 and 10;[22] to evaluate in an informed manner the present bargaining position; and in order to protect the rights of the Unions' members under Section 7 of the Act and under Section 7 of the expired bargaining agreement, which contract provision deals with adjustment of complaints.[23] Respondent replied that it did not know whether the Unions were entitled to the tour.

3. Respondent's May 15 letter to employees; the UPIU conference in Nashville on May 19, 1987

By letter to all the Mobile unit employees dated May 15, 1987, Respondent stated that it expected a ''coordinated bargaining'' campaign, and that Respondent was preparing to run the mill indefinitely.

The UPIU constitution provides that in order to get a contract, a majority of the membership must approve it. At a meeting in Nashville, Tennessee, on May 19, 1987, the UPIU locals which represented Respondent's Mobile, DePere, Jay, and Lock Haven mills agreed on three primary bargaining goals: retention of premium pay; preventing the contracting out of maintenance (a proposal then pending at the Jay mill); and retaining as to any successor contract the length of the preceding contract. Robert Frase, UPIU President Glenn's executive assistant, credibly testified that the UPIU wanted to consider some other avenues of action, but that the locals reached the following agreement:

> [T]hey felt that their best chances of trying to stave off the concessionary bargaining that they were facing was to band together in a pool or in a group to have the numbers to be able to defend against the company.
>
> And as far as the particulars of the pool, it was very loose . . . it wasn't structured, and I think on purpose, actually, is the way it turned out. They didn't want to be tied down to a written document . . . .
>
> . . . .
>
> The intent was to try and get agreement at each of the four sites on [the three primary bargaining goals], and then once. . . everyone had reached that and had voted on that, then the votes would be pooled at headquarters. And if a majority agreed, then basically everybody was turned loose to go ahead and ratify a contract at those four sites.
>
> If there were local issues that still had to be resolved, then they would have to bargain on those . . . .
>
> . . . .
>
> [If] they had an agreement, they could go ahead and vote on it, and they could send the results to headquarters; but . . . they would not be tallied until everybody had . . . something to vote on.

Frase further credibly testified that at this meeting it was initially explained to the representatives of the locals that if one group decided that it wanted to reach a contract under this understanding, that group's vote would be sent to ''the union headquarters'' but not counted until the other groups had voted.

In addition, Frase credibly testified as follows:

> Q. Prior to October of 1988 [when a contract was ratified and executed at Mobile], did you ever discuss with President Glenn what would happen if one location got an offer and requested to sign a contract?
>
> A. Specifically, we didn't talk about that because the question was never asked. It was in general discussion. We didn't want anybody in the pool that would be considered a weak sister . . . or a weak link. and I drew from that if someone wanted out of the pool, we would rather have them out than in.

Also, Frase credibly testified that when the pool was first set up and the initial three primary goals were established, it was not a requirement that each location get the same things in order to meet these goals; ''those goals were general goals. And if you could get something close to it, and felt you could vote on it, then you would go ahead and vote.''

Following the Nashville meeting, the UPIU's official newspaper, the Paperworker, described these bargaining goals and quoted Glenn as saying, ''We simply cannot stand by and permit International Paper to tackle our locals one by one with uniform demands for concessions in overtime pay,

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[22] Because Respondent had not yet proposed item 11, Funk was obviously mistaken in testifying that this item was among those then cited by the Unions.

[23] The subjects previously discussed at the grievance meeting included Respondent's obligation vel non to give severance pay to employees whose lockout after the expiration of the 1985–1988 agreement allegedly constituted a layoff within the meaning of that agreement, and to arbitrate that grievance.

Funk credibly testified that the Unions had wanted to evaluate the truth of rumors that the plant was not running as well as Respondent was claiming. Although it is unclear whether the Unions so advised Respondent, Perkins' May 8 offer of a tour immediately followed Dunaway's expressed skepticism of Respondent's claimed production figures.

subcontracting and other benefits. . . . In the past, the company has been successful in picking us off one by one—using the threat of hiring permanent replacements . . . by sticking together and coordinating our efforts, we can defeat these demands.'' That article further stated that the UPIU would impose ''greater supervision of the bargaining process,'' and quoted UPIU Local 2650 President Funk, a Mobile employee, as stating that the Mobile employees' spirits had been lifted by knowledge that they had been joined by the members in DePere, Jay, and Lock Haven.

Frase testified that beginning in May 1987 and continuing at least through the summer of 1988, the employees of the four pooled locations were linked together in coordinated bargaining, that there was close communication between the unions and employees at all four locations, that the unions and employees at all four locations held weekly conference calls, and that the locals shared information with each other.

4. The Paperworkers' charge on May 21, 1987

On May 21, 1987, the Paperworkers filed a charge against Respondent, docketed as Case 15–CA–10309, which alleged that Respondent had violated Section 8(a)(1), (3), and (5) of the Act at the Mobile mill by locking out employees, refusing ''the Union'' an opportunity to tour and inspect bargaining unit work being performed following the lockout, threatening employees with permanent replacement, shifting its bargaining position in bad faith, illegally implementing a unilateral bargaining offer, and proposing as a mandatory subject of bargaining that the bargaining unit be changed. This charge (amended on June 5 to add allegations of an unlawful refusal to arbitrate) was administratively dismissed by the Regional Director on July 7, 1987. An appeal of that action was administratively denied on September 30, 1987, on the ground, inter alia, that the parties had reached an impasse on mandatory bargaining subjects, including Sunday and holiday premium

5. The May 21, 1987 bargaining session at Mobile

The Mobile parties' next negotiating session was held on May 21, 1987. The parties reviewed the status of their respective proposals, and agreed to the elimination of the meal allowance, with the resulting savings to be converted to pay for future retirees' insurance. Vandillon stated that although there had been some movement, the prime issue was Sunday premium, and that was still deadlocked. He further stated that during the May 8 bargaining session, Respondent had advised the Unions that it had identified jobs it no longer needed; that Respondent was looking for the Union's response on that; that Respondent had made department heads available to answer the Unions' questions but none had been asked; and that ''we left it with you.'' UPIU Vice President Langham states that he did not agree with Vandillon, that Langham did not appreciate Vandillon's making threats to ''this union,'' and that ''We deem it as coercion.'' Then, Langham read aloud the following statement, which had been prepared by UPIU President Glenn, and which between May 19 and 21 was also read or passed across the table at Jay, DePere, and Lock Haven:

> You are hereby advised that due to the paper industry coordination to take away premium pay from UPIU members and International Paper Company's bargaining conduct in carrying out this object and making other concessionary demands connected with coercive conduct toward UPIU members, it has become necessary for the International Union to more closely supervise negotiations and the approval of collective-bargaining agreements.
>
> UPIU will pool the votes of affected locations to determine if an agreement acceptable to United Paperworkers International Union and its locals is achieved. Only when the coordinator appointed by the International President notifies you in writing will International Paper Company have a collective bargaining agreement.

Vandillon asked what this meant and how it worked. Langham replied, ''When you pay dues we'll explain it to you.'' Vandillon said, ''Then you're not going to tell me what it means?'' Langham replied, ''There will be no comments. That is our official position. There will be no concessions on premium pay and no subcontractors on permanent jobs in the mill. The major items remaining between us remain: Sunday premium, holidays, premium time for holidays, and negotiations on future retirees' insurance.'' Vandillon said, ''You're going to read me a quote, and I can't ask any questions about it?'' Langham said that the coordinator for the UPIU-IP Bargaining Committee was UPIU Vice President/Regional Director Dunaway, who was present at the meeting, and that Vandillon could ask him all the questions Vandillon wanted to ask. Vandillon said, ''Then you're saying that a situation could exist where employees at the Mobile mill could vote in favor and have ratification and still not have a labor agreement?'' Langham said, ''No comment.'' Dunaway said, ''Refer to the second paragraph . . . . It says we will pool the votes.'' Vandillon said, ''Is that just here at the Mobile mill or some other place?'' Dunaway replied, ''That's all I have to say.'' Vandillon said, ''Assume that 100 percent ratified, would we still not have a labor agreement?'' Dunaway said, ''That's right.'' Vandillon said that this made no sense, and asked for bargaining about company items 9 and 10. Dunaway said:

> International Paper Company has placed themselves in this position. When the locals voted . . . to split up the multiple, the Company's argument was that each location had to stand on its own. The Company has not [done] that. The Company came to the bargaining table making statements to the news media, to the press and they all have to do with what you've got to do at the individual mills. You leave us no choice. You said each individual mill needs to lose Sunday pay. We came to the bargaining table. You tell us you've got to do what every box plant, not just every mill, but every box plant has done.[24]

[24] On March 16, 1987, Respondent had placed an advertisement in the Mobile Press/Register listing IP locations where premium pay had been eliminated. On May 3, 1987, Respondent had placed an advertisement in that newspaper stating that ''Union leaders [are] threatening to tie Mobile to other mills,'' ''Sunday premium major issue/36 other IP facilities have eliminated Sunday premium.'' In addition, on April 1, 1987, Respondent had placed an advertisement in this Mobile, Alabama newspaper congratulating the employees in

Continued

Perkins asked whether the Unions would bargain with respect to company items 9 and 10. The Unions said, ''Certainly we will,'' but requested and received a half-hour caucus. Then, UPIU International Representative Langham expressed doubt that after declaring an impasse and locking out the employees on that ground, Respondent had the right to add items 9 and 10 to the agenda. He went on to say that on May 13 the unions had requested a tour of the mill in order to establish a bargaining position; and that until that request was met, the Unions did not feel they were in a position to respond to company items 9 and 10. UPIU Representative Dunaway said that Respondent had stated that it had made changes in its operation; and ''You are asking us to bargain on a pig in a poke. We need to look at the situation in order to protect our jobs.'' Vandillon said that these were ''regular routine jobs. We are not talking about any money. After working this way six or seven weeks, we found that there is fat in the system.'' Dunaway said that Respondent was claiming to have learned that some of these jobs could be done differently, but that the Unions did not know this for a fact, and that ''We want to review your operations in the mill. We are not refusing to negotiate on these. We refuse to negotiate on something we haven't seen.'' Vandillon said that it was unreasonable for the Unions not to have a response on items 9 and 10, and to apply a contingency on a response, and that the Unions had had more than enough time to have a response. He went on to say that in consequence, as of that day, company items 9 and 10 were ''part of our package;'' meaning that if the Unions voted for an agreement, they would be voting to eliminate the jobs whose elimination was called for by items 9 and 10.[25]

Then, Vandillon asked UPIU International Representative Langham to repeat the statement from UPIU President Glenn about coordinated bargaining. After Langham did so, Vandillon asked whether this meant that the UPIU would refuse to put a proposal for a vote at one facility until it had several proposals out there at several locations. UPIU Vice President Dunaway said, ''We won't answer that.'' Vandillon said, ''You put out a statement and then you refuse to answer questions on it? and asked whether this meant that ''you won't allow a vote until all locations vote.''[26] Dunaway said, ''UPIU mill pool the votes. What does the second paragraph say?'' Vandillon asked whether more than one mill would have to vote on a Mobile agreement. Dunaway replied, ''No comment.'' Vandillon asked, ''Does that mean that you will refuse to put a proposal to a vote until you have got several proposals out there simultaneously?'' Dunaway said, ''I am not going to give you anything, Vandillon. It ain't that difficult to understand.'' Vandillon asked whether the statement meant that UPIU would not put a contract to a vote until all the bargaining units had acceptable contracts. Dunaway said, ''You heard what the statement said.'' Vandillon asked whether employees at more than one location had to vote to ratify the Mobile proposal. Langham said, ''We will not answer that.'' Vandillon said, ''You read a statement and we can't ask questions? Then someone else will be voting on Mobile's proposal? Does it work both ways?'' Dunaway said, ''The second paragraph says the vote will be pooled. You can look up the word pool in the Webster dictionary.''[27] Vandillon asked. ''What if Mobile rejects a contract, are they stuck with it even if the rest voted for it?'' Dunaway said, ''The votes will be pooled in various locations.''

Then, Vandillon said, ''We have another item'' at this point, Perkins said:

> The last time we were here we told you that we have learned from first hand experience that the mill can be maintained competently with far fewer people than our normal manning. Our experience with contract maintenance thus far had been outstanding. So much so that we had asked them to put together a proposal for us to consider contract maintenance on a permanent basis. Of course we understand our obligation under the law to bargain with you over such a matter. Therefore, if the proposal presented to us is as big a cost reduction as we think it will be, we will be back to the bargaining table to discuss it with you. We got the proposal, we studied it and the cost reductions exceeded our expectations. Consequently, we have an additional item this morning—we will call it item No. 11.

Company item 11 proposed the following contractual language:

> Notwithstanding any provision of this labor agreement, ''A Report to Our Employees,'' past practice, grievance answers, or any other consideration, the company may, at its option, contract out any or all maintenance work on a temporary or permanent basis.[28]

In addition, company item 11 called for changes, with respect to the language in the expired contracts tending to forestall any contention that Respondent was limited in its right to subcontract maintenance work; and deleted the wage schedules for maintenance employees at the Mobile mill.

Respondent passed out to the Unions copies of company item 11, which bore a ''file document date'' of May 20, the preceding day. Vandillon stated that Respondent recognized its obligation and rights to bargain on those issues, and Respondent's obligation to bargain on the impact and effect of the proposal. He further stated:

Respondent's Moss Point, Mississippi plant for their acceptance of a contract, and including an at least purported history of the Mobile lockout.

[25] My finding as to Vandillon's meaning is based on Funk's testimony. I infer that similar language carried a similar meaning when directed on other occasions to other subjects of negotiations.

[26] The second quotation is from the bargaining notes of UPIU Local 337 Representative Thomas.

[27] ''[P]ool [transitive verb] to put together in a pool: contribute to a common fund or effort often on the basis of a mutual division of profits or losses or an equal share of benefits: make a common interest of . . . intransitive verb] to organize a pool: combine with others in a pool.'' Webster's Third New International Dictionary of the English Language Unabridged (G. L. C. Merriam Co., 1981) 1764.

[28] The quoted language was to be substituted for the following language in the expired agreement

> During normal operating conditions the Company will keep a maintenance crew sufficient to perform operating maintenance, preventive maintenance, and day-to-day equipment repairs, as distinguished from work get forth in Paragraph (2) below [which refers to, inter alia, ''New and additional work'' and ''Major repairs, rebuilds, reconfigurations and/or modifications''], and such work will normally be performed by mill maintenance employees.

> [I]f one considered a straight bump back, essentially all laborers in the mill would be displaced. Thus, there would be a tremendous training cost and it would be necessary to train the mechanics for relief work in all lines of progression. They would need to be trained to take set-ups in the lines of progression. We think we need to talk about this sort of thing.

IPIU International Representative Langham said, ''We will talk about it.'' At that time, the bargaining unit consisted of about 915 production employees and about 285 maintenance employees. The expired bargaining agreement required that ''a permanent reduction in work forces'' be effected ''according to Company Seniority''—that is, length of service in the mills included in the multiple. Employees demoted in consequence of such permanent reductions were to be demoted ''in the descending order of progression levels in their respective lines of progression according to applicable Job and Department Seniority''; seniority was to operate according to lines of progression agreed on by the locals and the mill manager.

In connection with the statement of UPIU President Glenn, Vandillon asked how the IBEW fit into Glenn's statement. IBEW International Representative Coleman stated, ''We are not signatory to the labor agreement. We just acknowledge it. We have to fit into it. Our international doesn't sign it.'' Vandillon asked whether Glenn spoke for IBEW Local 1315. Coleman stated, ''Wayne Glenn does not speak for IBEW. We speak for IBEW.''[29]

Perkins asked, ''[H]ow do you define pool voting?'' Dunaway said that it was self-explanatory and ''It's like getting in the swimming pool. There is no other explanation other than what we say is pool voting.'' Perkins said, ''Then you're going to keep me in the dark?'' Dunaway said, ''I'm sure Mr. Georges will explain it to you,'' referring to Respondent's chief executive officer. At this point, at the request of the Unions, the parties caucused for about 3 hours.

When the parties resumed their bargaining session later that day, the Unions read aloud the following statement:

> The Union requests the company to provide it with the following information: Any and all documents, including without limitation, contracts, reports, schedules, studies, books, records, prints, charts, evaluations, ledgers, expense vouchers, checks, drafts, recommendations of any kind, measurements, graphs. time studies, papers, recordings, photographs of writings of any kind, relating to or concerning the Mobile Mill, and which supports, justifies or tends to provide the basis for company proposals 9, 10 and 11.
>
> The Union also renews its request that it be permitted to enter the mill and to observe any and all operations which are encompassed or affected by company proposals 9, 10, and 11.

Respondent asked the Unions whether they would bargain about items 9, 10, and 11 once they got the information. The Unions replied that they would. When asked what the Unions had in mind when telling Respondent that they would bargain, Funk credibly testified, ''What we had in mind was trying to talk the company out of their proposal, to convince the company that they were wrong in what they were saying, and the information we were requesting, we felt would give us the aids to do this.'' Dunaway said that when the Unions received the requested information, the Unions would study it and would then be ready to negotiate on company items 9, 10, and 11. The Unions stated that because Respondent had attributed items 9, 10, and 11 to changes in operations, the Unions wanted to tour the mill in order to review the asserted changes and thereby be able to bargain more intelligently on these items. Vandillon said that he and Perkins did not think the Unions were entitled to a tour, but that they would check with Respondent's attorneys and get back to the Unions on their request. Vandillon also asked what the Unions expected to get from a ledger, and what they mean by charts and evaluations. Dunaway replied that Respondent had said it had proposals and studies that it requested a vendor to get, and suggested that Respondent ask its lawyer what the Unions' request meant. Langham said that ''we are not totally in agreement'' that Respondent was ''legal'' in proposing items 9, 10, and 11, but if Respondent was ''legal,'' the Unions needed this information.[30]

6. Perkins' May 21, 1987 letter to the employees; Gilliland's and Dunaway's late May 1987 conversations

Also on May 21, 1987, Perkins sent the unit employees a letter describing items 9, 10, and 11, and enclosing copies of items 9 and 10, which two items, the letter stated, had become part of the May 8 ''package.'' As to item 9, the letter stated that after operating the mill with salaried supervisors and temporary employees for an extended period, management had found that productivity could be increased by staffing reductions in various departments Also, the letter stated that company item 10 would become unnecessary if item 11 became part of the labor agreement. The letter further stated

> Since the lockout began . . . maintenance at the mill has been successfully performed by an outside contractor This experience has proven that the mill can be maintained efficiently and effectively by contract maintenance.
>
> In addition, preliminary figures indicate that contract maintenance offers our mill an opportunity to achieve very significant cost reductions compared to having in-house maintenance.

The letter went on to refer to ''the excellent experience we have had with contract maintenance since March 21.''

Shortly after the UPIU had read at the Mobile bargaining table Glenn's statement regarding coordinated bargaining, Gilliland telephoned Dunaway and asked whether his appointment as coordinator meant that he could sign the contract for the Mobile mill. Dunaway said that ''they are all in the pool,'' and that Respondent would not have a contract at the Mobile mill until Respondent had a contract in the

[29] The quotations are from Respondent's bargaining notes, which as to this matter are consistent with the notes of Thomas and Sanders, and with notes by an unidentified union representative received in evidence as R. Exh. 69d. I conclude that McDonald's notes erred in attributing to IBEW Representative Coleman the statement that ''We have to have an agreement from the UPIU before we can sign an agreement.''

[30] The quotations are from Sanders' notes.

other places as well. Around this same time, Dunaway telephoned Gilliland and asked whether Respondent was serious about its subcontracting proposal. Gilliland said that this was an item which had come strictly from the mill, that the proposal was based on what the mill had seen during the first few months of the lockout, and that Dunaway should not misinterpret this proposal as a bargaining ploy but should accept it at face value. Dunaway asked how Respondent could expect the Unions to agree to give up 285 jobs. Gilliland said, ''[L]et's talk about alternatives. Make a counterproposal. Let's try to find some middle ground.'' Dunaway said that making the proposal was illegal; Gilliland said that counsel had advised him otherwise.[31]

7. The May 22, 1987 bargaining session

The parties met again at Mobile on May 22, 1987. Vandillon said that Respondent did not understand what pool voting was. He stated that a Mobile newspaper that morning had quoted Langham as saying that ''No one group is to accept an offer until the majority of the workers at each of the mills is ready to accept an offer.'' Vandillon further stated that according to a television newscast the previous evening, ''Unions at IP plants across the country have banded together and . . . will refuse to reach a labor agreement until the [Mobile] labor dispute has been settled.'' Langham said that the newspaper had quoted him correctly, but that quotations aside, he could not be responsible for what the news media put out. Vandillon asked whether the ''ratification'' of the Mobile contract was contingent on ''that document,'' referring to the document which had quoted UPIU President Glenn and had been read at the previous bargaining session. Dunaway said that the document was ''self-explanatory;'' and that if Respondent's attorney, Jane Jacobs, who was present, had any questions about it, she should get in touch with the UPIU's attorney, whose name and telephone number Dunaway gave. Vandillon attributed to ''you'' the statement that if there was a 100-percent vote in favor of ratification, the parties could not have an agreement. Langham replied:

> [A]s far as the media is concerned you have had full page ads and you have had articles in the paper with flat lies. We have demanded on many occasions that you stop the rhetoric and start bargaining. You people started bargaining in the news media and not the bargaining table. You started the nation-wide campaigning across the mills. You chose to have uniform proposals throughout all of International Paper company. You locked us out, we did not strike. We wanted to continue to bargain and continue working.

Then, Vandillon attributed to Langham the language, inferentially from a newspaper article at least purporting to quote him, ''UPIU locals in Maine, Wisconsin, Oregon, Pennsylvania, and other states where the company and its workers are negotiating contracts have vowed to work together to see that they all get satisfactory contracts. No one group is to accept an offer until the majority of the workers at each of the mills is ready to accept an offer.'' Langham said that this ''second part . . . may or may not be'' a conclusion drawn by the newspaper reporter. Vandillon said that Respondent had been told ''in other places'' that

> [T]here is a list of about four items that triggered the pool voting . . . . in the [sic] IP contract proposal that contains any if the following items will trigger it: (1) Elimination of Sunday and holiday premium, (2) Elimination of holiday restriction, (3) and contracting of work. Any International Paper Company contract proposal which contains any of these items will not be allowed to be ratified by that mill's employees, but its votes will be pooled with the votes of all other mills where proposals contain the same items and nobody ratifies unless everybody ratifies.

Vandillon asked whether that was the way it worked. Dunaway replied, ''I don't understand that. I don't know where you got all that from.'' Vandillon asked, ''Do all bargaining units get to vote on Mobile's contract?'' Dunaway said, ''No, we will pool the vote. You know like a big pool, bikinis and everything.'' Vandillon asked if all of the people at Mobile voted to ratify ''today,'' what would happen. Dunaway said, ''We pool the votes.'' Vandillon asked, ''At what point do they get counted?'' Dunaway said, ''When are you going to get off Sunday premiums and holiday premium?'' Vandillon said that as to item 9, the tour requested by the Unions would serve no useful purpose, on the ground that the Unions knew the equipment, it had not changed, and the Unions had asked no questions of the department heads whom Respondent had brought to a bargaining session to explain the proposed manning reductions. As to the Unions' request for documentation in connection with item 9, Vandillon said, ''We need some idea of what you would need. Perhaps you could tell us''; to which Dunaway said, ''We gave you the document that told you what we wanted. We're not going to negotiate based on some department head's statement. We don't trust you that much.''[32] Vandillon repeated that he did not think a tour would serve any useful purpose as to item 9, and that the same was true of item 10; ''This is just common sense. Why have two people when only one is needed?''

As to item 11, Vandillon said, ''[W]e do have documentation. The attorneys are reviewing what, if any, we can furnish to you.'' There is no evidence that company attorney Jacobs, who attended this bargaining session, said anything about this matter. Gilliland, who is not a lawyer, testified that Vandillon did not ask him to have legal counsel look at whether Respondent was obligated to provide more documents than Respondent eventually did provide, that Gilliland did not consult with counsel, and that Vandillon ''would not have. If there was conversation with the legal counsel, I did it.''[33] Vandillon said that as to item 11, Respondent assumed

[31] My findings as to these conversations are based on Gilliland's uncontradicted testimony. Gilliland testified that Dunaway had retired; there is no other record explanation for the failure of the General Counsel and the Unions to call him as a witness.

[32] No contention is made that Respondent unlawfully failed to provide sufficient documentation in connection with item 9, the subject of several of the Unions' requests specifically cited by Respondent (opening Br. 90) in connection with its contention (infra, part II,V,1,a,13)) that the Unions' requests for documentation were insufficiently clear in connection with item 11.

[33] Vandillon did not testify (see infra, fn. 44). Ms. Jacobs is a member of the firm which represented Respondent before me, and

that the Unions wanted a tour in order to see what the contractors were doing, that Respondent would not permit a tour for this purpose, and that Respondent would consider a tour only if the Unions did not think the mill was running well. Vandillon went on to say that if a tour would contribute to a labor agreement, which Respondent doubted, ''based on the fact that Mobile mill can't ratify their own contract, then we're willing to base a tour.'' Dunaway said, ''We need the information we requested before we have the tour.'' Vandillon asked whether the parties could arrive at a mutually satisfactory time for the tour. Dunaway said, ''I don't know. When do you intend to provide us with the information?'' Vandillon replied, ''When the attorneys finish reviewing it.'' Dunaway said, ''Then we'll talk about the tour;'' he further said, ''We don't know what your requirements of the job are now. We need the documents we [asked] for to determine what we are looking at.''[34] Vandillion asked, ''What do you need?'' Coleman said, ''Anything pertaining to your proposal, any type of documentation. We'd resolved that yesterday.'' Vandillon said, ''What do you mean, resolved? You have the best understanding of the computer maintenance by the temporary agreement.[35] We can't understand what else you need. We know you don't want a ledger or a check.'' Coleman said, ''We requested in writing, you understand what we need.'' Vandillon said:

> What you gave us was a rubber-stamped version of what goes to court, like interrogatories. Some people refer to it as witch hunting . . . . We have the documentation on No. 11 being reviewed now and it's under study. What, if any of it, you will receive. we're not sure of. What are you going to gain, Roy [Lynch], by a tour on No. 11?

Dunaway asked Vandillon whether he was talking just to hear himself talk, or just to get ''all this in the record.'' Vandillon said, ''We're just trying to figure out if it is reasonable or not. . . . We are reviewing the documentation. We gave you what we see is a good way for the tour to go. Let's separate those items.'' Both Dunaway and Coleman said they needed the documentation before taking the tour.

F. *The Anti-BEK Campaign*

Because of Respondent's proposal to contract out the Mobile maintenance work permanently, the Unions and their membership began a campaign against BEK. They passed out leaflets and brochures against BEK; they wore, gave away, and sold about 1000 T-shirts depicting a UPIU–IBEW eagle swooping down on an IP rat towing a BEK banner and about 2000 T-shirts which bore the slogan, ''Proud to be Union'' and many of which also bore the words ''Ban BE&K.'' In addition, the Unions and their membership passed out about 10,000 ''Ban BEK'' decals at meetings of other UPIU and IBEW locals to which the Unions' membership and representatives described their situation. This activity probably continued until the end of March 1988. A Corporate Campaign News issued by the Paperworkers and the UPIU/IBEW joint bargaining committee in July 1988 refers to speeches by Paperworkers negotiators Funk and Thomas ''in recent weeks'' at a rally sponsored by the building trades to protest ''the anti-union contractor BE&K.'' This document aside, there is no evidence that the Unions continued anti-BEK activity after the permanent subcontract was rescinded on May 3, 1988.

G. *Preparation of the Cost Study*

Perkins credibly testified that long before Respondent began the lockout on March 21, 1987, he was aware that performing maintenance work by means of a temporary subcontract during a lockout was much more expensive than performing such work during a lockout by means of a permanent subcontract. IP Purchasing Manager William W. Patrick credibly testified that ''very shortly after the execution of the contingency contract in late March 1987, and 2 to 4 weeks after March 21 (that is, no more than 2 weeks after the ''temporaries'' got on board, according to Gilliland), Perkins and his immediate superior, Vice President Smith, asked Patrick to help them reduce the cost of that contract. Patrick and BEK Representative Melton testified that in late April or early May 1987, Melton began to receive complaints, from Patrick and Perkins, that BEK's charges under the contingency agreement were ''exorbitant,'' and requests for a reduction in the ''multiplier''—that is, the figure by which hourly costs, as set forth in the BEK contingency contract, were multiplied to determine what Respondent had to pay BEK. The permanent BEK contract proposal which was eventually executed by Respondent on August 11 (with a few revisions on August 10), and which specified for straight-time work a ''multiplier'' of 1.36, was forwarded to Respondent under a covering letter from Melton dated May 8. Melton testified that this proposal was a third draft, and that it was Respondent which in April or May requested BEK to submit a proposed permanent subcontract. Melton further testified that enclosed with this proposal was a document, headed ''Projected BE&K Cost,'' which was prepared by him on the basis of the hourly cost figures in the proposal; two copies of this document are among the three pages numbered six in General Counsel's Exhibit 50.[36] He

made an appearance on Respondent's behalf, but was absent during most of the hearing and made no remarks on the record.

[34] This last quotation is from McDonald's bargaining notes.

[35] Inferentially, Vandillon was referring to an August 1986 agreement (referred to in the record as the ''CIE'' agreement) between Respondent and the IBEW dealing with training certain instrument electricians to maintain some newly installed equipment (see infra, part II,K).

[36] The original G.C. Exh. 50 is bound in with the counsel for the General Counsel's November 1989 exhibits. The document bound in with her October 1989 exhibits is only a photocopy, and fails to show certain significant features of the original.

As discussed infra, various members of management testified that several days after the first 10 pages of G.C. Exh. 50 had otherwise been completed, the document prepared by Melton was substituted for a page which reads in its entirety ''Page 6 is the 'Projected BE&K Cost' sheet.'' Process Control Manager Paul Parnell testified that as to the page prepared by Melton, ''We only had that information via telephone, so we inserted a page . . . that said that page six reflects the BE&K labor break down sheet, which we did have at that time.'' It is unclear whether Parnell's testimonial reference to ''the BE&K labor break down sheet'' was intended to refer to a page otherwise undescribed in the record, to the one-line p. 6, to pp. 7–10 of G.C. Exh. 50, or to one or both of two pages which, if they ever existed, may have been numbered pp. 4 and 7 of G.C.

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went on to testify that he had discussions with Patrick about ''the proposal'' a week or 10 days before Melton gave it to Respondent. On or before May 18, 1987, BEK reduced the straight-time multiplier effective May 18, 1987 (3 days before Respondent proposed item 11 to the Unions); and on or before June 1, 1987, BEK further reduced the straight-time multiplier effective June 1, 1987; the record indicates that the original straight-time multiplier'' was 1.88, the straight-time ''multiplier'' effective May 18 was 1.72, and the straight-time ''multiplier'' effective June 1 was 1.6.[37] Patrick testified that his requests for further reductions in the multiplier were answered by Melton with the statement that such reductions could be obtained by executing a permanent contract; Patrick initially dated the first of these conversations as ''shortly'' after the completion of a 10-page cost study which according to him was completed (except for p. 6) on May 9,[38] and then as having occurred in late May or early June. Perkins testified that it was about late June, and perhaps earlier, when Patrick told him about these statements by Melton.

Perkins telephoned Gilliland and asked whether Perkins could propose ''permanentizing'' the relationship with BEK, to which Gilliland replied that he did not know, would check with counsel, and would then get back to Perkins. A day or two later, Gilliland telephoned Perkins that if he wanted to make such a proposal, counsel had stated that it would not be illegal.[39]

The complaint alleges, inter alia, that Respondent violated Section 8(a)(5) and (1) of the Act by failing to give the Unions pages 7, 8, and 11 of an 11-page document which purports to be an in-house cost analysis; Respondent contends (without explicit challenge by the other parties) that pages 1–5 and 7–10 of this document were completed by, and at least mostly prepared on, Saturday, May 9, 1987. Respondent gave the Unions pages 1–6 of this analysis on Wednesday, May 27, 1987, after the Unions on Thursday, May 21, 1987, had made a request for information (see supra, part II,E,5). The evidence shows that this entire cost analysis (except for p. 6; see supra, fn. 36 and the discussion infra) was prepared by members of Respondent's management. Discrepancies and peculiarities in their testimony about this analysis, as well as their demeanor when testifying, suggest that during this litigation, Respondent has been withholding, concealing, or occurring certain circumstances which it believes significant. Of particular interest is the testimony of the four members of management who testified about the physical preparation of this document—then Mill Manager Perkins, Process Control Superintendent Paul Parnell, Purchasing Manager Patrick, and Dennis Colley (manufacturing manager for Respondent's folding carton division)—that the document (except the p. 6 prepared by BEK and p. 11) was completed on Saturday, May 9, the date which appears, in the same word-processor type face in which all but the BEK-prepared page 6 of the document is mostly reproduced, on the page numbered 1 of General Counsel's Exhibit 50. Moreover, Colley specifically attached that May 9 date to the preparation of two of the pages (those pages of G.C. Exh. 50 with the inked pagination numbers 7 and 8) which the General Counsel alleges were unlawfully withheld from the Unions, and which are two consecutive pages showing a proposed allocation of BEK maintenance employees by craft, area, and number. Further, Patrick and Colley testified that the total number of maintenance employees so allocated (244, put on p. 8 in the type face of a word processor) was obtained by Patrick from Melton by telephone on Saturday, May 9. However, the first of these two pages—that is, the page with the inked page number 7 (see infra, fn. 47)—bears the date of May 8; and Perkins testified that if that May 8 date was on the first of these two pages when he first saw them, ''I am sure I would have recognized it was done the same day that the six-page analysis was done.'' When Parnell was shown that page with the Friday, May 8, date, and was asked who prepared it, he testified:

> It was [Mill Maintenance Supervisor] Devon Jones [who did not testify], myself, and Dennis Colley. Dennis may have been involved because this—we put some of this type information as shown on page seven.
>
> We listed some of this on a board and made—I am trying to find out the different area crew sizes and it is to whether we actually put it in type on that Friday afternoon in that two or three hour short period when we were all not there [see infra]—that is why I said that Dennis may not have part of that day, or whether we did it that Saturday morning, I don't recall exactly which day it took place. But it took place either that Friday afternoon or that Saturday morning or that day, Saturday.

Parnell had previously testified that Colley was not at the Mobile mill on Friday, May 8; and Parnell's uncontradicted testimony in this respect was corroborated by Colley, Patrick, and Perkins. Moreover, Parnell testified that he himself ''may have'' typed page 8, and that it was a continuation of page 7; whereas Patrick testified that on May 9, it was James Martin who was at the keyboard.[40]

Perkins testified that on the basis of Respondent's experience with BEK's maintenance services at the Mobile plant during the first part of the lockout, and after consulting with

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Exh. 50 or of another document which may have been incorporated (in whole or in part) into Exh. 50; see infra, fn. 46.

[37] For example, for straight-time work by a ''Mechanic A,'' Respondent was originally billed $23.50 per hour, effective May 18 was billed $21.50 per hour; and effective June 1 was billed $20 per hour. As discussed infra, after July 29 the straight-time ''multiplier'' was 1.36—that is, $17 per hour billed for ''Mechanic A.'' Melton testified that BEK agreed to the May 18 and June 1 reductions because of the absence of rioting, picketing, or ''abuse'' of BEK employees during the Mobile lockout. However, he also testified that BEK insisted on the maintenance of the man camp throughout the term of the 1987 contingency contract because ''We wanted to make sure that the people we had there were secure and we did not want to . . . expose our employees to any illegal activities or endanger their life.'' Patrick testified that he told Melton that these reductions should be made because ''I am a good client and my costs are exorbitant and I need some help.''

[38] As discussed infra, I believe that this document was completed on May 23, but that part of it was prepared on May 8.

[39] Gilliland testified that both of these telephone conversations occurred during the week which ended on the Saturday when the cost study was completed; that the second one occurred a couple of days before the Friday of that week; and that the first conversation occurred a day or two before the second one. Perkins' testimony at least implies that he did not discuss subcontracting with Gilliland until a day or two after the cost study was completed.

[40] Parnell testified that ''I think'' Martin typed pp. 1 through 5.

Mobile Director of Human Resources Vandillon, Operations Manager Walter, Crawford (at that time, Respondent's start-up and construction manager for the reconfiguration project which BEK had begun before the lockout, seq. supra, part II,A), and some of the department heads, Perkins decided to ask BEK for a proposal for a permanent maintenance contract Perkins further testified that during the first week in May 1987, he asked Patrick to approach BEK and obtain a proposal to perform maintenance work on a permanent basis Patrick testified that he made this request to Melton after Patrick had received Perkins' call and perhaps on the same day; that Patrick made this request ''Just prior to [Saturday] May 9—the week of—ending May 9''; and that he received a proposal from Melton ''the following week,'' which (he testified) would have been the week after May 9. Still according to Patrick, Melton initially responded to this request for a Mobile proposal by sending him a copy of a contract between BEK and one of Respondent's competitors, with a request that Patrick withhold from others the identity of that competitor; Patrick gave Melton's alleged request as his reason for allegedly destroying a few days later the competitor's contract which Melton allegedly sent him, and was testimonially unable to explain why Melton failed to delete the competiton's name before sending Patrick the document.[41] Patrick further testified that later on the same day as his conversation with Melton, Patrick told Perkins that Patrick could have a proposal within the next day or two. Perkins testified that about May 4 or 5, as soon as Patrick indicated that he could get ''the appropriate information'' from BEK, Perkins said that he wanted to create a team to evaluate the proposal to see if ''it was feasible, if it made these, if they would present enough economic opportunity for the mill,'' and asked Patrick to be a team member, to which Patrick agreed.

Perkins and Colley testified that on a day which Perkins testimonially fixed as a day or so after this conversation with Patrick, and which Colley testimonially fixed as between May 4 and 7, Perkins telephoned Colley and asked him to be a member of a team to evaluate the feasibility of subcontracting out maintenance to BEK Colley testified that Perkins said he wanted Colley on the team because (among other reasons) the fact that he had not been in the mill when Respondent began the lockout would cause him to be unbiased in that Colley ''was not a party to the people leaving the mill, the fact that BE&K—the work that was being done by BE&K employees, then as how good it is or bad it is didn't have a preference either way. That I would be looking strictly at numbers.'' Colley, who at that time lived in Mobile, testified that he told Perkins Colley would be available for the next 8 or 10 weeks on weekends only and the next weekend would be convenient because he would be in Mobile, that Perkins did not say how long he thought the study would take, and (in effect) that Perkins did not indicate when he wanted the study to be completed; whereas Perkins testified that he set up the team meeting for the forthcoming weekend because Colley said he would be continuously unavailable for several weeks thereafter. For demeanor reasons, I regard Colley's testimony as to what he told Perkins about Colley's availability as closer to the truth than Perkins' version.

Parnell testified, in effect, that he did not find out until about 3 p.m. on Friday, May 8, that the was to be a member of a team to study contracting out the maintenance work.[42] Colley testified that when Perkins asked him to be a member of the team, a request made on a date which according to Colley must have been no later than May 7, Perkins said that Parnell would ''probably'' be on the team. Perkins testified that as soon as he confirmed Colley's schedule, he ''went back to'' Patrick and thereafter, at about noon on May 8, had prospective team member James Martin (''a financial person from accounting'' who was then ''in transit'' to Respondent's Memphis operation after having been the Mobile mill's cost control manager for some years)[43] stopped at the airport to return to Mobile. However, Patrick testified that between Thursday, May 7, and after lunch on Friday, May 8, Perkins did not talk with Patrick about his prospective participation in the team. According to Patrick, during this May 8 conversation Perkins telephoned Patrick, whose office is about 6 miles from the Mobile mill, and asked him to come to the Mobile mill that afternoon; to which Patrick said yes. Patrick testified that by this time, he had received the contract proposal (to a competitor) promised by Melton.

Perkins, Patrick, and Parnell testified that in the afternoon of Friday, May 8, they met with Jones, Martin, and (according to Perkins) Vandillon. Perkins testified to saying that he wanted Patrick, Jones, Martin, and Parnell to conduct a study to determine whether using BEK on a permanent basis would be cheaper than having Respondent's own maintenance employees do the work if the mill was not involved in a labor dispute. Patrick testified that Perkins said Colley was unable to come to the Mobile mill until the following morning, and asked all of them to meet with Colley then. Patrick further testified that Perkins impressed on them to take as much time as they needed to do an evaluation, and not to be in a hurry. Perkins testified that Vandillon said, ''Be conservative in the study. I want to make sure if the numbers look good economically, that they are real numbers, and they are not just somebody's wishful thinking . . . don't assume that these [BEK] guys are supermen and that . . . they can do fantastic work as compared with an individual IP worker.'' Perkins further testified, in effect, that Vandillon attributed this message to Gilliland. No other witness testified that Vandillon attributed any remarks to Gilliland; as previously noted, Parnell and Patrick did not testify that Vandillon was there at

[41] Melton, who testified for the General Counsel, was not asked about any IP competitor's contract which may have been forwarded to Respondent Patrick's testimony at least implies that Melton said it would take 2 to 4 weeks to send a draft proposal specifically directed at Mobile. What Melton identified as a third draft of BEK's proposal for Mobile was sent by Melton to Respondent under a covering letter dated May 8.

[42] Parnell testified at one point that on this May 8 date, he found out that there was a proposal from BEK to contract out maintenance on a permanent basis. However, he previously testified that he did not learn this until May 9.

[43] My findings in the parenthetical quotation are based on Parnell's and Perkins' testimony, The analysis team also included the Mobile mill maintenance manager, Jones. However, Respondent's reply brief (Br. 105) states that the analysis team did not include anyone from the Mobile mill who would be in a position to know the actual costs being incurred under the contingency contract.

all.[44] Parnell testified that later that same day, he, Patrick, and Martin got together some materials to be used for the study.

Colley, Parnell, and Patrick testified that on the following day, they, Martin, and Jones met at the Mobile plant. Colley, Parnell, and Patrick testified that Patrick brought with him a BEK contract, supplied by Melton, with one of Respondent's competitors; and without shoving it to the others, periodically telephone Melton about what BEK would charge Respondent for maintenance work under a permanent contract.[45] Colley, Parnell, and Patrick all testified that by the end of that day, they, Jones, and Martin had completed the preparation of a document which at least purported to show that as compared to performing maintenance work with Respondent's own employees, subcontracting such work to BEK after Respondent ended the lockout would save about $842,000 the first year; $5,420,000 the second year; $5,541,000 the third year; and $7,199,000 the fourth year and thereafter. Colley, Parnell, and Patrick all testified, in substance, that the document completed by the team that day consisted of all but two sheets of paper numbered 6, and the last sheet of paper (numbered p. 11), of the document received in evidence as General Counsel's Exhibit 50. This document consists of an unpaginated cover sheet which contains only the entry ''Confidential'' in a typeface produced by a word processor; a series of pages bearing page numbers 1 through 6 in a typeface produced by a word processor, the last page of which bears only the entry ''Page 6 is the 'Projected BE&K Cost Sheet''' and a page number 6 in a typeface produced by a word processor; a page (not stamped ''confidential'') which contains a handwritten page number of 6 and is otherwise in a different word-processor type face, which page (except for the page number) was prepared by BEK and was at least allegedly added to the document several days after it was otherwise completed (see supra, fn. 36); a photocopy of this latter page; pages bearing the inked numbers 7 through 10 (see infra, fn. 46) and each with the red rubber-stamped entry ''confidential''; and a page bearing the page number 1 in a typeface produced by a word processor, to which page number a ''1'' has been added in ink. Unless otherwise indicated, when this study is referred to all page numbers refer to the exposed and final page numbers (as to pp. 7–11, the inked numbers) on General Counsel's Exhibit 50.

Parnell testified that the red ''confidential'' stamp on pages 7 through 10 was put on by the team ''as a group''; he further testified that the team felt that the first 6 pages were also confidential, but ''I don't know why it wasn't stamped at the same time. I don't remember.'' Perkins, Patrick, Parnell, and Colley testified that at the end of that day, the team gave Perkins a copy of the cover page, and the pages bearing the computer-generated numbers 1 through 6 (the sixth of which pages reads in its entirety ''Page 6 is the 'Projected BE&K Cost Sheet'''), but not the pages numbered, in ink, pages 6 through 10 or page 11 (which p. 11 at least allegedly did not come into existence until June 1987, see infra).[46] Parnell testified that until July or August 1987, he retained in his own possession the original General Counsel's Exhibit 50. From such testimony by Parnell, and from Colley's testimony that the copy received by Perkins was a photocopy prepared by Parnell, I infer that any copies retained by team members other than Parnell were also photocopies prepared by him, and that they included pages 7 through 10 of General Counsel's Exhibit 50.[47]

Patrick, Parnell, Colley, and Perkins all testified that after the team had given Perkins whatever copied portions of General Counsel's Exhibit 50 he did receive that day, Perkins conferred with the entire team as a group. He further testified that the conference ''spent a lot of time going over the manning, because . . . their bottom line number, which was the one I was concerned with—interested in on manning was appreciably lower for the contractor than it was for us.'' He went on to testify that he asked the team whether they agreed with him that the subcontracting ''proposal'' should be taken further (that is, that he should talk to his ''boss'' about the matter), and that they said yes. Perkins further testified that Colley gave Perkins an overview of the logic which the team had used in performing their analysis and then said, ''We will walk you through what we did.'' Perkins went on to tes-

[44] Vandillon did not testify. At the time of the hearing he was out on permanent disability, following a heart attack with side effects which may have interfered with his ability to testify accurately. I draw no inference from his failure to testify. Gilliland testified that ''on the Friday before the team . . . met on Saturday,'' he told Vandillon that ''about the issue of proposing item number 11,'' the team should limit itself to ''objective evaluation; namely, the wage rates and the number of people, and that they not give any consideration to subjective considerations such as BE&K works better, smarter, harder, longer . . . I wanted something that was quantifiable and provable, that could be relied on, something conservative.'' As previously noted, Colley testified to being told by Perkins, in effect, that the cost study was to be directed strictly at numbers and was not to consider how good or bad the BEK employees' work was.

[45] Melton, who was called by the General Counsel as a witness, was not asked about this matter.

[46] The number ''11'' on the last page consists of an inked ''1'' in front of a computer-generated ''1.'' The repeated repagination of the pages bearing the inked and final page numbers of 7 through 10 of G.C. Exh. 50 can be summarized as follows:

Inked Number	*Whited-Out Number*	*Number Under Whited-Out Number*	*Penciled Number*
7	8	1	1
8	9	2	2
9	10	5	5
10	11	6	6

Parnell testified that the team had to make the inked changes because ''the way that we had run the area people off, the computer would number the page . . . out of sequence with the [allegedly 6] pages that we gave'' Perkins. If G.C. Exh. 50 is taken to be what it purports to be, the material on pp. 7 through 10 was necessarily assembled before pp. 1 through 5 were drafted; as previously noted, pp. 1 through 6 (except p. 6 prepared by BEK) are computer-generated. Computer-numbered pp. 1 through 6 of G.C. Exh. 50 also contain penciled numbers 1 through 6.

[47] Patrick testified that he did not have a copy, and that to his knowledge, no other team members had a copy. Colley testified that it was his copy which the team gave to Perkins. Perkins testified that he was not ''sure'' whether any member of the team had a copy, but ''I think Bill Patrick and Dennis Colley would have. Logic tells me they should have had one. As to the rest of the members, I am not sure. I suspect they had copies . . . I think they had copies.''

tify that he asked the team how they arrived at the manning levels; and that they replied that they first got estimates from BEK, then analyzed that estimate looking at the different areas of the mill to see if their numbers made sense, and then compared the projected manning for the contractor as opposed to Respondent's prelockout manning. After that, Perkins testified, the team told him what at least part of their analysis had been in a couple of specific areas, and as to the other areas, stated that the team had analyzed them too, a representation which Perkins accepted as true Perkins went on to testify that although ''I was more interested in assessing the logic that they used in their analytical approach than their specific numbers,'' because the team were more experienced than he in maintenance, the team did put a lot of numbers on chalkboard in the office for his inspection, and he did not know whether they were obtaining these numbers from documents they had with them (''They had their analysis there'') or from memory. Colley testified that the team brought with them only a six-page photocopied cost study which they gave to Perkins; Patrick testified that he ''probably'' had with him the BEK proposal (to an IP competitor) he had allegedly received Colley testified that during this conference the team explained to Perkins how they ascertained that before Respondent locked out its employees, only 205 ''bodies'' were performing maintenance work.

The page which bears the inked number 8 of General Counsel's Exhibit 50 states, ''These figures are [calculated] using the following assumptions'' followed by a list. As this document was originally generated by the word processor, it contained 13 numbered entries, the first 2 of which were ''No. 1 machine will not run'' and ''No. 1 cyclone boiler will not run''; Perkins testified that during the lockout, these machines were not operated until August 1987. On General Counsel's Exhibit 50, the numbers preceding the entries, and the first two assumptions, are masked with tape. Perkins testified that on the same day, but before the team started working, he gave them certain ''broad assumptions'' (which he did not specify) but not the ''will not run'' assumptions. Colley testified that Perkins gave the team the assumptions that the lockout would end (an entry not listed under ''assumptions'') and that the ''present rate of spending for support contractors would be the same (the listed ''assumptions'' state that certain specified work ''will be contracted'' and that Respondent would ''continue contracting'' certain work). Colley testified that during the afternoon of May 9, Perkins left his office to check the team's progress; Colley told him that the team was proceeding on the assumption that the number one machine and the number one cyclone boiler would be ''down''; and Perkins then told the team not to make these assumptions.[48] Colley went on to testify that the team thereafter concluded that no additional manning would be necessary to run the number one machine and the number one cyclone boiler. Colley further testified on direct examination that toward the beginning of the alleged May 9 conference, when he asked Parnell and Jones (both of whom still worked at the Mobile mill) why the mill had been using more maintenance employees in early 1987 than when Colley had left the mill in July 1986, Parnell and Jones explained that ''five bodies were brought back to work with the number one machine, number one cyclone.''[49] On cross-examination, Colley testified that the number one machine and the number one cyclone boiler were both running at the time he left the Mobile mill in 1986. In addition, he testified as follows:

> JUDGE SHERMAN:
>
> . . . If it made very little difference as to the number of personnel needed one way or the other whether [the number 1 paper machine and the number 1 cyclone boiler] were operational, why did you bother to consider the matter at all for purposes of making the study?
>
> THE WITNESS: We just wanted to show which equipment that we were putting down to be maintained by the BE&K employees. We just wanted to list.
>
> JUDGE SHERMAN: Well, why did you bother to tell Mr. Perkins about it, if in your opinion, it wouldn't make much difference one way or the other anyway?
>
> THE WITNESS: Because it was the only equipment that was running today which we said was going to be shut down as a result—we felt would be shut down in the future. We just wanted to verify if our assumption was correct or not.
>
> See, number one machine—
>
> JUDGE SHERMAN: Even though it would make no difference to the—in the results of the study?
>
> THE WITNESS: Yes. We just wanted to make sure that we had the equipment that was running today identified so that there wasn't a proposal to contract equipment that we assumed wasn't running that in reality was going to run.
>
> We wanted to make sure we had the question mark identified and clarified. And these were the only two pieces of equipment, in our estimation, that was questionable.

Perkins and Colley testified that after Perkins' meeting with the team as a whole, Perkins conferred with Colley privately. Perkins testified that this conference was requested by him. Colley testified that he himself requested this conference in order to reassure Perkins that the team had been thorough and conservative and thoughtful in their analysis. Colley further testified that Perkins asked him what he

[48] Colley testified that Perkins also asked the team not to make ''an assumption'' about some supervisors; Perkins testified that he told the team not to assume the elimination of four salaried supervisors whose elimination they had been discussing Parnell testified that ''we'' or ''I just'' told Perkins that the team was assuming that the number one paper machine and the number one cyclone boiler would not run; that Perkins said the team could not make that assumption, and that this was basically all Perkins told them Perkins testified that one of the team (probably Colley) said the team were assuming ''we are doing four machines,'' Perkins said ''we would run five machines and planned to,'' and the team said they would go back and see if any change had to be made. Patrick testified, ''We said [to Perkins] that we have done our analysis, and we had assumed that certain pieces of equipment would not [be] operated,'' to which Perkins replied they could not so assume. As to the length of this alleged discussion, management witnesses' testimonial estimates ranged from less than 5 minutes to 20 to 30 minutes.

[49] However, Funk's testimony and certain remarks he made during the bargaining sessions on October 19 and 20, 1988, indicate that at least initially, Respondent did not increase the active maintenance force when, at an undisclosed date, it increased the number of functioning paper machines from four to five.

thought about the analysis the team had just completed, and that Colley replied that the numbers were accurate and conservative, to which Perkins replied that we will give this consideration to see if we need to move with it.''

Patrick testified that the competitor proposal which he allegedly received from Melton and allegedly used during the preparation of the cost study included a page which was similar in form to the page which eventually became the complete page 6 of the cost analysis, and that on receiving this page 6 from Melton ''within a week or a few days after we did our analysis,'' Patrick sent it to Parnell. Perkins, however, testified that he received this page 6, ''a couple, three days'' after the team's analysis was prepared, from Patrick.

Perkins testified that the first time he became aware of the existence of pages 9 and 10 of General Counsel's Exhibit 50 was when Vandillon showed them to him in the course of a discussion about opportunities for supervisory maintenance personnel if the maintenance work was contracted out. Initially, Perkins testified that this conversation ''probably'' occurred during the first week after the cost analysis had been completed, and that he reacted by asking Vandillon whether these documents should be shown to the Unions. Later, Perkins testified that this conversation took place ''within days'' after the Unions' May 21 request for information. Still later, he dated this conversation as ''perhaps the next day or within a couple of days'' after the information request. After so testifying, Perkins testified that this conversation with Vandillon may have occurred after Respondent gave the first pages of the cost analysis to the Unions on May 27. Perkins initially testified that during this conversation, he and Vandillon discussed whether Respondent ''should,'' or ''had any reasons'' to provide the Unions with portions of General Counsel's Exhibit 50 other than the first six pages. Perkins testified that the only pages under discussion were pages 9 and 10, which he testimonially described as ''work papers.'' According to Perkins' testimony, Vandillon replied that the Unions did not need this material; that it contained nothing which was not covered by way of summary in the first 6 pages; and that even if the summary did not fully cover pages 9 and 10, the Unions did not represent the supervisors whose retention vel non was discussed on pages 9 and 10, the information was of a confidential nature, and Respondent should not have to give such information to the Unions. Perkins testified that he and Vandillon agreed not to provide these two pages to the Unions, and if the Unions wanted anything else, ''they would give us a specific request . . . they could ask for it.'' Perkins testified that at that time he did not know that pages 7 and 8 existed, but that if he had known, ''I probably would have had the same reaction. That this information in [the first six pages] is sufficient to cover that subject. And should they need more information, they certainly would ask us.''

I find that the pages bearing the inked numbers 7 and 8 on General Counsel's Exhibit 50 were prepared on May 8, 1987, rather than on the same day as computer-numbered pages 1–6. Page 7 bears this date, Parnell testified that page 8 is a continuation of page 7, their content indicates that they are consecutive, both of them are rubber-stamped ''confidential'' in red whereas pages 1 through 6 are not, Parnell testified that he and Jones may have prepared pages 7 and 8 on May 8, and Jones unexplainedly failed to testify.[50] Accordingly, and for demeanor reasons, I do not credit the testimony of Colley, Patrick, and (in effect) Perkins that pages 7 and 8 were prepared on May 9, the day after the date which appears on page 7. Further, I believe that the pages bearing the word-processor-generated numbers 1 through 6 of General Counsel's Exhibit 50 were prepared on Saturday, May 23. Thus, Perkins testified at one point that his discussion with Vandillon about whether to show the Unions' pages 9 and 10 of General Counsel's Exhibit 50, a discussion which probably could not have occurred until after the Unions' request for information on May 21, probably occurred within the first week following the completion of the cost study. Moreover, Patrick testified that Melton did not tell him until ''shortly'' after the preparation of the cost analysis that Melton would reduce the multiplier on the execution of a permanent contract, and that Melton first told him this after May 27, and in the latter part of May or early June 1987. Further, Perkins' testimonial explanation of the haste with which the team was convened—namely, that Colley, whose assistance Perkins particularly desired, was unavailable for a considerable period after Saturday, May 9—was refuted by Colley's more credible testimony that he told Perkins that Colley was available on 8 to 10 weekends thereafter. Except for the Unions' May 21 demand for documentation, I perceive no other record explanation for the haste (as exemplified by Perkins' recall of Martin from the airport on Friday noon) in the convening of the cost-analysis team. Moreover, my inference that Respondent was trying to attach a falsely early date to the preparation of pages 1 through 6 promises an explanation for management's action in giving the unlikely testimony that information critical to the cost analysis was obtained from a competitor's contract which BEK supplied without deleting the name of the competitor but asked Patrick to destroy in order to conceal that name. If accepted, such testimony, which I discredit as improbable and for demeanor reasons, would reconcile the alleged May 9 date of the cost-study conference with the May 8 date on the covering letter of BEK's contract proposal to Respondent, and also provide an explanation for Respondent's failure to produce at the hearing the alleged contract between BEK and a competitor. In addition, although all the management witnesses testified, at least in effect, that the cost analysis was completed before Patrick received BEK's written proposal for a permanent maintenance contract with Respondent, and Parnell testified that he never prepared any analysis based on that proposal, he further testified that several weeks after May 9, Perkins asked him to look at that proposal ''again.'' Similarly indicating that Respondent did not prepare the cost study until after the BEK proposal dated May 8 was received by Respondent some days later is Respondent's statement, on its May 28 information line, that on May 27 Respondent had given the Unions a copy of the BEK proposal ''as well as the company's cost analysis of the proposal.'' Further pointing to a post-May 9 completion date of the first five pages is the presence of the page whose sole content is ''Page 6 is the 'Projected BE&K Cost' sheet.'' As

[50] The preparation of pp. 7 and 8 on May 8 may provide an explanation for the error of Respondent's counsel (supra, part II,E,1) in attaching that date to Respondents proposal of item 11. However, Funk's testimony contains a somewhat similar error (supra, fn. 22).

Colley pointed out, so long as this page constituted the only page 6 in the document, the document did not show that BEK's hourly cost for mechanics was $12–50, which he described as ''an important piece to the numbers which was in the calculations for the document,'' or the size of the multiplier. Rather similarly, in the absence of this page 6, the document fails to show the corresponding figures (salary or hourly rate and multipliers) for salaried, clerical, and supervisory personnel accordingly management's testimony (in effect) that the document as submitted to Perkins on May 9 omitted these figures (which according to management's testimony had been given by Melton to Patrick over the telephone on May 9) is almost impossible to square with management's further testimony that the six pages with computer-generated numbers were prepared on May 9 to assist Perkins in deciding whether to propose permanent subcontracting, particularly in view of Colley's testimony that the team did not contemplate that this document was going to be used at some future date. Rather, it is highly probable that the team would at the very least have included these figures in any cost-study documents which they gave Perkins to assist him in his decision-making. However, General Counsel's Exhibit 50 lends support to the inference that management included, in the documents given to the Unions on May 27, the page 6 emanating from BEK in order to lend credence to management's representation that these documents motivated Respondent's May 21 subcontracting proposal and that the page with the computer-generated number 6 was prepared in an effort to reconcile with the May 9 date on page 1 the fact that the BEK-generated page 6 was not received by Respondent until it received the BEK proposal under the May 8 covering letter. In addition, the conclusion that the portions of General Counsel's Exhibit 50 provided to the Unions on May 27 did not come into existence until after the Unions' May 21 request for documentation explains why Vandillon on May 22 put off providing documentation by making what Gilliland testimonially admitted (in effect) to be an untruthful representation—namely, that Respondent's counsel ''are reviewing what [documentation], if any, we can furnish to you.'' Also, as noted infra, Parnell testified at one point that during a conversation with Perkins which according to Perkins occurred shortly before the bargaining session (on Thursday, June 11) which immediately followed the Wednesday, May 27 session when the Unions received pages 1 through 6 of the cost analysis, Perkins told him to prepare a new manning estimate with ''what you did on Saturday what you all did on that Saturday''—an unlikely turn of phrase if the ''Saturday'' in question was May 9 rather than May 23. Further indicating management witnesses' untruthfulness about the preparation of the cost study is indicated by the inconsistencies in their testimony (particularly Colley's) about the number one paper machine and the number one cyclone boiler.[51]

[51] Thus, Colley at one point testified, in effect, that operation of these machines entailed five additional employees, but he testified that when participating in the cost study, he concluded that no additional employees were needed. Further, he testified at one point, in effect, that these two pieces of equipment had not been operating when he left the Mobile plant, but elsewhere testified that they had been. Also, he testified at one point that these machines were operating when the cost study was made, but immediately afterward testified that they were not running at that time.

My conclusion that pages 1–5 of the cost study were not created until May 23 casts at least some doubt on Perkins' testimony that he did not see pages 7 and 8 (which contain anticipated manning tables, and were dated and prepared on May 8) until some time late in July. In any event, even assuming that the first 10 pages of General Counsel's Exhibit 50 were completed on May 9, I conclude that Perkins first saw pages 7 and 8 no later than the date when he first saw pages 1–6, and I do not credit management's testimony otherwise. I so find for demeanor reasons and the following additional considerations: Perkins testified that when Vandillon approached him (on a date as to which Perkins' varying testimony identified as no later than the end of May) with copies of pages 9 and 10, ''I kind of said what have you got there[?] Because I didn't even know that he knew about that part of the analysis,'' testimony which implies that Perkins had already seen pages 9 and 10 notwithstanding management's testimony that the cost-study team gave him only pages 1 through 6. Moreover, Perkins elsewhere testified that he was pretty sure he gave a copy of the pages he had received from the cost-study team to Vandillon, who (according to Gilliland showed him pages 9 and 10 on May 22 or 23. Furthermore, pages 7 and 8 contained a breakdown by craft and area of projected BEK manning numbers, in which Perkins expressed particular interest on May 9 according to his testimony. I note, moreover, Colley's testimony that the document which the team allegedly gave Perkins on May 9 was numbered ''I think'' in a combination of computer typing, typewritten typing, and handwriting, although General Counsel's Exhibit 50 attaches computer-generated numbers to all of the six pages allegedly given to Perkins and only the page numbers on the rest of the document were otherwise produced.[52]

Gilliland testified as follows:

> After the Unions' May 21 request for information, Vandillon telephoned him and read him that request. Vandillon said that he wanted to bring Gilliland ''what we have,'' and to see if Gilliland agreed with him about what Respondent ''should provide.'' Thereafter, on May 22 or 23, Vandillon brought to Gilliland's office a copy of the first 6 pages of the cost study stapled together (and probably unnumbered) and unnumbered copies of pages 9 and 10 [see infra, fn. 63], but did not bring him pages 7 or 8 or any other material. Gilliland did not ask him how he had gone about compiling these documents, or whether any of the kinds of documents specified in the Unions' request was responsive thereto, but did ask him whether these 8 pages were all he had;

[52] Respondent's contention that Perkins did not receive pp. 7 and 8 until late July 1987 is based partly on its contention that Perkins would have had no motive to withhold these pages from the Unions. I note that the withheld pages would have assisted the Unions in determining whether Respondent had been realistic in assuming that BEK would begin with 244 hourly mechanics; and that BEK in fact used more than 244 hourly mechanics between the week beginning September 21, 1987, and the week ending March 13, 1988. Moreover, during no complete week of the entire effective period of the permanent subcontract (August 11, 1987, through May 3, 1988) was the total number of BEK nonsupervisory hours lower than the week ending April 3, 1988, during which week 241 nonsupervisory BEK maintenance employees were employed.

> he replied yes. Vandillon said that he was going to provide the Unions with the proposal from BEK; but he did not explain way he did not have it with him. Gilliland was not interested in looking through the proposal to see whether it had to be provided or whether there were certain parts that dealt with supervisors and might be excluded, because he did not see how the proposal could deal with IP supervisors, and did not ask Vandillon where the proposal was. Gilliland told him that Respondent ''obviously'' had to provide the first 6 pages of the cost study, but that in Gilliland's opinion Vandillon was not required to provide the Unions with the pages showing what supervisory jobs would be eliminated (pages 9 and 10 of General Counsel's Exhibit 50) because these pages did not deal with people for whom the Unions bargained. When Vandillon left Gilliland's office, Vandillon took with him the pages which he had shown Gilliland. Gilliland did not see pages 7 and 8 until the October 1988 charges were filed, and did not know where Vandillon got pages 9 and 10; but Vandillon had them because his responsibilities included dealing with its exempt salaried people who were going to be displaced by the proposed subcontracting.

Vandillon did not testify (see supra, fn. 44).

I do not credit Gilliland's testimony that on this occasion Vandillon failed to show him pages 7 and 8 of General Counsel's Exhibit 50. I have previously found that Perkins had a copy of pages 1–10 of General Counsel's Exhibit 50; and Perkins testified that he was pretty sure that he gave Vandillon a copy of what Perkins received from the cost study team. Moreover, Vandillon's responsibilities included bargaining with the Unions which represented the hourly employees to be displaced by subcontracting. Furthermore, pages 7 and 8 constitute a relatively detailed specification of the number of BEK maintenance employees contemplated by the cost study, their anticipated crafts, and the areas where they were to be assigned—information which would be useful to Vandillon if the Unions, during bargaining about Respondent's subcontracting proposal, raised any questions as to whether the cost study was based on realistic manning assumptions. Particularly for these reasons, I regard it as highly improbable that Vandillon was unaware of the existence of pages 7 and 8, or that he would have ignored them (as Gilliland's testimony indicates) on his inquiring whether Vandillon had shown him all Vandillon had.

Perkins and Parnell testified, in effect, that page 11 of General Counsel's Exhibit 50 was not prepared until some time after the first 10 pages. Perkins testified that shortly before the June 11 bargaining session, in order to be able to respond accurately to anticipated questions from the Unions as to how Respondent determined that the contractor could perform the work with the number of people and at the cost set forth in the documents given to the Unions on May 27, he asked Parnell to get together ''a very rough breakdown of how . . . they determined the manning levels . . . a rough breakdown of the methodology you used to get the manning numbers.'' Parnell's version of this alleged request was, ''look at the numbers you all generated . . . to make sure that there was no errors made in the mathematics and so forth . . . look at the proposal again and make sure—see if you can approach it from another way and come up with basically—see if the numbers compare, from what you did on Saturday. Look at it from some other way that you can look at it, and see if they come out together . . . see if you are still comfortable with what you all did on that Saturday.'' (Colley, who according to both him and Parnell was telephoned by Parnell for assistance,[53] testified that Parnell said ''he had been asked to recreate, on the first year, how we came up with the numbers for the first year . . . . He wanted to review the process that we went through on that Saturday in reducing the number from 285 down to 205, but he said he only needed to cover the first year, or the 244 number.'' Parnell testified that Perkins never told him the purpose of the requested analysis.

Page 11 is captioned, in part, ''To replace 285 mill [hourly] general mechanics and instrument electricians with 207 [hourly] BE&K employees.'' This page states, in effect, that its analysis is based on the assumption that during any given week, 240 maintenance employees were actively working in the mill.[54] The analysis explains that this figure was reached by deducting, from the 285 maintenance employees on the payroll, 15 employees being trained, 24 employees on vacation, 2 employees not performing unit work because of ''supervisor set up's, jury duty, sickness, funeral leave etc.,'' and 4 employees due to ''Removal of one GM [general mechanic] shift operator.'' Page 11 goes on to say, ''The 240 number is broke down as follows''; and then contains a table listing, after each of 10 areas, numbers under ''GM'' (general mechanic), ''IE'' (instrument electricians), and ''Total.'' The numbers in the table are the same as the numbers which appear as ''total'' on pages 7 and 8, except that page 8 calls for 60 ''shift'' employees and page 11 calls for 56.[55] When testifying as a witness for the General Counsel, Parnell testified in response to questions by counsel for the Electrical Workers that Parnell prepared page 11 on the assumption that the number one paper machine and its associated boiler would be running, and that the area-by-area manning numbers were the same on page 11 as on pages 7 and 8 of General Counsel's Exhibit 50 (which does not list these machines) because ''I just went down verbatim what we had on pages 7 and 8 and I transferred that information to the lower part of page 11. It is a type, if you call it that, or whatever, but it was my error because I did this myself.''[56] He further testified that after completing this page, he told Perkins that ''the numbers and my figures was comparative.'' As to the source of the 244 total on pages 7 and 8, Colley testified that Patrick advised the rest of the team that Melton had said BEK would need to begin with 244 maintenance employees, and would then ''ramp down over a three-year period to the 207 number'' which the team at least allegedly determined was the number of ''bodies'' needed each week to perform

[53] Colley's testimony at least implies that he was in Pine Bluff, Arkansas, when he allegedly conversed with Parnell. Parnell's testimony at least implies that Colley was then in Tennessee.

[54] This finding is based partly on Colley's testimony.

[55] However, as discussed infra, part II,V,1b, pp. 7 and 8 also specify by areas the number of employees in each craft.

[56] Thereafter, in response to questions by Respondent's counsel, Parnell testified that when preparing pp. 1–10 of the cost analysis, the team had decided, after discussion, that ''we could manage'' starting up and running these two additional machines with the same number of people.

maintenance work.[57] Page 11 states that 240 ''is what we felt would be needed to run the mill to start with. The 207 number after the third year is realistic, provided present rate of spending on old obsolete equipment, MCC rooms, etc. is continued.'' Parnell initially testified that he did not believe he gave page 11 to Perkins, and then testified that Parnell could not recall giving page 11 to Perkins. Perkins testified, in effect, that he received this page from Parnell. Perkins further testified that he had expected to use this page in answering questions from the Unions on June 11 about Respondent's subcontracting proposal, but that he did not so use it because the Unions asked no questions (cf. infra, fn. 65),[58] like pages 7 and 8, and notwithstanding management's testimony that Parnell and the other members of the cost-study team were told (on the Saturday they conferred) to assume the number one paper machine and its associated boiler would be operating, these machines are not included in the machine list set forth in the manning table on page 1. For this reason, in view of Parnell's demeanor in seeking to explain why page 11 fails to reflect this assumption, and in view of the inconsistencies between Parnell's and Perkins' testimony about the instructions by Perkins which allegedly caused Parnell to create page 11, I am inclined to think that it was created at about the same time (May 8) as pages 7 and 8, and some days before pages 1 through 6. However, this matter does not affect my legal conclusions here.

H. *Events Between May 25 and July 13, 1987*

1. Making the man camp optional

The contingency contract required Respondent to defray the costs of maintaining a man camp on plant property to house BEK personnel. Respondent's costs of maintaining the man camp depended to some extent on the number of residents. Before June 1987, BEK had required all contingency-contract personal to reside in the man camp.

By letter dated May 25 to the BEK maintenance employees at the Mobile mill, BEK and Respondent stated, inter alia (emphasis in original):

> Effective Monday, June 1, living in the man camp will become optional. Employees may choose to commute to the job on a daily basis . . .
>
> . . . .
>
> For those who choose to commute . . . Travel pay will remain the same . . . . While in the mill, all food and laundry services will remain the same . . . . Your bunk *will not* be reassigned . . . . The man camp will once again become mandatory if the same situation changes for the worse, or if absenteeism or tardiness becomes [unmanageable]. The man camp *will not* be disassembled until the lockout is settled.

Melton credibly testified that the requirement that all BEK maintenance employees live in the man camp was relaxed because of the ''tranquil environment'' at the mill. He further credibly testified that some of the BEK personnel had complained about staying at the man camp for long periods of time, that Respondent had asked BEK to consider dismantling it, and that the result was the arrangement described in the May 25 letter.[59] Melton also testified that Respondent's request to end the man camp during the effective period of the contingency contract had been refused by BEK because ''We did not want the community to get involved in this program. The workers were from over a hundred miles away from the mill and we wanted the work force to stay in the mill and assist in keeping the mill operating.'' As to BEK's motives for this refusal, I do not credit his testimony, for demeanor reasons and in view of Crawford's and Perkins' credible testimony that after living in the man camp become optional, BEK was willing to permit discontinuance of the man camp if Respondent made per diem payments to BEK personnel.

About 10 to 20 percent of the BEK personnel exercised the option of traveling back and forth to work rather than staying in the man camp.

2. The May 26–27 union communications

A flier to ''Fellow Union Members'' dated May 26, 1987, under a letterhead naming the UPIU, which was signed by the joint negotiating committee and all of the Charging Locals, stated, inter alia, that Respondent had been informed ''there would be no agreement with any IP location that included take away of premium time for Sunday, take away of premium time for Christmas, and contracting out of permanent jobs.''

On May 27, 1987, the UPIU issued a press release which stated, in part:

> Pointing to record company profits and unwarranted International Paper Company demands for concessions from its hourly work force . . . UPIU President Wayne E. Glenn vowed ''to unite International Paper Company Locals and around the country in an innovative negotiating strategy in order to defeat IP's demand for concessions during the current round of bargaining.''

[57] According to Colley's testimony, in reaching such a figure the team had assumed (as did p. 11) that Respondent's prestrike maintenance payroll had consisted of 285 employees; that 15 would be in training; that 24 would be on vacation; and that 1 operator for each of the 4 shifts would be eliminated. However, the team analysis at least allegedly deducted a total of 37 employees because of setups, absentee rate, holidays, and ''CIE's'' whose work could be contracted out (see infra, part II,K); whereas p. 11 deducted only 2 because of ''supervisor set up's, jury duty, sickness, funeral leave etc.'' Colley testified that the number 2 was ''greatly less than the number we come up with'' and appeared on the document ''Just to show that you can get to 244 very easily the first year.''

[58] In view of Perkins' testimonial explanation of why he asked Parnell to prepare p. 11, in view of the probabilities of the case, and for demeanor reasons, I do not credit Perkins' testimony that he never showed this page to Vandillon, Respondent's principal spokesman at the bargaining table. In connection with such testimony, Perkins initially suggested that p. 11 contained no manning numbers other than those on the pages (1–6) already supplied to the Unions. However, he then admitted that pp. 1–6 did not include the breakdown, on p. 11, by area and GM's and IE's.

[59] Melton's testimony that Respondent had asked BEK for permission to dismantle the man camp was corroborated by Crawford and by certain parts of Perkins' testimony. In view of this portion of Perkins' testimony, and for demeanor reasons, I do not credit those portions of his testimony suggesting that Respondent had given no consideration to ending the man camp.

> Glenn emphasized that all Local Unions will continue to bargain separately with company management in order to seek a collective-bargaining agreement which best meets local conditions. He cited the industry's coordinated efforts to extract concessions from UPIU members which required the International Union to adopt an innovative response. ''We simply cannot stand by and permit International Paper Company to tackle our Local Unions one by one with their uniform demand for comprehensive concessions in overtime premium pay, subcontracting, and other benefits,'' President Glenn stated.
>
> Noting that International Paper and other industry employers have demanded that workers give up their right to overtime pay for working on Sundays, Glenn stated, ''Our members don't want to work on Sundays anyway. Sunday is a day when workers should be home with their families. If the companies don't want to pay their employees extra for working on Sundays, then they should just shut the mills down.''
>
> The innovative strategy adopted by UPIU in response to International Paper's coordinated bargaining campaign includes greater supervision by the International Union of the bargaining process in order to seek primary collective bargaining goals for all plants involved. The Union's primary goals include maintenance of current premium pay policies, not contracting out of existing permanent jobs, and a three-year contract.

The press release specifically named the Mobile, Jay, DePere, Lock Haven, and Moss Point mills.

3. The May 27, 1987 bargaining session

The next Mobile negotiating session was held on May 27, 1987. Vandillon said that as to company item 9, the heads of the affected departments (including the extruders were present at the meeting to discuss how the reductions were to be made and what effects they would have. Vandillon also gave the Unions some documentation in connection with the extruder-operation reductions contemplated by item 9. Nobody was present who supervised the maintenance employees involved in items 10 and 11. Langham said that the Unions did not agree that Respondent had the right to change its bargaining position and add items 9, 10, and 11 ''after we have reached an impasse and implemented the contract. But we won't be rude, you can say anything you want to say and we'll listen, provided you are willing to negotiate on items 1, 2, and 3.'' Vandillon said that Respondent would negotiate on all the items. Langham asked whether Respondent was willing to change its position. Vandillon said that Respondent would bargain on the items, but whether it would agree to change was subject to negotiations. Langham asked whether it was still Respondent's position to eliminate Sunday and holiday premium and ''working holidays.'' Vandillon said yes. Langham said, ''We'll listen but we demand that you negotiate on 1, 2, and 3,'' to which Vandillon replied that Respondent would look at any union proposals or counterproposals on this subject; he also expressed disagreement with the Unions' views about postimpasse changes in bargaining position.[60] Then, Langham said, ''I don't agree that you can add items and we're not interested in anything you have to say. We requested documentation and someone like these department heads speaking on your behalf won't satisfy our request for documentation.'' Vandillon said, ''You asked for documentation and we just gave you all we have with explanations and discussions.'' Langham asked whether Respondent had changed its position on Sunday premium, holiday premium, and holidays. Vandillon said no, but that Respondent was willing to bargain and to listen to any proposal or counterproposal. Langham said that the Unions had given Respondent two before the lockout. Vandillon said that these union proposals added significantly to the cost; and that adding 7 percent to all rates for employees affected by elimination of Sunday premium (who, he said, were ''just about everybody'')[61] had the effect of making every day a day with Sunday premium. Accordingly, Vandillon said, Respondent ''in effect, [had received] no counter proposal dealing with Sunday premium.''

Then, the superintendent of the pulpmill explained the pulpmill reductions contemplated by item 9. Langham said that the Unions had no questions, but that this was not a proper topic for bargaining and that the documentation provided was not sufficient and did not satisfy the union request. Vandillon said, ''If you ask for what we have and we give you all we have, how can it be insufficient?'' Dunaway said, ''We'll decide what is insufficient.'' Then, Vandillon said that Respondent had no documentation on the proposed papermill reductions in connection with Respondent's beater room proposal, but that the superintendent of finished products would explain them. After his explanation, Langham said, ''That again does not satisfy the union request.'' Vandillon asked whether there were any questions; Langham said, ''We don't have any questions.'' The complaint does not allege that Respondent violated the Act by failing to provide information in connection with company item 9 (see supra, fn. 32).

After stating that company item 10 was encompassed in company item 11 (an assertion whose accuracy is undisputed), Vandillon gave the Unions a copy of BER's proposed permanent contract, which as to straight-time hourly employees specifies a multiplier of 1.36;[62] BEK's accompanying

[60] My findings in this sentence about Langham's remarks are based on Respondent's bargaining notes and similar entries in the bargaining notes of Union Negotiator Eddie McDonald. Respondent's reply brief (Br. 127) relies on the bargaining notes of Union Negotiator Richard Thomas, which attribute to Langham, just before Vandillon's remarks about the nature of an impasse, ''We will listen but we have no questions.'' Thomas' version of such remarks makes little sense in context, whether as described by him (his immediately preceding notes attribute to Vandillon the statement ''We are willing to bargain on all items'') or as described by Respondent's negotiators and by McDonald (essentially, a statement by Vandillon that as to these items Respondent's position was unchanged).

[61] A ''media statement'' issued by UPIU President Glenn on June 16, 1987, stated that most hourly employees worked 39 out of 52 Sundays a year, as well as most holidays.

[62] The proposal describes BEK as ''a dedicated merit shop general contractor'' which has been ''responsible for introducing merit shop in many locations throughout the U.S.'' Included in the proposal is a two-page chart entitled ''Pulp and Paper Projects where BE&K was the First Merit Shop Contractor,'' and containing a list headed

May 8 transmittal letter to Respondent; and a 6-page document consisting of the first 5 pages of General Counsel's 11-page Exhibit 50 plus the BEK-created page 6 of that exhibit, which 6-page document was received in evidence of General Counsel's Exhibit 18.[63] Each of the pages (other than the cover page) of the cost-study document given to the Unions was a photocopy which included a photocopy on each page of what appears to have originally been a rubber-stamped ''Confidential''; none of the corresponding pages of General Counsel's Exhibit 50 contains such a rubber stamp.[64] Funk credibly testified that the union representatives could not understand how Respondent arrived at the numbers in the cost analysis; and that on different occasions during later meetings before August 11, 1987 (although not, so far as he could recall, during the May 27 meeting) the Unions asked questions of Respondent about the manning.[65] Although Respondent was following the practice of attaching to its bargaining notes copies of the passouts given to the Unions during the meeting in question, and the May 27 bargaining notes attach the documentation which it gave that day in connection with item 9, for reasons not directly shown by the record these notes do not attach the documentation offered in connection with item 11. The BEK proposal plus attachments is about 99 pages long, although many of the pages contain only one line and the last 10 pages consist of a list of ''small tools'' subject to certain provisions of the proposal. After Dunaway flipped through this proposal, he and Langham stated that these documents were not sufficient, were not what the Unions wanted, and did not satisfy the Union's request. Vandillon said that ''You got everything we got . . . You got it all, this is it.'' Referring to a pending unfair labor practice charge (later dismissed) that Respondent was unlawfully refusing to permit the Unions to tour the plant, Vandillon offered such tour. Langhan replied that the Unions would take the tour when Respondent satisfied the Unions' request for ground rules and furnished ''the proper documentation we have requested''; that the Unions were not in a position to discuss ground rules right now; and that they would do so when Respondent was prepared to change its position on items 1, 2, and 3. After some discussion on these items by the parties, Vandillon said that the Unions probably needed time to review the information, but that the Unions should do it with the ''utmost dispatch.'' He asserted, and Langham denied, that the Unions were stalling.

After a 35-minute caucus proposed by Langham, Vandillon told the Unions, ''We gave you what you asked for, that's all we had.'' He went on to say that be could not see how the Unions could review the information about the BEK permanent subcontract ''with a terse flip of the page''; that Respondent recognized the Unions would need some time to look at it; but that they would not need ''a heck of a long time.'' IBEW Representative Coleman said that he did not think Respondent could ''legally'' put ''this stuff on the table,'' and urged Respondent to talk about the issues. Vandillon said that the Unions presently had ''a package'' which included item 9 but not items 10 and 11, and asked whether the Unions were willing to discuss items 9 and 11. Langham said, ''Are you willing to change your position on Items 1, 2, and 3? Are you willing to talk on 1, 2, and 3?'' Further, Langham remarked to the mediator that when Respondent was ready to change its position on items 1, 2, and 3 he should call the Unions and they would be ready to bargain.[66] Vandillon asked whether the Unions were refusing to meet and bargain unless Respondent changed its position on items 1, 2, and 3. Langham said that the Unions were not refusing to meet, and were prepared to bargain ''on all items. Not only at Mobile but all other mills. We are specifically talking about Mobile Mill.'' Vandillon said, ''Pooled voting?'' Dunaway said, ''Whatever. we are specifically talking about Mobile Mill.'' Vandillon said that Respondent had seen no counterproposals on items 1, 2, and 3. Langham said, ''Have you agreed to change your position on 1, 2, and 3? I don't have anything else to talk about. When [you] are willing to change [your] position on items 1, 2, 3, we'll negotiate.''[67] Vandillon said, ''Are you refusing to bargain on 9 and 11? We are unwilling to agree on anything we've seen on those items inferentially, referring to items 1, 2, and 3] . . . . Let me just say that I want you guys to know that you asked for documentation on Items 9 and 11 and we gave you exactly what we had. Obviously, this is just another one of those stalling, delaying things . . . . By responding to your request he gave you a document. But you keep fooling around and continue to drag. If you keep fooling around and won't deal with Items 9 and 11, we're not going to have any recourse but to implement it at some time.'' UPIU Vice President Langham said that Respondent was ''threatening this bargaining unit and this international union'' and said that when Respondent was willing to change its position on items 1, 2, and 3, ''we'll be ready to sit down and talk about the other items.'' Vandillon said, ''Let's talk about 9 and 10.'' Langham said, ''we are asking and demanding that you

''Client.'' A column headed ''Remarks'' contains such entries as ''Picketing'' and ''Organizing Attempts.''

[63] The pages of the document (G.C. Exh. 18) received by the Unions bear no numbers, and were given to the Unions in an order different from the order in which they appear in G.C. Exh. 50. Neither the Unions nor the General Counsel contends that the change in the order of the pages tended to alter or confuse the meaning or implications of these six pages; nor do I see any basis for any such contention. The changes in the order are summarized below; it should be noted that the cover page of G.C. Exh. 50 is unnumbered and, at the hearing, the cover page of G.C. Exh. 18 was assigned page number 1.

Finally Assigned Page No. in Exh. 50	*Page No. in G.C. Exh. 18*
Cover Page	1
1	7
2	6
3	4
4	5
5	3
6	2

[64] However, the cover page of both documents contains a typewritten ''Confidential.'' Although both cover pages contain the same entries, their location on the page shows that the cover page of G.C. Exh. 18 is not a photocopy of the cover page of G.C. Exh. 50.

[65] In so finding, I am aware that none of the bargaining notes shows that such questions were asked before August 11, 1987. However, as to the July 16 session, Funk's testimony in this respect is uncontradicted; cf. supra, fn. 18. To the extent that Funk's testimony may differ from Perkins' testimony as to the June 11 session, for demeanor reasons I credit Funk.

[66] My finding in this sentence is based on a composite of Respondent's and McDonald's bargaining notes.

[67] The last quoted sentence is from Union Negotiator Allen Sanders' bargaining notes.

change your position on 1, 2, and 3. And that our people continue to work and you not lock us out. Don't threaten me any more.'' Vandillon said that item 11 was not part of the voting package.

4. Remarks to UPIU Local 2650 President Funk by Manager of Industrial Relations Fayard

Diane Fayard was one of Respondent's representatives at all of the bargaining sessions on and after May 8, 1987, during a period when she was manager of industrial relations and, in that capacity, assisted in mill management with preparation and negotiations, was the company advocate for arbitration hearings, and was responsible for directing and insuring compliance with labor relations policies and procedures, including proper administration of the labor agreement and its supplements. On a date between May 27 and June 11, 1987, Fayard, who admittedly had authority to speak for Respondent in this connection, told UPIU Local 2650 President Funk that she had been hearing rumors that ''folks'' thought item 11 was in the voting package. Fayard went on to say that Funk should know that item 11 was not a part of the voting package at that time, and that of the employees voted on the existing package ''now, the maintenance people still have their jobs.'' In connection with the May 21 bargaining session, Funk testified that Respondent's action in making particular May 8 proposals ''a part of [Respondent's] voting package'' meant that an employee vote for an agreement meant an employee vote to accept those proposals.

5. The May 27, 1987 memorandum regarding reduction in the multiplier; other events prior to the June 11, 1987 bargaining session

As previously noted, Perkins and Patrick testified to conversations with BEK that it would cut the multiplier if Respondent would execute a permanent maintenance arrangement. On June 5, 1987, Respondent received from BEK a letter (dated May 27) which memorialized BEK's agreement to reduce the straight-time multiplier under the contingency contract from 1.88 to 1.72 effective May 18, 1987, and to reduce it to 1.6 effective June 1, 1987. A memorandum dated May 27, 1987, from Jim Hodges of BEK to John Piacentino, Respondent's manager of financial controls, with courtesy copies to Crawford among others, shows a change in billing rates under the contingency contract, effective the week ending May 24, 1987, ''per an agreement between our respective corporate offices. The new agreement results in a substantial savings to International Paper over the original agreement.'' The April 1989 complaint alleges that Respondent violated Section 8(a)(5) and (1) by failing to provide the Unions with this May 27 memorandum to Piacentino.

By letter to the employees dated May 28, 1987, Plant Manager Perkins stated, inter alia, that Respondent had interpreted the UPIU's May 21 statements about ''pool voting'' to mean that ''employees at company mills in the North most approve a Mobile Mill settlement before it can become effective, and you can return to work.'' The letter further stated that Respondent had agreed with a union which represented Respondent's 206 Gardiner mill employees to table Respondent's ''best and final offer until September 1, 1987. During the interim, the union has agreed that no strike will take place, and the company has agreed that no lockout will occur.'' The letter went on to say:

> Contract maintenance has exceeded our expectations. In fact, it has been so successful that we have proposed to the joint bargaining committee that the company have the right to temporarily or permanently contract out any and all maintenance at the mill, even after an agreement on a new labor contract has been reached.
>
> [I]f this proposal is implemented, it will mean significant cost savings for the mill. . . .

During the lockout Respondent maintained a telephone ''information line'' which played recorded statements, changed from time to time, to anyone who chose to call a particular telephone number. The information line for May 28, 1987, included a description of the events at the Gardiner mill. As of December 5, 1989, no contract had been ratified at that mill, and (so far as the record shows) no work stoppage had taken place there. Although there is no evidence that the union which represents the Gardiner employee is affiliated with the Charging Parties, the information line stated that the UPIU had targeted this mill for inclusion in its coordinated bargaining effort.

6. UPIU President Glenn's June 1, 1987 meeting

On June 1, 1987, UPIU President Glenn conducted a meeting in Hot Springs, Arkansas, of locals which represented the employees at IP's mills in Pine Bluff and Camden, Arkansas. A letter from UPIU Vice President Bradshaw to various other UPIU representatives, including Dunaway, dated September 11, 1987, stated that during the June 1 meeting, Glenn explained in detail the plan for coordinating UPIU bargaining strategy, and said that he would refuse to sign any contract with Respondent ''unless they resolved all the issues on givebacks.'' Frase, who at that time was Glenn's executive assistant but who did not attend this meeting, testified, in substance, that the give back issues—that is, those regarding premium pay—could be resolved only by an offer for something in return for premium pay.

In early 1987, Glenn approved with respect to a Champion mill (inferentially, the Canton mill) a contract which called for the elimination of Sunday premium (see infra, fn. 116). Frase testified that the considerations which led Glenn to this decision included ''input'' from the International representative and from local leadership, regarding the impact of his decision one way or the other on the local, the region, and the International.

7. The June 11, 1987 bargaining session

The parties conducted another Mobile negotiating session on June 11, 1987. Vandillon asked for the Unions' position on items 9 and 11. UPIU Representative Langham responded by asking Respondent's position on items 1, 2, and 3. Vandillon said that Respondent was unwilling to change its position, and again asked for the Unions' position on items 9 and 11. UPIU Vice President Dunaway said that because of pending union charges pertinent to these additional proposals, ''We will listen to anything you have to say, but we will not agree to Items 9 and 11.'' Vandillon stated that the parties were apparently at a stalemate on these items.

Dunaway said that the NLRB would rule whether the parties were at a stalemate. Langham said, ''We are willing to listen to anything you have to say, but we have charges with the NLRB. We are here to bargain on your original eight items, 1 through 8, and you have no changes on items 1, 2 and 3. We are demanding that you negotiate and change your position on 1, 2 and 3.'' Vandillon reaffirmed Respondent's offer of a tour. Dunaway asked whether the tour would be conducted under the same guidelines outlined before. Vandillon said that the outline was just a suggestion, and that perhaps Respondent's proposed limitation on the number of union participants was too low. Vandillon further said that Respondent had been ''picking up'' that these people thought item 11 was part of the voting package; he said that item 11 was not part of the voting package, but was only on the table for consideration. After a caucus requested by Dunaway, Langham stated:

> On May 21, 1987, the union requested that the company provide any and all documentation including studies, books, charts, records, evaluations, checks, drafts, expense vouchers, records of any kind, time studies, graphs, papers, recordings, photographs, or writings of any kind relating to the Mobile Mill which would provide a basis or justification for support of company proposal 9, 10, and 11. The union also renewed its request that it enter the mill to review all equipment and operations affected by items 9, 10 and 11.

Vandillon said that the Unions had been given all Respondent had. No attempt at correction of this statement was made by Perking, who by this time had admittedly received page 11 of General Counsel's Exhibit 50.[68] Funk testified that he knew Respondent kept maintenance logs, that he believed the Unions' request for documentation encompassed these loss, and that when Respondent asked what else the Unions wanted, ''I didn't make a reply back across the table.'' Respondent's reply brief states (Br. 73) that the Unions' May 21 request for documentation did not encompass maintenance logs, and the complaint does not allege that Respondent violated the Act by failing to provide them.

Langham said that when the NLRB had had time to rule on the unfair labor practice charges, ''we'' would be in touch with Respondent to prepare for a tour and to work out ''reasonable ground rules,'' including participation of the entire bargaining committee (at least 18 individuals). Vandillon asked Langham whether he had said that the Unions had no intention of meeting until the charges were ''reconciled.'' Langham replied that he had not said that, and that ''we are demanding'' that Respondent change position on items 1, 2, and 3. Vandillon asked for Langham's intentions on items 9 and 11. Dunaway said, ''I told you he'd listen, but we are not going to agree on 9, 10 and 11.'' The bargaining notes of Union Negotiator McDonald indicate that during the latter part of the June 11 meeting, the Unions said that until the NLRB had ruled on the legality of Respondent's adding item 9 and 11, the Unions had no need to recognize them as negotiable items and no need for a tour of the mill.

8. Respondent's June 19–July 5, 1987 public position regarding status of subcontracting proposal

Respondent's information line for June 20, 1987, stated, in part:

> Maintenance at the mill has been successfully performed by an outside contractor since the lockout began. Therefore, we have made a proposal to the joint bargaining committee that would give the company the right to temporarily or permanently contract out any and all maintenance in the future.
>
> Preliminary figures indicate contract maintenance offers Mobile Mill an opportunity to achieve very significant cost reductions, while providing the high level of maintenance reliability needed to successfully operate the mill. The right to contact out maintenance is not part of the company's current proposal. We intend to make it part of the offer, however, when discussions on the issue have been completed.

An advertisement inserted by Respondent in the Mobile Press/Register on June 19, 1987, stated, among other things, that Respondent intended to include contract maintenance in its Mobile proposal when discussions ''are complete,'' but that it was not in Respondent's package now. Such an advertisement on July 5 contained a similar message, but with the work ''cease'' in place of ''are complete.''

9. Funk's July 8, 1987 letter to Perkins

By letter to Perkins dated July 8, 1987, UPIU Local 2650 President Funk stated, inter alia (emphasis in original):

> [T]he Mobile delegation *did not* meet in an attempt to tie several locations together and shut them down simultaneously. We went to Moss Point in order to inform the Union leaders there of the concessionary demands of IP at Mobile. We never intended to strike as you have said.
>
> The Union was forced to seek help and support from other locations after you ruthlessly and unnecessarily locked us out of our jobs. This was done only as a last resort and long after you had implemented *your agreement*.
>
> . . . .
>
> On Coordinated Bargaining, can either of us, Union or Company, afford to hold out until *all* locations of Hammermill [an IP subsidiary which operates several plants, apparently including the Lock Haven plant] and DePere are in the pool?
>
> You have mentioned several times in the paper, that people at other locations, with no regard to our future may be able to determine it. It would seem logical to us that people in other locations *are* making these deci-

[68] My findings in these two sentences are based on Perkins' testimony. Perking testified that Vandillon had said ''something like'' the words set forth in the text. Perking then testified as follows:

> A. . . . [Vandillon] made a true statement. He had given them all the information that I used to make the decision to make that proposal.
>
> Q. But that wasn't what Mr. Vandillon said, was it?
>
> A. As far as I understand, that is what he said.
>
> Q. I though, he said, We have given you all we had.
>
> A. . . . My interpretation of his response is, we gave them everything they asked for. You have what we used. You have all we had.

sions, *Corporate People*, again, with no regard to our feelings or needs in Mobile.

. . . .

We still do not understand your statement about contracting out maintenance. How can you make an offer to take away our jobs? If that is a part of the offer, we reject that part now!

10. The strikes at DePere, Jay, and Lock Haven

The collective-bargaining agreements between Respondent and the UPIU at the DePere, Jay, and Lock Haven mills expired on various dates between May 31, 1987, and June 20, 1987.[69] After the expiration of these contracts, these three mills were struck on various dates between June 8 and 20, 1987. As discussed infra, part II,S,8, these strikes were called off by the UPIU in October 1988.[70]

11. The June 16–July 13, 1987 UPIU statements about coordinated bargaining; fund-raising efforts

On June 16, 1987, the UPIU issued a press release which stated, in part:

> The . . . UPIU . . . has developed an innovative bargaining strategy that will increase the strength of its locals to bargain company-wide on major contract issues during the current round of negotiations with [Respondent].
>
> . . . .
>
> The strategy is as follows:
>
> 1. Each local will continue to bargain separately with company management for an agreement which best meets local conditions.
>
> 2. The International will supervise the bargaining process in order to meek the following primary bargaining goals for [the Mobile, DePere, Jay, and Lock Haven] mills:
>
> * Prevent subcontracting of existing permanent jobs;
> * Maintain current premium (overtime) pay for Sundays and holidays.
> * Keep contract terms (length of contract) comparable to existing term.
>
> 3. Local union members at each plant will vote on their contract proposals at times designated by the individual local unions. These ballots will be held at the International headquarters until all four mills have voted. The voting results will be pooled. Acceptance of the contract by a majority of all the votes will constitute approval at any one mill.

This press release was part of a ''media kit'' which had been prepared by the Kamber Group, and which also included a ''media statement'' by Glenn and a financial analysis which purported to document the UPIU's position that there was no economic justification for IP's concessionary demands. Glenn's ''media statement'' included the following language (emphasis in original):

> At International Paper, the UPIU locals representing the primary mills negotiate on a mill-by-mill basis. There is no formal Coordinated bargaining. Yet, in a sense, the company engages in its *own* form of coordinated bargaining. In the current round of negotiations, IP's contract proposals or agendas have included virtually the *same* economic concessions for *each* mill . . . .

The ''media statement'' went on to say that the two concessions the UPIU was most worried about were the abolition of premium pay for Sunday and holiday work, and Respondent's ''insistence on subcontracting out work in order to, it claims, cut labor costs.'' Further, the ''media statement'' averred:

> Each local at the four mills . . . will continue to negotiate on local issues. The UPIU will supervise the bargaining process to ensure three (3) primary bargaining goals at all four mills . . . .
>
> When each local's membership votes on the contract proposal, the ballots will be forwarded to the International and the votes pooled. Acceptance of the contract by a majority of all the dates will constitute approval at any one mill . . . .

Also on June 16, UPIU President Glenn delivered at a press conference a prepared statement such the same as the ''media statement.'' During a subsequent question-and-answer session, Glenn stated, inter alia, that Respondent's UPIU-represented employees would be delighted if the mills would shut down on Sundays; that the UPIU was ready to negotiate, but was not willing to give up the benefits of 40 years in Mobile; and that the participation of these four mills would give a ''lot more leverage'' than would be possessed by just one mill. He went on to say that the DePere mill would not start up again until the others had settled. In response to a question about whether a local could be compelled to return from a strike when the unsettled issues were purely local in character, he said that ''we'' would ''see.'' In response to another question, he stated that he did not know how the bargaining was going to end. During a press interview later that same day or very shortly thereafter, UPIU International Representative Dan Janssen (whose jurisdiction included the DePere mill) stated that ''until we get an agreement with all four locations on these 3 issues, we will all stay out.''

On June 29, 1987, UPIU President Glenn sent, to every United States senator and representative from, and every governor of, the four States where the ''pooled'' plants were located, a letter which included the June 16 ''media kit.''

About late June or July 1987, the UPIU began to explore the possibility of stimulating Government action against the struck mills to curb perceived soil, air, and water pollution from operations by strike replacements. This UPIU activity

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[69] The IBFO was also a party to the Jay contract.

[70] Respondent's opening brief (Br. 152) states, ''Apart from the Louisville negotiations [see infra, part II,R,6], revised offers were never even made—much less voted on—at Jay, Lock Haven, and DePere after the strikes began.'' The General Counsel moves to strike this portion of Respondent's brief, on the ground that Respondent cites no portion of the record in support of this contention and the General Counsel is unaware of any (reply Br. 89). The motion to strike is denied, but Respondent's assertion in this respect will be disregarded. Cf. infra, fn. 77.

continued until at least mid-April 1988, and for an undisclosed period thereafter. See *International Paper Co. v. Town of Jay*, 928 F.2d 480 (lst Cir. 1991), affg. 736 F.S. 359 (Me. 1990).

The July 1987 issue of the Paperworker, the UPIU's ''official publication,'' quotes Glenn to the following effect, in part:

> The key issue in the struggle [at Mobile, DePere, Jay, and Lock Haven] is International Paper Co's demand that workers give up their premium pay for Sunday and holiday work . . . .
>
> As a result of a request to me by the local unions involved, we have developed a unified bargaining strategy against IP that the locals have agreed to. We have been forced to adopt this strategy because of the virtually identical economic concessions that the company is seeking at each of the mills.
>
> Some 700 UPIU members employed at the Moss Point, Miss., International Paper mill have also now voted to join the unified bargaining program. They have been working without a contract since April 1 and are facing the same concessionary demands.
>
> Under the unified bargaining program, I will supervise the contract negotiations relating to the basic issues the locals have agreed to coordinate their bargaining on. Local members' votes on their contracts will be forwarded to International Union headquarters where the votes will be pooled. Acceptance of the contract by a majority of all votes will constitute approval.

An interoffice memorandum from Glenn to his assistants dated July 14, 1987, described a plan of action ''to improve coordination,'' listing various actions or proposed actions on dates between June 15 and the end of August 1987. Some of such proposals were implemented, and some were not.

About mid-July 1987, the UPIU began to issue a series of newsletters each of which was entitled ''The Coordinated Bargainer.'' The first of these newsletters, issued between July 8 and 30, described the June 16 press conference by UPIU President Glenn at which he ''announced a unified bargaining strategy designed to maximize negotiating strength and to stop company demands for concessions.'' The newsletter stated that the facilities currently involved in the coordinated bargaining strategy were the Mobile, MOBS Point, DePere, Jay, and Lock Haven mills. The newsletter further stated (emphasis in original):

> Glenn stated that the UPIU adopted the coordinated bargaining strategy to counter [Respondent's] own form of coordinated bargaining. ''In the current round of negotiations,'' Glenn noted, ''[Respondent's] contract proposals . . . have included *virtually* the same economic concessions for each mill.'' By unifying the contract ratification process at several mills [Respondent] will be unable to implement unnecessary concessions at any one location.

This newsletter, which otherwise substantially tracks the UPIU's June 16 press release, was forwarded by Glenn to all presidents of IP locals under a cover letter dated July 13, 1987, with the request that copies be posted in ''your mill'' and/or distributed to the membership. The letter stated, inter alia, ''Under a unified bargaining strategy, five IP locals have agreed to coordinate bargaining on four key issues: premium pay, contracting out of jobs, contract length, job [retention] and in addition, we have launched an all-out campaign to take our case to the public and Wall Street.''

By letter dated July 17, 1987, to the president and financial secretary of all UPIU locals, the UPIU stated that in support of the UPIU members locked out at Mobile, and on strike at DePere, Jay, and Lock Haven, the UPIU executive board had unanimously agreed to each contribute $200 per month to the ''special strike fund,'' to ask every International representative to contribute $100 per month though May 1988, and to ask all locals to increase their monthly dues by $10 through May 1988. The letter stated that the members were determined to resist abolition of Sunday and holiday premium, ''because there is no financial justification'' for such abolition, and thanked the locals which had already voted to raise money in support of ''this cause.'' Thereafter, and until at least July 1988, the UPIU attempted to obtain funds for such purposes from these sources and from members of locals affiliated with the UPIU, the IBEW, and other unions.

I. *The July 13, 1987 Kosak-Crawford Memorandum Regarding Maintenance Manning*

On an undisclosed date prior to June 21, 1987, IP's manager of operations, Crawford, instructed BEK Site Manager Ray Kosak to let BER's manning decrease through attrition. By memorandum to Crawford dated July 13, 1987, Rosak stated that the current BEK maintenance manpower level (including supervision) was 220; and that Respondent had previously wanted that total to fall to 209 through attrition. Kodak's letter went on to say:

> Having worked under the premise for several weeks, I have noticed a trend developing which is detrimental to both I.P. and BEK's ability to effectively perform maintenance. Being in a work mode which prohibits replacement of workers who quit or are terminated, is creating a situation in which a foreman is reluctant to discharge a worker whose performance is marginal, or for tardiness, etc. At the same time, via attrition, good workers are leaving and are not being replaced with good workers. The reluctant crews are, therefore, less effective and less efficient.
>
> . . . top people are becoming more and more difficult to find, especially in the instrument and electrical crafts.

The letter stated that to correct this situation, representatives of BEK and Respondent had decided to effect a layoff to the desired manpower level (''particular names were suggested for further evaluation and layoff consideration'') and thereafter replace individuals as they were separated. Crawford eventually agreed to this arrangement. The April 1989 complaint alleges that Respondent violated Section 8(a)(5) and (1) by failing to supply this July 13 Kosak memorandum to the Unions.

J. *The July 16, 1987 Bargaining Conference; Subsequent Events Before Respondent's Execution of a Permanent Contract with BEK*

At the next Mobile negotiating session, on July 16, 1987, Vandillon stated:

> On May 21st we told you that our proposal from BE&K far exceeded our expectations and that our intent was to follow through on bargaining on Item No. 11 . . . . Since that time, you have made many requests of us for items you said were pertinent to your position. Even though we failed to see the relevance of some of those—we met the requests.

Vandillon went on to say that the Unions had been refusing to discuss item 11 on the ground that they were awaiting the disposition of the charges filed with the NLRB. Vandillon stated that those charges had been dismissed, and that as of that day Respondent was making item 11 part of the voting package.

Langham asked Respondent's position on items 1, 2, and 3; Vandillon replied that its position remained unchanged. Vandillon stated that it was Respondent's intent to contract maintenance, and that it was Respondent's responsibility to negotiate in good faith the impact and effect of such subcontracting. He asked for the Unions' position on item 11. UPIU Vice President Langham said that the Unions had appealed the dismissal of the charges, and that until that appeal had been disposed of, the Unions were taking the position that items 1, 2, and 3 were the major issues between the parties. Vandillon said that Respondent was unwilling to wait on the appeals, that it had a right to bargain on item 11, that this issue was important to both parties, and that as to item 11 the parties were deadlocked if the Unions were not going to bargain about it that day. Langham said that the Unions felt that they still had the right to wait on the appeal of the dismissal of the NLRB charges; that until the decision on the appeal, the Unions took the position that items 1, 2, and 3 were the major items standing between the parties; that the Unions did not ''agree unilaterally that [Respondent had] the right to add to [Respondent's] original proposal''; but that the Unions would ''have to listen'' to what Respondent had to say.[71] Vandillon asked whether this meant that the Unions were not going to address the subcontracting issue. Langham denied saying that the Unions would not negotiate, and said that Vandillon was ''putting words in [Langham's] mouth.''[72] He further said that he was not saying the parties were deadlocked on item 11, and that the NLRB had not ruled that Respondent had the legal right to put it on the table.

Vandillon asked what role the local committee had, and quoted portions of the letter written by Funk, chairman of the joint negotiating committee, rejecting Respondent' subcontracting proposal (see supra, part II,H,9). Langham said that he had not signed it: Funk said that he himself had. Vandillon said, ''It is our intent to contract maintenance. You need to believe that. We are as serious as a breath of air. We implore you to bargain about the impact and effect of item 11.'' Dunaway said that it was ''ridiculous'' to think that the Unions were going to agree that Respondent could contract maintenance; ''Do you think that we are going to give up 280 jobs? We want to stay alive. You're going to get us killed.'' Langham asked whether Respondent intended to move the extruder dealt with in item 9; Perkins replied no, not at this time, but Respondent was looking into it. After some discussion of insurance issues, Vandillon said, ''I must reiterate our intent is to contract maintenance. You need to have input and discuss the alternative and the impact and effects of item 11.'' Langham said that whether the Unions were willing to agree to contract maintenance was ''the silliest question a grown man could ask,'' and that ''we wouldn't agree to give up our jobs.'' Vandillon said that the parties needed to talk about what would happen to the people who would be displaced by item 11, and that Respondent intended to contract out maintenance.

The UPIU Coordinated Bargainer issued between July 17 and 19 states, inter alia, ''You are the front line soldiers fighting for paperworkers everywhere. By getting [Respondent] to stop its totally unjustified concessionary bargaining, we can stop the other companies, too.''

By letter to the locked-out employees dated July 20, 1987, Perkins stated that at the July 16 bargaining session, Respondent had made a revised proposal for a new 3-year agreement, which revision

> amends the company's May 21 voting package to include company Agenda Item 11, which gives the company the right to contract any and all maintenance at the mill on a temporary or permanent basis.
>
> BE&K . . . has performed maintenance, on a temporary basis, since the lockout began. Our excellent experience with the organization, both during the lockout and during the reconfiguration project, has proved to us that the mill can be maintained efficiently and effectively by contract maintenance.
>
> Almost two months ago, BE&K made a proposal to continue to perform the mill's maintenance on a permanent basis.[73] Our cost analysis of the proposal indicates that contract maintenance provides the mill with the opportunity to achieve very significant cost reductions, while providing the high level of maintenance reliability needed to successfully operate the mill.

At the request of the Federal Mediation and Conciliation Service, Gilliland and Oskin met on July 21, 1987, with UPIU President Glenn, UPIU Vice President Dunaway as representative of the Mobile mill, and various UPIU representatives of the Jay, Lock Haven, and DePere mills respectively. Glenn stated that Respondent had been making an acceptable level of profits and that it was wrong for Respondent to insist on the elimination of premiums; Dunaway made some contents on the subcontracting issues. Oskin said that ''we needed to make these changes as a company—as an industry serving those mills on a long-term basis.''

A radio ''spot'' broadcast by Respondent between July 22 and 26 stated, among other things, that the lockout was the

[71] The quotation is from R. Exh. 69g, which is bargaining notes produced by the Unions pursuant to subpoena but whose author is not shown by the record.

[72] See supra, fn. 71.

[73] BEK's third-draft proposal is dated May 8, 1987, about 10 weeks before Perkins' letter.

''Only way to ensure customer service and encourage ratification.''

On July 27, 1987, the UPIU issued a news release stating that on July 22, the UPIU had sent a letter to 200 securities and research analysts of the paper and forest industry, alleging that Respondent's ''concessionary demands'' were unjustified and purporting to document ''management problems of excessive overhead costs.'' The previously described Kamber media kit was attached to these letters and to the news release. The news release went on to say that the UPIU had communicated in the last several weeks with leading analysts in the paper industry about the UPIU's strikes and lockout, future IP contract expirations in 1987, and Respondent's finances. The news release claimed UPIU responsibility for a recent published securities analysis recommending that investors avoid buying IP stock because of ''unresolved labor union problems that could cause costly production loss.'' The news release further stated that the UPIU was ''supervising negotiations of its four-point coordinated bargaining agenda [including]: 1) maintain premium pay for work on Sundays and holidays; 2) prevent contracting out of existing jobs; 3) keep similar length of contract term; 4) all striking and locked out union members to return to their jobs upon conclusion of the dispute.'' The news release referred to the lockout at Mobile and the strikes at DePere, Jay, and Lock Haven.

By letter dated July 27, 1987, to the UPIU membership who worked in IP mills, UPIU President Glenn stated that by ''taking on'' IP and its demands for ''totally unjustified concessions,'' the members would help all paperworkers to stop the other paper companies from following suit. The letter gave credit to the ''determined and unified action'' of UPIU members in Mobile, Jay, DePere, and Lock Haven for specified nonconcessionary agreements at two papermills not owned by IP. Further, the letter stated, ''In the coming weeks we will expand the battle to every plant in the IP system. We will keep up its pressure on the picket lines, in the courts and legislatures of the nation and in the press. We will continue to expose [IP's] unfair, unjustified and arrogant demands.''

In late July 1987, Perkins asked Gilliland whether he had any problem with Perkins' implementing item 11. Gilliland asked why Perkins wanted to do this ''now.'' Perkins gave more than one reason, but the only one described in the record as having been then given by him was ''the possibility or the certainty of a significant reduction in the multiplier, which would translate to significantly reduced costs.''[74] Gilliland said that he would have to check with counsel. After being advised by counsel that Respondent ''could proceed,'' and because Gilliland considered this to be a matter of some significance, he advised his superior, Vice President Oskin, that the intent was to proceed. When Gilliland telephoned Perkins that counsel had advised it was all right to proceed, Perkins asked for his interpretation of the status of negotiations on this decision. Gilliland said that the parties were at impasse. Gilliland testified that Perkins wanted to proceed as quickly as possible, that Gilliland suggested that Perkins give the Unions another 10 days to 2 weeks in which to bargain, and that Perkins agreed.

Meanwhile, on July 13, Patrick tried to induce Melton to agree to reduce the multiplier in the contingency contract from 1.6 to 1.36 for straight-time hours, the figure contained in BEK's May 8 proposal for a permanent contract, effective the week beginning July 19. Melton refused. On July 21, Patrick sent Melton a letter which purported to confirm an alleged agreement by Melton (which Patrick testimonially admitted they had not reached) on July 13 to make such a reduction for straight-time hours, and to reduce the multiplier in the contingency contract to 1.13 for overtime hours (the figure contained in BEK's May 8 proposal for a permanent contract). BEK persisted in its refusal to make further reductions in the multiplier. About July 27, Perkins telephoned Patrick that Respondent had made a decision to move forward and to execute a contract on or about August 10; that Respondent and the Unions were continuing to negotiate; and that unless Perking advised Patrick otherwise, he could expect that on about August 10 Respondent would execute a contract for maintenance. Patrick asked whether he could negotiate from this posture with BEK; Perkins said yes. Thereafter, on July 27, Patrick telephoned Melton and said, ''Although I can't guarantee you that you will have a contract, I have been told that we will move forward on or about August 10 unless I am advised otherwise. And on the basis of that, I want those multipliers reduced.'' Melton said, ''On that basis, we will move those multipliers, not only for the straight time but for the premium time,'' to the levels under the proposed permanent contract. This was in fact done, at Patrick's request retroactive to July 20, 1987, and such reductions were memorialized in a letter from Melton to Patrick dated July 29, 1987. According to Patrick's testimony, Melton told them that Melton was willing to make the reductions retroactive because this was the first time that Patrick had given BEK an indication that Respondent was going to move forward with a permanent contract.[75] Patrick and Melton had no discussions about what would happen to the multiplier if IP and the Unions eventually agreed that there would not be any permanent subcontracting.

By letter to the Unions dated July 28, 1987, Perking stated that in response to a request for the Unions on May 21, ''we promptly provided you with copies of all documents and internal analyses that provided the basis for the Company's proposal''; before writing this letter, Perkins admittedly had a copy of all 11 pages of General Counsel's Exhibit 50. Perkins' letter went on to say that Respondent intended to sign on August 10 a contract with BEK to subcontract maintenance at the Mobile mill. The letter stated that Respondent would make itself available to meet with the Unions before that time to discuss any aspect of the matter. Respondent mailed to each locked-out employee a copy of this letter under a covering letter from Perkins dated July 30. The July 30 letter also expressed confidence (which turned out to be misplaced) that at the conclusion of the pending unemployment-compensation case, the locked-out employees would continue to be held ineligible for such benefits.

On July 27, 1987, Gilliland, Oskin, and Georges met with Glenn and Dunaway at Respondent's hangar in the White Plains, New York airport. Glenn talked about, inter alia, Sunday and holiday premiums and the term of the contract, but

[74] The quotation is from the testimony of Gilliland, the only witness who testified about this conversation.

[75] Melton, who testified for the General Counsel, was not asked about this alleged statement.

mostly emphasized a desire to retain Sunday premium. Georges said that Respondent ''had to respond to what was happening in our market place by making long-term reductions in the operating cost.'' After this meeting, Gilliland, Dunaway, and Glenn flew to Nashville, Tennessee, on a company plane. Gilliland said that the parties ought to let the Mobile mill out of the situation, and the parties ought to let Mobile negotiate a contract and end the lockout and let the people back to work. Glenn said that it would be impossible to do that because of the pool, that the 2300 people in the 3 struck mills were always going to outvote the 1260 people in the Mobile mill. He asked why they should agree to let the Mobile mill come back to work given the fact that some significant percentage of the strikers at each struck mill had been permanently replaced. Gilliland suggested that ''perhaps a way out of it was to count the Moss Point vote in the pool since the Moss Point negotiations had come up after the Mobile negotiations.''[76] He received no response to this suggestion. Glenn left the plane in Nashville, but Gilliland and Dunaway stayed on the plane as it headed for Mobile. During that leg of the trip, they discussed the subcontracting issues, among others. Gilliland stated that the Unions had not bargained over the issue and had made ''no proposals whatsoever.'' He suggested that the parties try to seek a middle ground on the issue. Dunaway was noncommittal.

By letter to BEK (for Melton's attention) dated July 21, 1987, ''Re: Contingency Maintenance Mobile Mill,'' Patrick stated, in part:

> Confirming our telecon of July 13, the Mobile Mill will implement, week beginning July 19, a schedule of four-12 hour shifts (Monday–Thursday) and one-8 hour shift (Friday) for a total of 56 hours. The multiplier for straight time hours worked is 1.36 and 1.13 for premium hours worked.
>
> The provision for a minimum fee of $250,000 is not applicable to this agreement unless International Paper Company terminates the agreement for other than cause. Settlement of the labor dispute is agreed as a cause to terminate without penalty to International Paper Company. Further, it is agreed that one day's notice will suffice as notification to terminate without penalty to International Paper Company.
>
> All other aspects of the present agreement remain as they are presently being administered.

A statement by UPIU President Glenn in the July 1987 issue of the UPIU's official publication, the Paperworker, described the Mobile lockout and the DePere, Jay, and Lock Haven strikes. The statement vent on to say:

> The key issue in the struggle is International Paper Co.'s demand that workers give up their premium pay for Sunday and holiday work. This demand, if agreed to . . . would result an a wage reduction from 8 to 12 percent . . . for most of the 3,400 workers.
>
> As a result of a request to me by the local unions involved, we have developed a unified bargaining strategy against IP that the locals have agreed to. We have been forced to adopt this strategy because of the virtually identical economic concessions that the company is seeking at each of the mills.
>
> Some 700 UPIU members employed at the Moss Point, Miss. International Paper mill have also now voted to join the unified bargaining program [cf. supra, fn. 76]. They have been working without a contract since April 1 and are facing the same concessionary demands.
>
> Under the unified bargaining program, I will supervise the contract negotiations relating to the basic issues the locals have agreed to coordinate their bargaining on. Local members' votes on their contracts will be forwarded to International Union headquarters. Acceptance of the contract by a majority of all votes will constitute approval.

A UPIU press release issued on August 3, 1987, announced a meeting on that date in Memphis, Tennessee, among UPIU leaders representing IP plants, ''to map out plans for expanding the union's corporate campaign against'' IP. The press release stated, in part, that ''UPIU headquarters is supervising negotiations of its four-point coordinated agenda for [the Mobile, DePere, Jay, and Lock Haven] mills. The agenda includes 1) maintain premium pay for work on Sundays and holidays; 2) prevent contracting out of existing jobs; 3) keep similar length of contract term; 4) all striking and locked out union members to return to their jobs upon conclusion of the dispute.'' The press release announced a planned demonstration in front of Respondent's Memphis headquarters, and quoted Glenn as saying, ''Our meeting and rally . . . will send an even stronger message to IP headquarters that all the employees are solid in their position that there is no economic justification for I.P.'s concessionary demands.'' The press release described IP's concessionary proposals as ''corporate arrogance of the worst kind,'' and stated that Glenn would ask union representatives to ''continue their educational campaign on I.P. mismanagement, solicit voluntary contributions for locked out/striking members, and participate in letterwriting, media and other strategy actions.'' The proposed rally did in fact take place on August 3. A ''media statement'' issued by Glenn that same day stated that as to the four issues specified in the press release, ''Our members agreed to exercise their individual rights for the collective good by pooling votes.''

The UPIU Coordinated Bargainer issued between August 6 and 16 quoted Glenn as stating, during an August 3 press conference before the Memphis meeting (emphasis in original):

> We are here to say ''*NO*'' to corporate arrogance; we're here to say ''*no*'' to concession demands; and we're here to say that if [Respondent] needs to improve its competitive position it should cut overhead costs, not workers' paychecks . . . .
>
> More that 98% of our members continue to hold the line against unjust concessions . . . every UPIU [member] in the IP system closes ranks behind our front-line soldiers.

Also on August 3, the UPIU tried to make available to television and radio stations a 90-second tape which stated that in the UPIU's view, there was no economic justification for

[76] The Moss Point unit, consisting of 870 employees of whom about 700 were union members, had ratified on March 31, 1987, an agreement reached at the bargaining table.

IP's demands. After the resolution of some technical difficulties in preparing this tape, it was beamed by satellite to the television and radio stations which wanted to pick it up.

The August 1987 issue of the Paperworker described a UPIU letter to securities and research analysts, stated that some of them later discouraged investment in IP stock, quoted certain portions of Glenn's August 3 ''media statement,'' and described the August 3 Memphis demonstration as involving picketing and chanting of slogans, including ''Enough is enough.'' Glenn was quoted as telling newspaper reporters, ''We are here to say '*NO*' to corporate arrogance; '*NO*' to unjustified concession demands; '*NO*' to bloated overhead; and to let the company know that we stand behind our locked out and striking brothers and sisters'' emphasis in original). The Paperworker further stated, ''[M]embers agreed to coordinate bargaining on'' the issues described in the August 3 press release and media statement.

On August 5, 1987, Respondent dropped its proposal at the Jay mill to permanently subcontract all maintenance work.[77] By memorandum dated August 10, Oskin advised Respondent's managers that Respondent had taken this action ''in an effort to achieve a ratification by the striking employees. It was felt that other solutions to the maintenance cost problem exist at [Jay], since the mill does not have multicraft, and that we can achieve savings through greater flexibility that may equal or exceed the proposed savings through subcontracting.''[78] Perkins received this memorandum the following week, and distributed it to his ''lead team.''

A letter dated August 6, 1987, under the letterhead of and signed by the joint bargaining committee for all the Unions, advised the membership, in part, that at the August 3 Memphis meeting of UPIU affiliates which contracted with Respondent,

> Wayne E. Glenn addressed the situation at Mobile, Lock Haven, DePere, and Jay, saying ''The pool will get deeper and wider; it won't dry up.'' As even more contracts expire [Respondent] just realize *we are united*! The solidarity and support expressed by our fellow members at Memphis gives us much confidence that thru our joint efforts we can overcome the unnecessary concessionary demands by [Respondent]. [Emphasis in original.]

K. *The ICS Documents*

Among the tasks traditionally performed by the instrument electricians (IEs) in the bargaining unit is field instrumentation work. About late 1985, Respondent installed some equipment, referred to in the record as ROLM or ROM equipment, which replaced individual field instrumentation devices over which the IBEW had jurisdiction. Respondent initially assigned the repair and maintenance of this equipment, which work is referred to in the record as ''ICS II work,'' to personnel employed by Instrument Control Services (ICS), a group which performs maintenance work and construction work for companies in the instrument and electronics field, including computers. Later, Respondent assigned the work of maintaining and repairing the ROLM system to its own engineers, who were not in the bargaining unit.

In August 1986, Respondent (through Perkins) and the IBEW entered into an agreement under which, ''during the period of this agreement,'' Respondent undertook to train a limited number of IEs, to be selected by it, in maintaining and repairing the ROLM equipment. Page 2 of this agreement states that the work rules negotiated under ''this agreement [supersede] any existing rules, past practice, grievance settlements, or language in the Labor Agreement or 'A report to our employees' which are in conflict with them . . . . Layoffs that may occur, either temporary or permanent, will be handled under the current labor agreement . . . no grievance concerning computer equipment maintenance and repair or other provisions of this agreement will be filed during the period of this agreement.'' Perkins testified that he and the IBEW agreed that when this training was completed, the people who were the trainees would be members of the bargaining unit. In view of this testimony and the quoted language of the agreement, I infer an agreement that employees who were covered by the 1983–1987 bargaining agreement before beginning their training under the August 1986 agreement would continue to be covered by the 1983–1987 bargaining agreement during their training and after they started to perform the work they were being trained for; and that the 1983–1987 bargaining agreement and the August 1986 IBEW agreement were coterminous.[79] The August 1986

[77] Such a proposal was initially made about late April 1987, and then dropped, by Respondent before the strike began at the Jay mill on June 16, 1987. Gilliland testified that before he was telephoned by Perkins in early May about proposing permanent subcontracting at Mobile, Gilliland was told by the Jay mill manager that he wanted to make such a proposal in order to save money, and Gilliland told him to go ahead. During the Jay strike, BEK performed maintenance work at the Jay mill. The Jay proposal dropped by Respondent in August 1987 had been tendered after the strike began but on a date not clear in the record. A maintenance contract proposal submitted to Respondent by BEK for the Jay mill under a cover letter dated June 19, 1987, stipulated a 3-year term, but Patrick testified that it may have been a proposal for a contingency contract.

[78] The record contains no explication for Oskin's opinion in this respect. A proposal advanced by Respondent to the Unions at Mobile in April 1988 states that in recent years the parties had attempted to deal with high maintenance costs and the level of manning ''By agreeing upon new, more efficient manning systems such as multicraft.'' BEK's May 1987 proposal for a permanent subcontract at Mobile had included a proposal for in-plant training to upgrade single-craft mechanics to multicraft status. As discussed infra, part II,L, such a BEK program caused some problems when the maintenance work was permanently subcontracted; all BEK mechanics were hired as single-craft mechanics. Gilliland testified that the decision was reached at Jay not to enter into a permanent subcontract with BEK because ''They reached a point in the strike where they elected to hire permanent replacements for maintenance rather than enter into a subcontract.''

[79] Respondent's opening brief (Br. 123) states that the August 1986 agreement ''specifies that in agreeing to train Union personnel to perform this computer maintenance repair] work on a 'trial' basis, the IBEW was acknowledging that that work could not be considered bargaining unit work,'' citing R. Exh. 67 without giving a page number. Particularly because of Perkins' testimony, I reject any contention that this claimed IBEW concession would be effected by the language on p. 1 that Respondent ''proposes on a trial basis the following addition to the collective bargaining agreement . . . . In making the proposal, the company makes it clear that . . . computer

Continued

agreement is referred to in the record as the ''CIE'' computer instrument electricians agreement, and the trainees are referred to as ''CIEs.'' The work for which the CIEs were being trained is referred to in the record as the ''ICS II'' work. When Respondent began the lockout in March 1987, the CIE training had been substantially completed, and the CIE's were actually performing the field instrumentation work on the ROLM equipment, but they had not yet assumed the CIE maintenance work on this equipment, which maintenance work was being performed by nonunit mill engineers on Respondent's payroll.

In early January 1987, ICS sent Respondent a proposal, received in evidence as General Counsel's Exhibit 38a, which set forth in dollars and cents what ICS would charge for maintaining and programming of Accu Ray and Measurex computer systems in the mill; this work is referred to in the record as ''ICS-I'' work. Respondent accepted this proposal later that month. The contract thus created is referred to here as the ICS-I contract. Before being contracted to ICS, the ICS-I work had been done by the vendors themselves. Unit personnel had never performed this work, and were not capable of doing so.

Shortly before Respondent locked out its Mobile employees, ICS began to perform ICS-I work pursuant to the ICS-I contract. After Respondent began the lockout, some of the ICS personnel employed under this contract did other work to keep the mill running, including bargaining-unit work. In about May 1987, Respondent had ICS provide Respondent with two additional day technicians in order to enable Respondent's own personnel to train the temporary production replacements.

When Respondent began the lockout, Respondent's own mill engineers, who had been performing the maintenance and repair of ROLM equipment located in the mill, also began or resumed the performance of that part of the ICS-II work (the ROLM field instrumentation work) which before the lockout had been taken over by the CIE's. In order to free the mill engineers for other work, Respondent about a week or two before June 1 asked ICS for a proposal to perform the ICS II work. This proposal, introduced into evidence as General Counsel's Exhibit 38b, was received by Respondent a day or two after June 1; and resulted in the execution on June 15, 1987, of a contract between Respondent and ICS, received into evidence as General Counsel's Exhibit 38c, for the performance of the ICS-II work. The contract was terminable at will, although funds were initially committed for a 3-month period. Patrick testified that he substituted the ''terminable-at-will'' provisions for the duration provisions in the proposal from ICS because, when this ICS contract was executed, Respondent was still under a contingency contract with BEK and, therefore, could not permanently subcontract the CIE work. IBEW Local 1315 President Lynch credible testified to the belief that the June 1987 contract with ICS (which he did not see until at least October 1988) could have been intended to cover all maintenance work within the IBEW's jurisdiction. After inspecting a June 1987 purchase requisition making ICS as vendor, Parnell testified that the agreed-on rates under the June 1987 ICS-II contract were $44,292 a month—that is, $531,504 a year.

Before August 1987, Louis C. Walker was Respondent's manager of operations, who is responsible for maintenance and production at the mill and is something akin to an assistant mill manager. Respondent's reply brief states (Br. 75), ''It is . . . to be expected that in deciding the vital question of whether to permanently subcontract, Perkins would turn to and consult with those high-level management people . . . in a position to assess all aspects of that issue—namely, Assistant Mill Manager Walker . . . .'' Because the ICSII contract was a high-cost contract, on an undisclosed date prior to August 5, 1987, Walker directed Parnell to request proposals from ICS which would lead to a lower cost for performing the ICS II work. On August 5, 1987, an ICS representative met with Parnell, his immediate subordinate David Hayes (Respondent's supervisor of technical services), and Respondent's manager of purchasing stores. No BEK representative attended the conference; Parnell testified that at this point, because of ICS' perceived superior expertise, Respondent was not considering having BEK handle this work; ''We had earlier on decided that we would have ICS handle the work, back when the decision was made to contract maintenance.'' What appears to be Hayes' notes during this conference state (inter alia; emphasis in original), ''*Asked for quote by Thurs. 8/6 P.M. NO Reference to 'Lockout,' 'CIE,' etc. Reference temporary or on an annual basis. As separate item, address possible consolidation of ICS I and ICS II.*'' By letter dated August 6, 1987, and received in evidence as General Counsel's Exhibit 38d, ICS offered Respondent several pricing options. For the performance of the ICS-II work only, the estimated yearly billings were about $496,000 for a 1-year contract; $492,000 for a 2-year contract; and $482,000 for a 3-year contract. In addition, the letter offered performance of both the ICS-I and the ICS-II work at an estimated yearly billing of about $491,000 for a 2-year contract, and $482,000 for a 3-year contract, plus, in each case, about $55,000 a year to cover the cost of an assistant manager; General Counsel's Exhibit 38e (see infra) states that the existing contract for ICS-I work was due to expire by its terms at the end of 1988.

A few days after Respondent received ICS' August 6 letter, Hayes prepared an analysis, received in evidence as General Counsel's Exhibit 38e, which described the work being done by the ICS-I and ICS-II groups and how they could be merged together.[80] This analysis concluded, inter alia, that ICS had erred in estimating as $496,430.20 the cost of a 1-year agreement limited to ICS II work, and estimated that cost as $423,556. Page 1 of General Counsel's Exhibit 50, which was at least allegedly prepared on May 9 and was received by the Unions on May 27, lists under ''Other costs'' of subcontracting to BEK ''ICS (CIE replacement) . . .

equipment maintenance is not now and will not be work that is exclusive to the unit . . . is and will continue to be work that may be contracted to third parties . . . is and will continue to be work that is performed by exempt employees.''

[80] Although still in Respondent's employ, Hayes did not testify. My finding as to the date of preparation is based on Parnell's initial testimony. Parnell thereafter testified that Respondent did not look at ICS' letter proposal, dated August 6, 1987, until 2 or 3 weeks after receiving it, and that Hayes' analysis was not prepared until after that. It seems unlikely that after pressing ICS on August 5 for a proposal no later than August 6, Respondent would thereafter have waited for 2 or 3 weeks before reading it. Moreover, an entry on the Hayes document which states ''Training scheduled for week of 8/17'' indicates that the document was prepared before August 17.

423,948.'' Patrick testified that Parnell developed this figure by using the hourly rates under the ICS-I agreement, ''which was a permanent agreement,'' and the projected number of people. Parnell testified that this figure was a ''ball park figure'' for the performance of the ICS-II work by subcontractors and that it was derived from the cost of the ICS-I contract. Patrick testified that when the cost analysis was prepared, ''we'' were contemplating subcontracting the CIE work on a permanent basis.

Inferentially after receiving ICS's August 6 optional proposals for a contract of at least a year's duration but any one of which would otherwise be cheaper than the June 1987 ICS-II contract, and inferentially after Hayes prepared an analysis showing an even greater saving than ICS' optional proposals suggested (see infra, fn. 81), Respondent signed on August 11, 1987, the contract with BEK calling for permanent subcontracting of maintenance work, not including, however, any of the work then being performed by ICS. Perkins testified that once that contract had been signed with BEK, (1) it was almost automatic that the ICS II work would be done by a contractor, and (2) from a business standpoint the contractor would be BEK. Perkins explained that it would make no business sense to carve out 2 or 3 percent of the total maintenance for Respondent's own employees while a contractor was responsible for all the rest of the maintenance, or for Respondent to get involved with two contractors rather than BEK alone.[81]

On October 1, 1987, Respondent extended the June 1987 ICS-II contract (G.C. Exh. 38c) for an additional 0–3 months. Patrick testified that it was decided, by someone whose identity he could not recall, to extend the June 1987 ICS contract (which he characterized as a contingency contract), rather than to sign a long-term contract with ICS, because ''We wanted unit responsibility eventually.'' After this extension, Patrick for the first time engaged in discussions with BEK and ICS about subcontracting the ICS-II work through BEK. ICS continued to perform under the extended contract with Respondent until November 2, 1987, when ICS began to perform this same work under contract to BEK. ICS' billing rates as to the working manager were the same ($1,061.60 per week) under both contracts. ICS' billing rates to BEK were lower than to Respondent as to day technician ($21.83 straight time and $30.14 overtime, as compared to $24.09 and $32.43) and shift technician ($23.20 straight time and $30.65 overtime, as compared to $24.89 and $33.49). However, Respondent had to pay BEK a 5-percent markup on these rates. Perkins testified that it was he who decided (after conferring with Gilliland ''to see if it was okay'') to subcontract the ICS-II work through BEK rather than directly through ICS. Perkins further testified that Respondent could probably have obtained some kind of cost savings by merging ICS-I and ICS-II, but that the decision to subcontract through BEK ''delayed'' the ability to effect the merger. He went on to testify, ''Possibly at a later date as things went along, we could figure out a way of doing it and getting these savings . . . . But . . . the cost of doing this work was not the driving force of getting it done. It was the quality of work and the assurance that we were going to get reliable work done.''[82]

The April 1989 complaint alleges that Respondent violated Section 8(a)(5) and (1) by failing to supply the Unions with General Counsel's Exhibits 38a through 38e.

L. *The Execution of the Permanent Subcontract with BEK on August 11, 1987*

Patrick testified that about July 27, 1987, Perkins told him that Respondent had made a decision to go forward with a permanent contract, and that Patrick could anticipate executing the contract about August 10 unless Perkins told him otherwise. Respondent's information line between July 31 and August 7 stated, inter alia, that since May 21 two negotiating sessions had been held ''for the specific purpose of bargaining over the decision to subcontract and its effects.'' This information line further stated that BEK ''has performed maintenance at the mill on a temporary basis during the lockout. Mill Manager Ken Perkins said, 'Our excellent experience with contract maintenance during this period has proven to us that the mill can be maintained efficiently and effectively in this manner.''' About August 8, Patrick reviewed BEK's proposed contract for permanent maintenance, including a provision stating, ''the parties recognize that [BEK] will incur substantial mobilization expenses. Accordingly, a minimum fee of $250 thousand will be paid to [BEK] on the effective date of this Agreement.'' Patrick testified to the belief that this payment was intended to compensate BEK for recruiting, and that it was inapplicable because BEK was already in place.[83] Although on or about August 9 Patrick asked Melton to change what Patrick testimonially described as ''two or three words that I thought were out of place [and] didn't have anything really to do with cost,'' he did not ask Melton to delete the clause calling for a $250,000 payment by Respondent on execution. Melton made the requested changes, and in consequence the permanent maintenance contract was signed on August 11, 1987, rather than on August 10, 1987, as initially planned.[84] With exceptions material here, that contract entitled BEK to retain the $250,000 mobilization fee if Respondent terminated BEK

[81] This testimony that the August 11 contract with BEK precluded a permanent contract between Respondent and ICS covering the ICS-II work leads me to conclude that Hayes completed his analysis of ICS's August 6 proposals for a permanent contract as to ICS-II work before Respondent executed the permanent contract with BEK.

[82] As previously noted, Perkins elsewhere testified that Respondent had subcontracted the ICS-II work to ICS rather than BEK because of ICS' perceived greater enterprise.

[83] However, BEK's contract proposal also provided. ''The transition period from the present escaped labor force to the trained business as usual' labor force will take place over a 3 year period . . . we would pay [subsistence] to the out-of-town workers while we are acquiring a local labor force.''

[84] The $33 million expenditures called for over the 3-year life of the contract far exceeded the commitment authority of either C. L. Collins ($5 million), who actually signed the contract on August 11, or his immediate subordinate Patrick ($1 million). However, under Respondent's practice, Collins and Patrick had authority to sign contracts which exceeded their commitment authority but included cancellation clauses (as did the BEK contract); thereafter, and before actual expenditures under the contract exceeded the signatory's commitment authority, he was expected to obtain approval from a superior with commitment authority sufficient for the life of the contract. The BEK agreement was approved by such a superior, D. I. J. Wang, on September 11, 1987. Respondent's board of directors recommended to the stockholders Wang's election to that board at the May 1988 stockholders' meeting.

within 3 years. As discussed infra, in April 1988, about 9 months after the execution of the permanent maintenance contract, Respondent asked BEK to agree to rescind that contract in order to try to avoid issuance of an NLRB complaint against Respondent. BEK agreed. As of October 17, 1989, Respondent had never paid the $250,000 mobilization fee. Patrick's letter to Melton dated July 21, 1987, purporting to confirm an agreement which had not yet been reached to reduce the straight-time multiplier under the contingency contract to the rate set forth in the permanent contract, had stated in part, that the ''provision for a minimum fee of $250,000 is not applicable to this agreement unless International Paper terminates the agreement for other than cause''; the contingency contract called for a minimum fee of $100,000. Patrick's July 21 letter had further stated that ''Settlement of the labor dispute is agreed as a cause to terminate without penalty'' to Respondent; such a provision is not included in the permanent contract, but the contingency contract was effective by its terms ''for one year, or until the cessation of the current labor dispute existing at . . . Mobile mill is resolved, at owner's option,'' with any unexhausted minimum fee creditable to BEK work at other mills. Contrary to Respondent's standard procedure of requesting bids from three companies for contract maintenance service, Respondent did not request any bids from any other companies for such service before executing the permanent maintenance contract with BEK.[85]

A letter from IP Vice President Oskin to Respondent's managers dated August 10, 1987, stated, inter alia, that the Jay strikers had largely been replaced and Respondent was taking the bargaining position that these replacements were permanent; that striker replacements at Lock Haven (with a normal complement of 700) exceeded 250 ''and hiring continues''; and that by the end of the week, DePere would have entirely replaced its striking work force. The letter further stated that Respondent ''will sign a contract today'' with BEK for ''permanent maintenance of the [Mobile] mill . . . the effects of the decision to subcontract are subject to bargaining if the union wishes to do so.''

Perkins testified that it was he who decided on August 10 or 11, in conjunction with his immediate superior (Vice President Smith) and Gilliland, that Respondent should execute, and begin to operate under, the August 11, 1987 permanent contract. He testified that he made this decision in order to save money with respect to the performance of maintenance work during the lockout (see infra, fn. 132).

Perkins testified that when Respondent and BEK executed the contingency contract on August 11, ''We knew that there would be a transition period from BE& K going from a temporary work force to a permanent work force and a lot of changes. That was something that would require two or three months.'' The parties continued to operate under some significant aspects of the contingency contract for some period thereafter. Perkins testified that during this period, BEK had to find out from its current work force who was interested in working under a permanent contract, and to test them in order to determine whether they were qualified to work as permanent employees for BEK. He further testified that on a date which he described as ''shortly after we signed the permanent contract,'' Respondent and BEK ''agreed that we thought they were being too tough on qualifying their people because they were requiring more of their people from a skills standpoint than we required. And we felt like they were rejecting good people who were doing a good job in the mill.'' Accordingly, he testified, Respondent agreed that until about January 1988 BEK could continue to pay all of its mechanics, whether single-craft or multicraft, the $12–50 hourly contingency-contract rate which the BEK permanent contract specified for multicraft mechanics only, in order ''to give [BEK] time do all the testing and to assure that a guy could, in fact, perform skillfully in three skills or three crafts as opposed to a single craft.'' Perkins further testified that after early January 1988, a BEK employee who wanted to stay as a single-craft mechanic with the idea of training later to develop the other crafts would have his pay reduced from $12.50 to $11.50 an hour; that some BEK mechanics quit in anticipation of this pay cut; and that Respondent knew that when the pay cut was actually effected, some of the remaining BEK mechanics would leave for other jobs. He went on to testify that for this reason, when the ''moratorium'' agreement was reached, some ''extra people were on the payroll.''

The man camp stayed on site until shortly after October 1, during which period Respondent continued to pay the expenses associated with the man camp, including beer, sodas, snacks, meals, and trailer rental. Crawford testified that Respondent and BEK ''understood with a permanent contract we did not have to provide the perks of a man camp in order to retain the personnel.'' Crawford further testified that in mid-August 1987 the scheduled overtime was decreased by 4 hours, and that in October 1988, the scheduled hours went to 40. Perking testified that 5 months after the permanent subcontracting agreement was signed, BEK did not have all of its permanent employees at the site; ''A lot of them had relocated, and they had hired some local people. But they still had some people who were leaving as the moratorium was coming on them, and they would actually have taken a cut in pay.'' Perkins further testified that as of January 1988, BEK had put on about 20 people for shift coverage (that is, for work on other than the day shift) because not enough BEK employees were at that time living in the Mobile area. According to a memorandum to Perkins from Respondent's maintenance expert W. R. Lecky, III, dated February 19, 1988, and received into evidence without objection or limitation, cost of the BEK maintenance personnel come from the construction industry. The memorandum further stated that too much turnover in the lubrication crew caused it to be not

[85] Patrick, who is Respondent's manager of contracted services, testified as a witness called by the General Counsel that although it is his responsibility to comply generally with policy and procedure, he did not ask for competitive bids; he did not check to see why there were no other bids on this contract; he did not know why competitive bids were not asked for; nobody told him that it would be unnecessary under the circumstances to ask for competitive bids; he made no conscious decision whether to request bids from other contractors; and he assumed from Perkins' statement that ''we were going forward'' as of a certain date, that the permanent contractor would be the contingency contractor. He gave essentially conjectural testimony, which was informed by his knowledge of Respondent's corporate culture and which he amplified when later called by Respondent as a witness, that nobody else asked for competitive bids, or told him to ask for competitive bids, because the contractor was already in place doing contingency work and would not need to go through the ''learning curve'' which would be needed by rival bidders; ''and we make judgments based on those considerations. And under those circumstances, I wouldn't competitive bid it.''

fully effective, resulting in lack of lubrication, and contained certain specific recommendations for lubrication, including ''need stabilized personnel.''[86] Crawford's notes show that at least as of early February 1988, Respondent was still having difficulties in arranging for training BEK mechanics (all of whom had hired in as single-skill mechanics) in multicraft skills. In connection with the preparation of the May 1987 cost study, Colley testified that Respondent did not want single-craft mechanics, and wanted to continue to operate with multicraft mechanics.

Gilliland testified that item 11 was implemented on August 10 or 11, as opposed to June 10 or July 10, partly because ''we wanted to allow plenty of time for bargaining,'' and partly because Respondent wanted to see the outcome of the UPIU's May 21 charge alleging, inter alia, that Respondent unlawfully locked out employees, threatened them with permanent replacement, and proposed as a mandatory subject of bargaining that the bargaining unit be changed. As previously noted, this charge was dismissed by the Regional Director on July 7, more than a month before the implementation. However, the UPIU's administrative appeal was not denied until September 30, more than 6 weeks after the implementation.[87] The denial of the appeal stated, in part

> The evidence did not establish that the Employer threatened locked out employees with permanent replacements, and its employment of temporary replacements during a lawful lockout is privileged under the Board's decision in *Harter Equipment*, 280 NLRB [597] (1986) [affd. 829 F.2d 458 (3d Cir. 1987) (*Harter I*)].
>
> Further, the Employer's [proposal], based on its experience during the lockout, to . . . subcontract all maintenance work based on a cost analysis was a mandatory subject of bargaining and did not involve a change in the scope of the unit.

M. *Events Between the Execution of the Permanent Subcontract and the Substitution of Vandillon at the Bargaining Table*

At the Unions' request, a negotiating session was held at Mobile on August 24, 1987. UPIU Vice President Langham asked whether Respondent had signed ''a contract'' with BEK to contract all maintenance work at the Mobile mill. Perkins said yes, Langham said, ''Then we request a copy of that contract.'' He gave Respondent a letter dated August 24, signed by Langham and addressed to Perkin which stated, ''In order to evaluate the Union's bargaining position, we are hereby requesting copies of all signed contracts between [Respondent] and BE & K, for contracting out [Respondent's] maintenance work.'' Then, Langham said, ''We officially request a signed copy of that contract by this letter.'' Vandillon said that the Unions already had it. Langham accurately said that all the Unions had was the BEK proposal. Vandillon said that the two documents were virtually the same (as in fact they are). According to Respondent's bargaining notes, as to the Unions' request for the permanent BEK contract, Vandillon said ''we'll see about [it]. I'll check and see what we can do with it . . . if we can comply, we'll mail it to you'' or otherwise deliver it. According to the bargaining notes received in evidence as Respondent's Exhibit 69(h), which were supplied by the Unions pursuant to subpoena and appear to be in the handwriting of UPIU Local 337 Representative Thomas, Vandillon said, ''We will get with you if we comply with the request.''

Langham asked whether Respondent's execution of the contract meant that Respondent had ''replaced maintenance.'' Vandillon said that the people had not been permanently replaced, that Respondent had contracted that portion of the work. Langham asked, ''are you saying that you do not have work for these people?'' Vandillon said, ''As it stands today, that is correct. I understand where you are coming from. The argument is that you can't replace permanently during a lockout.'' Dunaway profanely asked what the difference was. Vandillon said, ''We do not have a situation where we've hired permanent replacements on [Respondent's] payroll to perform maintenance.'' He further said that Respondent had tried to bargain about the matter for months, the parties had reached impasse, and Respondent had implemented the item. Langham asked whether, if the parties reached a settlement under items 9 and 11, the maintenance people would have a job. Vandillon replied, ''No, not under the contract.'' Langham said, ''Then I request the meeting be adjourned''; Perkins testified that Langham ''used to do that occasionally.''

The meeting nonetheless continued. UPIU Local 1940 President Howell made angry remarks about Respondent's perceived failure to appreciate the Unions' concessions before the most recent contract, perceived unduly generous treatment of persons who were performing unit work during the lockout, and perceived unpopularity in the community; and stated that Respondent's only reason for executing the permanent contract was ''we didn't shut that place down in 1983. You think you can do anything you want now.'' Then, Dunaway asked Vandillon whether Respondent was prepared to give the Unions a copy of ''the contract'' that day. Vandillon said that Respondent would try to provide it promptly. Howell asked what was going to happen to Respondent's locked-out maintenance employees. Vandillon said that Respondent had tried for 3 months to get the Unions to bargain about the impact and effect of the subcontracting, and that the Unions had refused Respondent's request. Langham said that this was a ''damned lie.'' IBEW Local 1315 President Lynch repeatedly asked whether ''maintenance jobs [had] been permanently replaced.'' Vandillon repeatedly said that the jobs had been contracted. UPIU Local 2650 President Funk said, ''How in the hell do you ever expect to get an agreement out of this now?'' Vandillon said that this had evolved over a long period of time, and that Respondent had asked the Unions time and again to discuss the impact and effect of the subcontracting. Dunaway said, ''You want us to bargain on how to replace people?'' IBEW Representative Coleman asked whether Respondent could give the Unions a yes or no on whether maintenance jobs had been permanently replaced. Vandillon

[86] Although BEK had performed the lubricating work immediately after Respondent locked out its employees, at BEK's request Respondent began performing this work with its own employees in about June 1987. This arrangement continued until September 1987, when BEK transferred to its own payroll the IP employees who had been performing the lubricating work.

[87] Absent an extension, the appeal had to be received by the General Counsel in Washington, D.C., on or before July 21, 1987. The record fails to show the date of the UPIU's appeal.

said that these questions did not lend themselves to a simple yes or no answer, that Respondent had bargained to impasse over the right to subcontract, that Respondent had told the Unions it would sign ''a contract,'' that it did sign ''a contract,'' and that Respondent had a right to contract maintenance. Langham said it was a ''lie'' that the parties had bargained to impasse. Vandillon said that BEK was performing maintenance at the mill; but, when Dunaway asked whether BEK was replacing ''our mechanics,'' Vandillon replied, ''No, they're not on our payroll. There is a difference . . . . They are not an employee of TP.''

On August 26, 1987, Respondent put on its information line, in connection with the subcontracting of maintenance, the message, inter alia, ''IP has acknowledged since the Introduction of Item 11 in May, its obligation to bargain over the subcontracting decision and its effect and impact . . . . We promptly furnished to the unions, upon request, all written documentation that we had in support of the subcontracting proposal, including the complete BE&K proposal and our internal analysis of it.''[88] On August 28, 1987, Respondent put on its information line the message that because about 280 hourly employees were involved in maintenance work in the mill, about that number of jobs would be eliminated as a result of Respondent's contract with BEK. The message further stated, in response to the question about what would happen to the maintenance employees, that ''currently, under the terms of the expired labor agreement, maintenance employees could use their applicable seniority to bump-back into base-rate jobs.''

Under a cover letter dated August 31, 1987, the Unions received from Respondent a copy of Respondent's August 11, 1987 permanent contract with BEK.

A September 2, 1987 letter from Glenn to IP strikers, after giving Labor Day greetings, expressed his intention to march with the Mobile workers. The letter further stated that 91 percent of ''our contracts'' nationwide preserved premium pay, and that he was ''confident we will continue to prevail.'' The letter further described a ''new spirit of solidarity'' involving voluntary dues assessments to assist the strikers, and concluded by saying, ''together we possess the power and strength to win.''

The UPIU Coordinated Bargainer issued about Labor Day includes an ''op ed piece'' by UPIU President Glenn which had been submitted to newspapers in states where UPIU members were on strike against Respondent. That ''piece'' expressed the belief that workers were entitled to be compensated for inability to worship or celebrate holidays with their families because Respondent had scheduled them to work on Sundays or holidays. Glenn further said, ''Throughout the negotiations, we have been ready to compromise on a lot of issues. But at some point, you can't compromise your basic beliefs.'' Similar views were expressed by Glenn in an article which appeared in a Mobile newspaper on September 9.

A Labor Day (September 7, 1987) speech in Mobile by UPIU President Glenn included the following language:

> The International Executive Board launched a corporate campaign against International Paper Company earlier this year.
>
> We have . . . adopted an innovative bargaining strategy as part of our corporate campaign. So far members of our UPIU local unions at five IP mills [Mobile, Jay, DePere, Lock Haven, and Moss Point] have . . . agreed to this unified bargaining strategy which is designed to maximize our negotiating strength.
>
> Under this program, each local is continuing to bargain separately with IP management for an agreement that best fits its local conditions. However, I have agreed to supervise the negotiations on the primary goals that the locals have agreed to coordinate on.
>
> These primary goals consist of holding onto our premium pay for Sunday and holiday work, preventing the subcontracting of existing jobs, keeping the length of the contract comparable to the existing term in each location; and protecting the jobs of all of our members who are out on strike.
>
> . . . .
>
> Under this coordinated strategy, when each local eventually votes on a contract proposal, the votes will be forwarded to headquarters and the votes pooled. Acceptance of this contract by a majority of all the votes will constitute approval at any one mill.

About mid-September 1987, as part of the UPIU's expanded corporate campaign, the UPIU sent letters to IP's customers telling them that their orders might be interrupted or delayed because of alleged production problems due to the fact that Respondent's current active work force consisted partly of replacements for strikers or locked-out employees. At about this same time, Glenn sent to the members of Respondent's board of directors letters which stated, in part, that the UPIU's ''solidarity stems from the belief that the concessions demanded by your company's management are totally unjustified by the economic reality.'' The content of these letters was summarized in the September 1987 Paperworker. At about this same time, the UPIU encouraged the membership to write to the members of the IP board of directors; a UPIU Coordinated Bargainer listed their names and addresses and provided suggestions as to what these letters should say. At about this same time, a letter from Glenn to about 200 investment analysts, for the purpose of affecting their assessment of IP's stock ranking, described alleged economic problems at IP, assertedly resulting in part from the work stoppages at Mobile, DePere, Jay, and Lock Haven. The letter concluded by saying, ''UPIU members stand ready to return to work and help International Paper regain its reputation for a quality product delivered on-time. But we refuse to accept unjustified concessions.'' Copies of this letter were attached to a UPIU press release dated September 16, 1987, which also stated that ''UPIU is supervising negotiation of its four-point coordinated bargaining agenda.'' The letters referred to in this paragraph were also described in a UPIU Coordinated Bargainer issued between August 25 and September 14, 1987, which also untruthfully alleged that during the August 24 bargaining session, Respondent had ''refused'' to tell union negotiators whether a maintenance contract had been signed with BEK.

[88] As shown supra, part II,G, management witnesses testified that the cost analysis was prepared by Respondent before it received the ''complete BE&K proposal.''

About early or mid-September 1987, the Kamber group prepared a videotape which the UPIU distributed, at least on request, throughout the fall of 1987 and, perhaps, into the spring of 1988. This videotape, which includes the 90-second tape released a few weeks earlier (see supra, part II,J), consists mostly of a speech by UPIU President Glenn. Glenn stated that the August 3 Memphis meeting decided to expand the corporate campaign to all IP mills. He further stated that the UPIU had adopted a coordinated bargaining strategy, in response to IP's unified concession demands, by pooling votes on the issues of premium pay, contracting out, contract duration approximating the duration of the expired contract at the particular location, and guaranteed return of strikers and locked-out employees; and that the International was going to ''supervise'' negotiations. He stated that IP's present bargaining policy had left IP's long-term employees at war with management; further stated that the UPIU was not backing down, but was extending it's campaign against IP; and described UPIU demonstrations against IP at its corporate headquarters in Memphis. Glenn stated that all UPIU locals had a stake in the labor disputes at the struck and locked-out mills, because if the demanded employee concessions were agreed to, IP would want similar or more concessions at other mills and other employers would then have to ask the UPIU for the same. Glenn described the dispute at the struck and locked-out mills as one of the greatest battles the UPIU had ever faced.

The UPIU Coordinated Bargainer, which issued between September 22 and October 2, 1987, stated that Respondent's concessionary demands had no economic justification, because premium pay for Sunday and holiday work was paid by a lower proportion of Respondent's mills than under UPIU contracts with other primary pulp- and papermills. Also, this issue stated that when Respondent's negotiators had ''last week'' asked the Lock Haven strikers to get out of the coordinated bargaining strategy, union negotiators asked Respondent ''to first back off their patterned [sic] bargaining.''

By letter dated September 11, 1987, to various UPIU vice presidents including Dunaway, UPIU vice president; Bradshaw stated that on June 1, Glenn had advised UPIU's Camden and Pine Bluff locals that he would ''refuse to sign any contract with IP unless they resolved all the issues on givebacks.'' About September 22, 1987, UPIII President Glenn told UPIU representatives not to sign any concessionary contracts with Respondent ''unless he knew what was out there''; and not to sign contracts eliminating Sunday premium.

Respondent's bargaining agreement with the UPIU and the IBEW with respect to the Pine Bluff mill expired by its terms on September 1, 1987. On an undisclosed date before this expiration, the Paperworkers and the UPIU/IBEW joint bargaining committee sent the Pine Bluff membership a letter urging them to reject concessionary demands in their negotiations. Under some circumstances, the UPIU's internal procedures require that an offer characterized by the employer as its best and final offer be submitted to the membership. On an undisclosed date during the first 3 weeks of September 1987, the UPIU local which represented Respondent's employees at Pine Bluff, Arkansas, conducted a membership meeting to discuss whether the membership should ratify what Respondent had characterized as Respondent's ''final offer.'' This proposal included the elimination of premium pay for Sundays (after the second year of the agreement) and holidays; in a local newspaper advertisement explaining the UPIU's position in the Pine Bluff negotiations, the UPIU had characterized the Sunday premium issue as ''the key issue in the current contract dispute.'' This membership meeting was attended by Frase (Glenn's executive assistant), UPIU Vice Presidents Dunaway, Marshall Smith, and Joe Bradshaw, and a representative from each of the four pooled locations. All of these union officials urged the Pine Bluff membership to reject Respondent's proposal. However, on September 22, 1987, the membership voted to ratify it. Thereafter, the Pine Bluff membership and local officials stated to the UPIU International headquarters that according to Respondent, unless it got a signed contract the employees could lose the ratification bonuses included in Respondent's offer. Also, UPIU President Glenn received hundreds of letters and telephone calls, mostly from ''Chamber of Commerce people in Pine Bluff,'' urging him to sign the agreement. Glenn told the plant manager that Glenn would sign the proposal if Respondent put Sunday and holiday premium back into the offer, but not otherwise. On the Paperworkers' information line for September 22, 1987, UPIU Local 265 President Bragg stated (emphasis in original) that the tentative Pine Bluff agreement contained ''the right to retain Sunday that was not offered to our members here,'' and that no labor agreement would be in existence at Pine Bluff ''due to a commitment made by Wayne Glenn to the mills at DePere, Jay, Lock Haven, and here in Mobile not to sign any contract that deals with the four items in the coordinated campaign.'' about September 24, 1987, the Mobile joint bargaining committee issued a document stating, ''Even with the vote to accept, Pine Bluff will not have a signed agreement as Wayne Glenn has said there will be no ratification by the International Union as long as the other four locations are locked out and on strike.'' Frase testified that Glenn had decided not to sign that contract because it was a concessionary contract. Shortly after the ratification vote, Gilliland telephoned Joe Bradshaw, who was the UPIU's vice president and regional director for the region which included Pine Bluff, and asked him whether he was going to execute the ratified agreement. He replied no, and gave as the reason that he was under directions from UPIU President Glenn not to sign any contract with Respondent that eliminated Sunday premium. By letter to the locked-out employees dated September 24, 1987, the joint negotiating committee at Mobile expressed disappointment with the Pine Bluff employees' acceptance of Respondent's ''first offer.'' The letter stated, however, that ''Even with the vote to accept, Pine Bluff will not have a signed agreement, as Wayne Glenn has said there will be no ratification by the International Union as long as the other four locations are locked out and on strike.'' The letter announced a forthcoming meeting on September 30, 1987, between the union representatives for the Lock Haven, DePere, Jay, Moss Point, Pine Bluff, Corinth, and Mobile mills, when ''We will attempt . . . to further coordinate our efforts.'' The Pine Bluff contract was not signed until December 2, 1988. So far as the record shows, no strike or lockout occurred.

A UPIU Coordinated Bargainer issued between September 25 and 29 stated that when the Governor of Maine asked Local 14 (which represented the employees at the Jay mill) to admit that the International and not Local 14 was in con-

trol of negotiations, a UPIU International representative replied that Local 14 would negotiate its own contract, and that ''Local 14 members only wanted to vote on an offer which dealt with the major issues: premium pay, removal of all scabs, no contracting out, and length of contract.'' A UPIU Coordinated Bargainer issued between October 3 and 6, 1987, stated that Local 14 planned ''to contact UPIU locals nationwide to bring them on-board the fight against unjustifiable concession demands.'' A UPIU Coordinated Bargainer issued between October 15 and November 13, 1987, quoted UPIU President Glenn as saying that after examining the analysts' reports and Respondent's financial statements and predictions, ''We concluded that it was insane for its union to contribute millions more in concessions while watching only the stockholders and management reap the benefits of our sacrifices.'' A statement delivered by Glenn in Lock Haven on October 8, 1987, averred that the UPIU continued to oppose the abolition of premium pay, or at least Sunday premium pay, and that as long as IP ''refuses to discuss in a meaningful way the issues that are on the table, including premium pay, the UPIU is committed to continuing its corporate campaign against the company.'' The statement averred that the UPIU intended to increase its communication with Wall Street analysts, IP customers, and IP's board of directors. Further, the statement averred that the Lock Haven, Jay, Mobile, and DePere ''brothers and sisters'' were strong and determined, and had made a commitment to fighting IP's ''corporate arrogance.'' A UPIU Coordinated Bargainer issued between October 22 and November 8, 1987, stated that an AFL–CIO convention, UPIU President Glenn had nominated Respondent and ''the professional strikebreakers'' of BEK to a ''Dishonor Roll,'' with the assertion that Respondent was demanding concessions it does not need, does not deserve, and will not get from our members.'' Similar material appeared in the November 1987 Paperworker. A UPIU Coordinated Bargainer issued between November 5 and 25, 1987, urged union members to write to members of Respondent's board of directors complaining about Respondent's proposed withdrawal of premium pay.

In the fall of 1987, Gilliland learned that during a lockout at another plant not owned by Respondent, Dunaway, without signing a bargaining agreement, had negotiated a back-to-work agreement which included a no-strike pledge for the duration of the bargaining agreement. Gilliland suggested to Dunaway that the same approach might be used at the Mobile mill. Dunaway said that it would not matter, that the Mobile employees were in the pool, and that nobody was going to come back to work until everybody came back to work.[89] Respondent never proposed at the Mobile bargaining table any sort of a no-strike/no-lockout agreement on an interim basis. On various occasions between August 27 and September 7, 1987, Respondent inserted in the Mobile Press/Register an advertisement urging an employee vote on its Mobile proposal.

[89] My findings as to this Gilliland-Dunaway conversation are based on Gilliland's uncontradicted testimony; laying to one side Dunaway's retirement, his failure to testify is unexplained. I do not regard the at least arguable illogicality of Dunaway's remarks as sufficient to warrant a finding that they were never made.

N. *The October 26, 1987 Bargaining Session*

As previously noted, item 9 as proposed by Respondent on May 8 included a proposed reduction in the manning of the extruder. By letter to the Unions dated October 6, 1987, Mobile Mill Manager Perkins stated that Respondent was proposing to relocate the extruder from the Mobile mill to Respondent's Jackson, Tennessee packaging facility. The letter stated that Respondent was available to discuss the proposal, and requested the Unions to arrange for a meeting in the near future if they wished to discuss the proposal because Respondent would like to implement it in the near future. After receiving this letter, the Unions requested a meeting, which was held on October 26, 1987. Because of a heart attack, Director of Human Resources Vandillon, who did most of the talking for Respondent though the bargaining session of August 24, 1987, participated in no further bargaining sessions. At the October 26 bargaining session, Respondent was represented for the first time by, inter alia, Gilliland and Schneider; Schneider represented Respondent at all subsequent Mobile mill bargaining sessions through October 1988, and on January 1, 1988, succeeded Vandillon as manager of human resources at that mill.[90]

UPIU Vice President Langham stated that that Unions wanted to talk about the relocation of the extruder, how items 9 and 11 had been added, and about the contracting of maintenance. Langham further stated, ''The main thing is we are here to reach some kind of settlement . . . . That is the reason for the request for the meeting. We understand that the Company is concerned with the pooled voting matter. About what's happened in Maine and Wisconsin and Pennsylvania, but what's happened in Mobile is our responsibility. We want to talk about the issues in Mobile.'' IBEW Vice President Coleman said that he agreed with Langham, that ''we are here to negotiate,'' and that ''we need to address the issues here in Mobile.'' Referring to the recent settlement of a labor dispute not involving the Unions, Langham remarked, ''If the UAW can settle for 350,000 people, we . . . sure ought to be able to settle for 1,200,'' the size of the Mobile unit. Gilliland said that he saw no reason a settlement could not be worked out, and that ''If your desire is to reach a settlement for Mobile, independent of any other, then let's do it. If the desire is to keep it tied to others, then I don't know if we can.'' Langham said that although he anticipated the questions Respondent was going to have about pooled voting, the Unions were there to negotiate for Mobile; that they stood on their own; that they would negotiate on their own; and that if the parties had an agreement before them, and the employees voted to accept it at Mobile, the UPIU representatives would petition UPIU President Glenn to sign it. Langham went on to say, ''First we have got to talk about Mobile and get everyone else out of our business. Irregardless [sic] of what has happened the Union [sic] was put in the position to come up with the joint alliance but irregardless [sic] we are interested in settling at Mobile.'' Gilliland said, ''I understand the business you are talking about dealing with the Mobile issues . . . . What

[90] Before January 1988, Schneider had been manager of human resources at Respondent's Moss Point mill, about 40 miles from Mobile. He had been company spokesman during negotiations, which had begun and ended in March 1987, for a new labor agreement at the Moss Point mill.

you have to understand is the difficulty in reaching a settlement at Mobile is just as much or as little as you have the ability to deal with it. We must have some assurances that it is possible for you here to ratify and sign a contract. We are wasting time if that's not the case.'' Langham said, ''I know your reluctance to reach an agreement when the International President won't sign it. But we are going to have to talk about the issues at the Mobile Mill and we can't get back into the rat race where you are going to do something and we won't accept it. We hope you are not holding a gun to our head though. If there is a question about getting out of the pool, I don't have the right to do that.'' Gilliland said, ''Up until tonight, it was difficult for me to [envision] any scenario in which Mobile Mill can ratify a contract because there are 2200 . . . people in other facilities out of work that won't vote for Mobile Mill people to go back to work.''[91] Langham said, ''I believe there is or we wouldn't have requested the meeting. I may be speaking out of school here but it was upon this committee's recommendation that the meetings were requested around at the other places. We want some discussion of the issues rather than dog eat dog.'' Gilliland said, ''I don't see how you guys are going to get yourselves out of the position you are in. Until tonight there was no way I could [envision] anything we could throw across the table that would really lead to a settlement.''[92]

Then, at the Unions' request, the parties discussed health insurance for retirees and future retirees. After that, Gilliland said, ''Let me mention one other thing in a positive light. At some time we will settle this labor dispute and . . . some issues . . . have to be resolved centered around people coming back to work.'' After mentioning such problems as ascertaining who wanted to return, whether Respondent would have enough employees to man the plant, how long employees would be given to report for work, safety indoctrination, and refamiliarization, Gilliland said that these things had to be provided for before the parties could sign a contract. In addition, he said that Respondent wanted the Unions to agree to certain practices which Respondent had begun after locking out the employees and wanted to continue after ending the lockout. He went on to say that Respondent did not understand the allegations of a current UPIU charge regarding the extruder, and that Respondent had written a letter (inferentially, Perkins' October 6 letter to the Unions) stating that Respondent wanted to discuss it with the Unions and was aware of Respondent's obligations to discuss the matter with the Unions. Langham said that the extruder ''itself'' was ''not an issue. We had a legal right to file it but it won't bar us from coming to some agreement.'' Gilliland said that he understand the extruder issue had been discussed for years. Langham said that both sides knew they were bound to bargain, and ''this issue is not going to be a stumbling block.'' Gilliland asked what would happen to the maintenance people. Langham replied that there was one issue which needed to be resolved.

A UPIU Coordinated Bargainer issued about October 28 states that the resumption of Mobile negotiations on October 26 and Lock Haven negotiations on October 27 ''represents a victory in UPIU's efforts to coordinate bargaining by scheduling sessions at all sites at the same time.'' There is no claim, and no other record evidence to support such a claim, that the UPIU entertained any such purpose.

O. *The November 5, 1987 Bargaining Session*

The Mobile parties met again on November 5, 1987. After some discussions about retirees' health insurance, Perkins stated that Respondent wanted to move the extruder from Mobile to Jackson for reasons related to technological efficiency and labor costs. He went on to say that if the extruder were moved, the jobs of about 20 Mobile employees would be eliminated, and that absent any changes in the terms of the contract, these employees could bump junior base rate employees, who would be subject to layoff or reassignment. Perkins further said that efforts to make the extruder operation ''more viable'' had been going on since at least 1985, and that Respondent and UPIU Local 265 had discussed the matter as early as October 1986. Langham said that the extruder had been at the Mobile plant for 20 years, and observed that ''it is not until during the lockout that you decide to move it.'' Perkins said that the extruder operation had been marginal for the last 3 years, and that during the lockout, Respondent had been able to see alternate ways to serve its customers. Langham said, ''We still question why it came about during the lockout. People are saying it came about because they wouldn't agree to the labor agreement.'' Perking reiterated that the extruder matter had been discussed during the October 1986 local discussions. Coleman said, ''Why bring it out in the middle of a lockout? Why couldn't you wait until another time? . . . there are other economic problems that are more pressing.'' Perkins again said that the extruder operation was marginal.

Then, Langham told Gilliland that Langham's desire and ''the Union's'' desire were ''to try to reach some kind of an agreement. We want to work out a meaningful settlement at Mobile.'' Langham expressed the view that the parties were at a ''Mexican standoff,'' meaning that they were at loggerheads. Gilliland said, ''I told you the other day that we have a certain amount of [skepticism] on any proposal that we put across the table as far as ratification and signature by the International president. That is due to the pool. We are here to negotiate, we are perfectly willing to negotiate, but we are skeptical about it. Is it possible under the rules that you are operating under to reach an agreement?'' After stating that meetings involving other mills had centered on getting rid of permanent replacements for strikers, Gilliland said, ''If the fact is that you can't do anything until the others do, then the old Mississippi skepticism is coming out.'' Langham said, ''My responsibility is to represent those in Mobile, but I am responsible as well for assisting others at other locations. If we ever get into a position to reach a settlement, we're gonna have to start bargaining at some point, somewhere.'' He further said that he was the designated representative for Mobile and IBEW Vice President Coleman was involved in Mobile. Further, Respondent was told that ''we were there to negotiate for Mobile, that we could reach

[91] Both Perkins and p. 3 of Respondent's bargaining notes attributed these remarks to Gilliland, who as a witness was asked by Respondent's counsel to read such notes on that page. Although Gilliland did not deny making these remarks, he testified that ''there should be no connotation of expectation here in reading those words that all of a sudden I saw how we were going to get out of that mess because that was the furthest thing from the truth.''

[92] The quotation is from p. 4 of Respondent's bargaining notes. Gilliland was not asked about this page; see, however, supra, fn. 91.

agreement in Mobile; if we had an offer in Mobile that we had voted to accept, that we would ask our international president to sign it, and we would have an agreement in Mobile.''[93] Coleman said that if the parties sat down and talked about the problems in Mobile, ''we'll let the others take care of themselves . . . . We are as serious as we can be . . . . If we can talk about the issues then maybe we can reach an agreement.'' UPIU Vice President Dunaway, whom Langham had introduced at the outset of the meeting as ''the coordinator for IP throughout the country,'' stated:

> We can talk about the four operations. The Company was not willing to move or throw out a plan that could be acceptable in any one of these organizations. We are not here to negotiate on a nation-wide basis. Let me make that clear. I'm not just stuck here as a coordinator for four mills. We have got to start somewhere. Regardless of the pooled voting, we will negotiate on an individual basis at each one of these places. We are not going to wind up with everything that we want, nor [are] you either. We have to start somewhere. We can start here in Mobile and it is as good a place as any to start. It just doesn't seem like we are getting anywhere. We know less here of our status than we do at other places. We have to start somewhere before we ever get the pooled voting issue settled. I'm glad no one asked me what pooled voting is? Whenever they talk about pool I think of a pool full of lovely ladies in bikinis. I don't know the status of the Mobile Mill. And I don't know the status of the two hundred and eighty maintenance jobs. We're going to have to start somewhere. I can think of a lot better things that I ought to be doing. I do urge both sides to try to reach a [tentative] agreement. I'd like to get this thing settled before I retire.

Gilliland said that unless it was possible that the Mobile mill could deal with Mobile mill issues it would be difficult for the parties to reach a tentative agreement. Gilliland went on to say that the Unions had said they would not vote the same package again; that if Respondent made a change unanimously favored by all 1200 of the Mobile employees, it could nonetheless be effectively rejected by a vote of the employees at the other facilities; and that the only way of subsequently obtaining an agreement might be for Respondent to sweeten the package already acceptable to the Mobile employees. Dunaway said, ''Taking away doesn't warrant a vote.'' Langham said that in order to petition Dunaway and Glenn for approval, the Mobile bargaining committee had to have something to go to them with; and that Dunaway had said, ''[D]o what you can do, then come see me. We'll talk to Wayne Glenn and the other places.'' Coleman said that as to Gilliland's mention of ''sweetening'' the package, the real issues were the takeaways; the union committee could decide that very day to take back to the membership for a vote any company package which satisfied the committee; and the reason it had been turned down was that the committee had never been satisfied. Dunaway said that after seeking the elimination of Sunday and holiday premium, Respondent was going to propose substantial reductions in basic pay. Dunaway further said that Respondent had rejected at its Georgetown mill a UPIU proposal to reduce basic pay rates by 7-1/2 percent but retain Sunday and holiday premium, on the ground that ''we don't need that [premium] to start with.'' Langham said that further economic concessions to Respondent had no economic justification. Gilliland suggested that the parties discuss a ''productivity bonus at the end of the year. If we made a target, then a productivity bonus would be paid.'' However, he said, ''We are not interested in changing our position on Sunday premium. It seems fruitless unless those things . . . can generate a ratification and execution of a labor agreement. I don't have that assurance yet'' Langham suggested a ''profit and productivity bonus.'' Gilliland said, ''If profit was below a certain level would the wages then be cut?'' Langham said that Respondent had done that before, and that this was better than the 7-1/2-percent cut mentioned by Dunaway.[94]

[93] The quotation is from Funk's testimony, partly corroborated by Langham.

P. *Caravaning Activity*

After Respondent advanced its subcontracting proposal in mid-May 1987, some of the membership began to go to the gates of plants which were only a few hours away from Mobile (for example, Butler, Pine Hill, and Jackson, Alabama) in order to obtain money to operate the union food bank, and to speak at some of the union meetings of these plants' employees. Toward the end of November 1987, the UPIU terminated the services of its then public relations firm, the Kamber Group, and hired the public relations firm of Corporate Campaign, Inc. (CCI) for the purpose of redirecting and, perhaps, expanding the campaign against IP.

At CCI's suggestion, the Unions began about Christmas 1987 to engage in what the record refers to as caravans. Pursuant to respective predetermined itineraries, 2 or 3 groups of 6 to 20 IP employees traveled to papermills and chemical plants in various locations in order to raise money for the locked-out workers and to spread the word, at union halls or rallies, about what was happening to the locked-out workers with their permanent replacement and their contract issues. The Mobile caravans went to various locations in Georgia, Mississippi, Florida, Texas, Louisiana, Arkansas, New Hampshire, Massachusetts, Vermont, Pennsylvania, and Alabama. A March 1988 issue of the Paperworker, which on timely objection was received (as to the truth of the contents) against the Paperworkers only, describes preparation for an extension of the campaign into Ohio and West Virginia; and describes speakers sent out by the DePere locals to Illinois, Wisconsin, Michigan, and Minnesota. Mobile had two caravans consisting of 9 to 10 people; at Jay, DePere, and Lock Haven the caravans ranged in size from 10 (DePere) to 50 (Lock Haven). A purpose of some of this activity was to in-

[94] My findings as to the discussion regarding bonuses are based on Respondent's bargaining notes. Gilliland was not asked about this matter. Funk testified in October 1989 that Gilliland mentioned the possibility of a ''profit-sharing plan'' where ''if profits went up [the employees] profited; if [profits] went down, [the employees] lost.'' Schneider testified in December 1989 that the word profit sharing was not mentioned, and that Gilliland mentioned that possibility of bonuses based on productivity at the end of the contract year. To the very limited extent that these evidentiary sources may differ, I am included to accept the notes because they were closest in time to these February 1988 events; and for demeanor reasons, to accept Funk's testimony in preference to Schneider's.

duce firms to remove from their boards of directors the individuals who were also on Respondent's board of directors, unless such individuals attempted to change Respondent's labor policies.

In April 1988, the UPIU largely replaced the caravaning activity with the ''outreach'' program, which involved monitory visits by striking, locked-out, and other IP employees to employees at other IP mills. The outreach program continued in existence until at least late September 1988.

Q. *Events in December 1987*

The parties at Mobile met again on December 4, 1987. Langham said that he had ''the full authority for the UPIU and brother Coleman [who was present] has the full authority to settle the agreement for the IBEW. I am not going somewhere else for approval.'' Schneider asked, ''[A]re we going to be able to settle this issue for Mobile or are we going to have to allow the other three facilities to be involved before a settlement can be reached here?'' Langham said that ''I do have authority to settle this agreement in Mobile''; Coleman said, ''I do have the authority to settle this agreement for the IBEW.''[95] Langham and Coleman expressed doubt of the authority of Respondent's representatives who were present to settle the agreement for the Mobile mill, and expressed a desire for the presence of Gilliland or someone from ''corporate'' with a little more authority than those representing Respondent at that meeting (Schneider Perking, Fayard, and Busbee). Schneider said that Gilliland had attended the previous meeting to ''get [Schneider] up to speed, let him find out where are were in negotiations, and familiarize him with where we were, to buy some time, so to speak.'' Schneider said that the Unions would not see Gilliland there again.[96]

Schneider asked for a response to Respondent's proposal to move the extruder, whose manning was included in item 9. He further said that Respondent had no intention of dropping items 9 and 11, but that Respondent was willing to discuss making cash payments at the end of the contract if certain productivity and quality goals were achieved. Funk asked whether the parties could reach an agreement at putting the maintenance people back to work at the Mobile mill. Langham said that the Unions would change their position on items 1, 2, and 3, if Respondent would withdraw items 9 and 11. Schneider said that if the Unions would agree to items 9 and 11, Respondent was willing to discuss cash payments at the end of the contract term if certain productivity and quality goals were achieved; but that Respondent had no intention of dropping items 9 and 11. Perkins said that those ''items'' represented ''at least an 8 million dollar savings for 1988. This is a big big savings for our mill. It is too big of an item. I have no intention of dropping these items.''[97] He further stated that Respondent was totally satisfied with BEK's performance, and it was too big a cost to have in-house maintenance.[98]

A UPIU Coordinated Bargainer issued between December 5 and 14, 1987, described the December 4 meeting as ''nonproductive.'' This issue also nominated Respondent for the ''1987 Scrooge Award,'' and described Respondent's strategy as ''starve 'em out''—specifically alleging that Respondent was refusing to check off from UPIU members voluntary dues increases, to be used for benefits for locked out and striking workers, under currently effective bargaining agreements, and that Respondent had caused a low-cost shopping chain to deny locked-out employees the membership cards needed to shop there (action which the chain eventually rescinded).

The approximately 500 employees at Respondent's primary mill in Corinth, New York (also referred to in the record as the Hudson mill), are represented by the UPIU and the IBFO. A UPIU Coordinated Bargainer issued between November 5 and 20, 1987, stated that the Corinth membership had rejected an IP contract offer and ''We're proud to have you with us.'' On December 7, 1987, the Corinth employees ratified a proposed contract to succeed a contract which expired on September 30, 1987. However, Glenn refused to sign it at that time because (Frase testified) it was a concessionary contract and Glenn believed it was not in the best interests of the UPIU to sign concessionary contracts with IP. This new agreement, which eliminated holiday premium and gradually eliminated Sunday premium, was not executed until December 16, 1988. No work stoppage took place at this mill.

During the first week of December 1987, Oskin and Gilliland met with UPIU President Glenn, UPIU Vice President Dunaway as representative of the Mobile mill, and various UPIU officials as representatives of the Jay, Lock Haven, and DePere mills, respectively. By this time, Respondent had permanently replaced all the strikers in the three struck mills. The UPIU wanted the permanent replacements fired and the strikers brought back to work. Respondent refused, on the ground that the replacements had been promised permanent jobs and had endured harassment, intimidation, violence, and threats of violence in order to apply for and come to work. Dunaway said that Respondent's recent profitability made it wrong for Respondent to insist on the elimination of Sunday and holiday premiums, and also mentioned subcontracting at the Mobile mill.[99] No agreements were reached.

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[95] My finding that these remarks were made by Langham at the December 4 meeting is based on Respondent's bargaining notes. Although these notes state that Respondent's representatives at that meeting included Schneider, he testified that not until October 19, 1988, did Respondent receive any indication that Langham would sign a proposal which was ratified by the membership.

[96] The record fails to show Busbee's job title or responsibilities. As to Schneider's remarks about Gilliland, the quotation is from Funk's credible testimony.

[97] Aside from this statement and Respondent's subsequent claim that the move of the extruder would gave Respondent $400,000 annually in labor costs, the record contains no evidence as to how much savings Respondent anticipated from item 9. The cost study had estimated that the net savings due to subcontracting would be $842,000 during the first year and $5,420,000 during the second year. However, these calculations purported to compare a permanent BEK contract with performance of maintenance work by Respondent's own employees; and did not purport to take into consideration any comparison between the BEK contingency contract and the at least allegedly less expensive BEK permanent subcontract.

[98] My findings as to the December 4 meeting are based on a composite of Respondent's bargaining notes and the testimony of UPIU Local 2650 President Funk.

[99] This finding is based on the testimony of Gilliland, who, however, testified that Dunaway ''had no permanent replacement issue to deal with.''

During the first or second weekend in December 1987, Oskin and Gilliland met with Glenn and UPIU Vice President Joe Bradshaw at a hotel in Jacksonville, Florida. Glenn again said that Respondent should drop the demand for Sunday premium elimination, and expressed the concern that such elimination would spread throughout the industry. Oskin replied that Respondent had frequently stated its position on this issue and that ''like it or not, we were going to have to face the need for long-term changes in the cost structure of our company.'' Glenn also argued that Respondent should fire the permanent striker replacements and bring the strikers back.

The next bargaining session at Mobile was held on December 17, 1987. Schneider said that the parties were still apart on six issues, including items 9 and 11. As to each of these six issues, the respective parties stated that their own position remained unchanged. Langham stated that the Unions would not compromise over items 9 and 11, and Schneider stated that Respondent had no intention of dropping item 11. Schneider asked whether Respondent could assume that the Unions agreed to the move of the extruder. Langham said no, that Respondent's Camden extruder was not making any money either. Langham went on to say that even though the UPIU represented the employees at the Jackson facility, the Unions wanted to keep the extruder in Mobile and intended to file all the NLRB charges needed to accomplish that result. The Unions asked what concession they could make to keep the extruder in Mobile. Respondent said that it would ''continue to look at it.''[100] Schneider said that Respondent wanted ''to ensure that when these issues are resolved . . . and if any proposal is ratified that you will sign the agreement. Or are we still dealing with a pool?'' IPIU Vice President Langham said that he had told Respondent he had the authority, and that he was fairly certain that IBEW Representative Coleman also had such authority. Coleman remarked that items 9 and 11 had come ''after the problem . . . . That is something that you people added on later and muddied the waters up.'' He further stated that he had the authority to reach and ratify an agreement. Langham said that if he signed an agreement it would be a valid agreement (see supra, fn. 95).

Then, Respondent distributed a proposed transition agreement to cover the period immediately after Respondent ended the lockout. This proposal stated, inter alia, ''This agreement shall become effective upon notification of ratification of the new contract proposal and execution by the International Union and will continue in effect for three months from that date . . . during the period of this agreement the Company may assign work on a non-precedent setting basis for any reason to either Mill employees, both permanent employees and temporary replacements, or contractors . . . there will be no jurisdiction of work between supervisors, hourly employees, and contractors.'' In addition, the proposal called for Respondent to send employees a letter ''following ratification and execution by the International Union of the new contract proposal advising of the date and time the lockout will end and notice of return to work procedures.'' Respondent's proposal included an attachment, headed ''Return to Work Notice,'' which was to be ''strictly adhered to and there will be no recourse through the grievance procedure.'' This notice, inter alia, contemplated that some locked-out employees would not be eligible to return to work immediately after the end of the lockout, and would be permanently laid off subject to the terms of the labor agreement with respect to recall rights. Langham expressed the opinion that this proposal put ''the cart before the horse,'' that the parties needed a contract before they could reach a transition agreement, and that Respondent had given the Unions ''information just to make our people mad.'' The Unions asked why the parties needed a transition agreement when they had not reached an agreement on a contract. Respondent said that at some point in time the parties would reach agreement, and this would be the vehicle by which the employees would return to work. Langham asked what was meant by contract employees. Schneider replied that the contract employees were, basically, the BEK employees; but that some of the work was being done by ICS and some by an insulating contractor (Basic Industries). Langham asked whether Schneider's position was that they were going to remain in the plant and that item 11 stayed intact. Schneider said yes. Langham asked for Respondent's position on the maintenance people. Perkins said, ''[W]e said earlier that negotiations are very important [and] that senior employees would have bump back rights, they may have to bump back into a laborer's job. And then a junior employee would be laid off. We are willing to negotiate on Item 11.'' Langham asked how many of the unit employees would be laid off if the contractors stayed in the plant. Perkins replied that Respondent did not know, but assumed that some of them would come back. Langham said, ''Our position is and always has been that all of them will have to come back before Item 11 is removed.'' In connection with the provisions, in Respondent's proposed transition agreement, which anticipated that when Respondent ended the lockout some of the locked-out employees might assume the status of permanently laid-off employees, Langham asked who they were. Schneider replied that Respondent would not know until it received all the notifications of who was coming back. Langham asked approximately what number could come back assuming all the locked-out employees wanted to return. Schneider replied that Respondent did not intend to drop company item 11; and that if the proposal was ratified, and if the parties had not talked about what to do with the maintenance people, then in effect the number that would be laid off would be the size of the maintenance department. Langham asked whether the number of employees who were involved in the extruder and of those that were being bumped back would be added in there too. Fayard said yes, if that was in the proposal and it was accepted. Funk said that until item 11 was resolved and dropped, there would never be any harmony at the mill. Coleman said, ''We still have got a lot of negotiating to do. You talk about permanent replacements in a transition agreement, it's not in this document. We have our own ideas on 9 and 11, and we recognize your position on 9 and 11.''

Schneider testified at the hearing that when making this proposal for a transition agreement, Respondent did not believe that the lockout was coming to an end, but that Respondent made it at that time because Respondent knew it would be taking the position that the returning locked-out employees would have to ''interface'' and work side by side

[100] My findings in these two sentences are based on Funk's testimony.

with temporary employees, and knew that this was going to be a ''very big issue'' which could not be resolved in a couple of days.

At the next Mobile bargaining session, on December 21, Langham expressed the opinion that the discussion of a transition agreement was ''premature'' because no settlement agreement had been reached. The Unions then gave Respondent a counterproposal with respect to a transition agreement. This counterproposal provided, inter alia, that during the effective period of the agreement (1 month from the UPIU's execution of a new labor agreement), Respondent ''may assign work on a non-precedent setting basis to employees . . . there will be no jurisdiction of work between supervisors, hourly employees . . . . All employees who desire to do so will be scheduled to return to work . . . no later than fourteen (14) days after ratification and execution of this proposal.'' Laying to one side a provision that Respondent would not be ''penalized'' for inadvertent scheduling errors, no provisions were included as to recourse to the grievance procedure. Schneider asked whether this counterproposal would prohibit the use of contractors. Langham said that if all the Unions' represented people came back, Respondent could have all the contractors it wanted. Respondent gave the Unions a revised proposed transition agreement which shortened to 75 days the 3-month transition period called for by Respondent's initial proposal. The Unions orally stated that they would agree to a 1-month transition period, during which Respondent could assign work to supervisors and permanent employees without regard to ''jurisdiction''; but that the Unions would not agree to the use of temporary or subcontractors' employees.

R. *Events in 1988 Until the May Cancellation of the Permanent Subcontract*

1. Mobile bargaining sessions, and UPIU releases, in January 1988

On January 1, 1988, Schneider succeeded Vandillon as the manager of human resources at the Mobile mill. The parties met again on January 4, 1988. Respondent gave the Unions a revised proposed transition agreement, which called for an effective period of 75 days and was otherwise similar to the transition agreement which Respondent had proposed on December 21. The parties engaged in further discussions as to a transition agreement, although Langham remarked at one point that a discussion of this subject was ''a bit premature'' and that the Unions ''don't feel . . . we can agree to a return-to-work notice . . . until Company items 9 and 11 are resolved.'' The Unions proposed a 30-day transition period. Further, the Unions adhered to their position that the transition agreement should not include language permitting Respondent to assign work, during the transition period, to temporary replacements or contractors, and that the ''jurisdiction of work'' clause should contain no reference to contractors. During the discussion of the transition agreement, Schneider said, ''It's our position that the temporary employees and contractors, for a period of time, are to continue working during the transition period . . . we want the flexibility to utilize the temporary employees and the contract employees to work in the mill during this transition stage.'' Coleman said that Respondent should get them out as soon as possible. Schneider and Perkins agreed.

The parties also discussed, as to Respondent's October 6 proposal to move the extruder to Respondent's Jackson facility, the Unions' counterproposal that the manning of the extruder be reduced by two (as called for by the initial version of item 9) and that the extruder employees' wages be frozen. The Unions further said that they would discuss contract language in an effort to make the extruder more profitable. During the January 4 bargaining session, Respondent stated that this counterproposal was insufficient to induce Respondent to leave the extruder in Mobile, because of the monetary savings (too large to permit them to be made up for by wage cuts at Mobile) to be effected by the proposed move to the Jackson facility, which is also represented by the UPIU.

A UPIU Coordinated Bargainer issued between January 9 and 24 quotes UPIU President Glenn as stating that Respondent's recent profits showed that ''concession demands always were and still are unjustified.'' The January 1988 issue of the Paperworker acknowledged that the Jay, DePere, and Lock Haven strikers had been permanently replaced. The newspaper further stated that Respondent had operated these and the Mobile mills with the help of professional strikebreakers. The newspaper also stated:

> These are not isolated disputes. What we're up against is the beginning of an all-out assault by giant IP against our union.
>
> The leadership of UPIU is determined to prevent the company from shredding the contractual rights that the union and the membership have worked so long and hard to establish . . . as they've gotten tough so have we, and now we are embarking on a new phase of our resistance.

After urging the membership to join the ''corporate campaign'' against Respondent, the newspaper stated:

> The IP assault does not stop at these four mills. Unless we win, every other IP worker will face the same concessions and the same threat of replacement . . . . an IP victory would also encourage other employers in the paper industry to join in the attack on our members.

The charges which underlie the July 1988 complaint were filed in August and September 1987. In January 1988, at the conclusion of a Federal court hearing which involved the UPIU and was attended by both Gilliland and Dunaway, Gilliland told Dunaway that there were ways to deal with the subcontracting issue other than subcontracting all the maintenance work. Gilliland said that ''We have got'' a significant maintenance cost problem in the Mobile mill as well as a number of other mills, and that ''We could cut wages. We could look at ways to reduce the crew over time . . . . Make us a counter proposal, and let's get some discussion going over this subject.'' Dunaway replied that ''they were going to let the board take care of this issue.''

The next Mobile negotiating session was held on January 29. Respondent distributed a revised proposed transition agreement which called for a 75-day transition period (like Respondent's January 4 proposal), retained the ''no jurisdiction'' language in Respondent's prior transition proposals, and also retained the same provisions with respect to the recall rights of the locked-out-employees—that is, some of them might not be recalled, and failure to recall them would

be nongrievable. However, Respondent's January 29 proposal differed in certain respects from Respondent's January 4 proposal. Langham said that Respondent's January 29 proposed transition agreement was all right so long as the transition period was reduced to 14 days and ''our folks'' were back to work. The parties also discussed Respondent's proposed move of the extruder. Langham asked certain questions, some of which are described infra, about items 9 and 11. Respondent said that it would not remove these items, and was not interested in modifying its stand on items 1, 2, and 3.

2. Negotiations at the Camden Primary Papermill

The UPIU and the IBEW jointly represent a unit of several hundred employees in Respondent's primary papermill in Camden, Arkansas.[101] On February 12, 1988, during bargaining negotiations to replace a contract which had expired the previous month, Respondent made to the UPIU and the IBEW a proposal which Respondent characterized as its ''best offer.'' This proposal called for the gradual elimination of Sunday premium during the life of the agreement, and for the abolition of holiday premium. The president of the UPIU local at Camden criticized Respondent's offer, particularly because of the elimination of Sunday premium and the inclusion of bonuses for ratification by the local and execution by the International, and said that UPIU President Glenn would not execute that contract ''under the conditions that exist today.'' Respondent's manager of human resources for that mill, Donald R. Baggett, replied that Respondent hoped the parties would get to a point where the local would ratify the offer and urge Glenn to execute the agreement. UPIU International Representative Waylon Brown responded, ''Then all you have to do is back off of the concessions.''

A UPIU Coordinated Bargainer issued on February 27 or 28, 1988, stated, as to the rejection by the Camden employees of ''concession demands,'' ''Welcome aboard; we're glad you're on our side.'' On March 7, 1988, at a meeting attended by all the local union presidents, UPIU International Representative Brown, and IDEW International Representative Lloyd Lynch (not to be confused with IBEW Local 1315 President Roy Lynch), Baggett asked Brown if it was still the UPIU's position that it would not execute a labor agreement which eliminated Sunday premium. Brown replied that the UPIU would not execute an agreement that did not meet its objectives. Baggett asked whether one of these objectives was to not eliminate Sunday premium. Brown replied that this was correct.

A proposal by Respondent covering the Camden mill was ratified on January 30, 1989, and executed that same day. The record fails to disclose the provisions of that agreement. So far as the record shows, no strike or lockout occurred at the Camden mill.

3. The February 18, 1988 bargaining session at Mobile

Between the meetings on January 29 and February 18, 1988, Respondent prepared written responses to the questions asked by the Unions on January 29 regarding the subcontract to BEK. The record includes both the written response which was actually read by Schneider to the Unions on February 18, and an earlier draft. When the parties met again on February 18, Schneider repeated the first question put to Respondent on January 29—namely, whether company items 9 and 11 were still a company proposal or was the permanent replacement of unit employees final; and whether they had in fact been implemented. Then, Schneider read the following reply:

> As to Item 9, we told you when we made that proposal that it was based on operating practices already in effect. You were briefed in detail about those changes in the actual work area involved. We have continued to operate that way since. This subsequent experience confirms we can operate in this manner. Therefore, Item 9 is still part of the company's offer.
>
> As to item 11, as you know we have signed a maintenance contract with BE & K to provide maintenance services for the mill on a continuing basis. Since we have no intention of rescinding this contract it remains part of our proposal. You have asked whether the permanent replacement of the UPIU/IBEW represented employees is final. We have not replaced anybody—we have subcontracted maintenance work with BE & K. As to finality—we have solicited your views and proposals before we signed the maintenance contract with BE & K—we have never refused and do not refuse now to discuss any proposal you may wish to make on the subject.
>
> However, our experience with BE & K has been extremely positive—you should understand, it is not our intention to rescind that contract.

Langham thereupon asked Schneider whether the maintenance employees had been replaced by BEK, and whether the maintenance work was to be permanently done by BEK. Schneider said no. Coleman asked whether Respondent was going to have two people on each job—BEK and ''our people.'' Schneider said no.

Schneider then repeated two more questions asked by the Unions on January 29: (2) ''What savings has the Company realized in the months since signing of the contract with BE & K?'' and (3) ''What has been the cost to the Company to replace the represented employees?'' Perkins, who attended the February 18, 1988 bargaining session, testified that on an unspecified date after Respondent executed the permanent subcontract on August 11, 1987, the Unions asked Respondent for an analysis comparing Respondent's maintenance costs during the lockout under the permanent and under the temporary subcontract, and that in consequence, he arranged for the preparation of a specific analysis. At the February 18, 1988 bargaining session, Schneider orally represented to the Unions that for January 1988, BEK was maintaining the mill with 245 mechanics on a daily basis, and that ''Based upon what we've seen so far,'' Respondent thought that BEK was correct in estimating that in time, BEK could maintain the mill with fewer people than that. In addition, Respondent provided the Union with certain written passouts, including charts which (Schneider said) had been briefly reviewed by Perkins. A draft answer to these questions, which draft the General Counsel obtained pursuant to

[101] Too much smaller units at Respondent's primary papermill in Camden are represented, respectively, by the Machinists and the Plumbers, each of which signed an agreement with Respondent on March 3, 1988. The UPIU alone represents a unit of Respondent's employees at a Camden bag plant.

subpoena, stated that BEK was currently performing the maintenance work with 271 mechanics;[102] stated that an associated savings with signing of the contract with BEK had been the October 1987 elimination of the expenses of room, board, and transportation for their work force (as required by the contingency contract); and further stated, ''The cost for BE &K to provide maintenance for the mill has fluctuated on a monthly basis. Actual costs have ranged from approximately $2,000,000 per month at the beginning of the lockout to a current monthly cost of approximately $1,100,000.''[103] The passouts given to the Unions on February 18 contained no reference to BEK costs before the execution of the permanent contract. Rather, the passouts given to the Union on February 18, 1988, compared Respondent's monthly maintenance charges from BEK (including charges for supervisory personnel) for the first 5 months of the permanent BEK contract (September 1987–January 1988) with the costs of maintaining the mill with Respondent's own employees (excluding supervisors and deleting Sunday and holiday premium) during September 1986–January 1987. The Unions complained that this comparison did not constitute an answer to the question which they had asked—namely, what savings, if any, Respondent had made over the temporary contract.[104] In addition, the Unions questioned the accuracy of the representation that Respondent was using 245 maintenance employees.[105] Respondent's Exhibit 81 shows that during the last 4 weeks of January 1988, BEK nonsupervisory maintenance personnel averaged about 271 a week; that during the first 2 weeks of February, they averaged about 270 a week; that the number had exceeded 245 during each week after the week ending September 27, 1987; and that the number had averaged 261 a week during the September through January period covered by the February 18 passouts.[106] Moreover, the passouts given to the Unions contained no reference to the total number of hours worked. However, a set of documents attached to position papers submitted by Respondent's counsel to the Board in connection with the February 18 bargaining session and dated ''2/18/88,'' which are otherwise identical to the passouts in fact given to the Unions that day, set forth the number of hours worked by BEK supervisory and hourly personnel from September 1987 to January 1988 inclusive, and the number of hours worked by Respondent's own 285 hourly maintenance employees during the corresponding months in 1986–1987. These omitted figures show that during the covered period, these BEK personnel worked about 14 percent more hours than Respondent's hourly employees. As to who decided to omit these figures, Perkins testified, ''I don't recall being involved in the conscious decision not to put the hours on. Who did that I don't know.'' In reply to the Unions' question about whether Respondent would be willing to open up its financial books in order for the Unions to verify Respondent's figures, Schneider said:

> Our response is no. We have previously provided you with the data on which the company's decisions [sic] were based. If you have questions about that data, you should bring those questions to our attention.

My finding that the Unions complained that Respondent had failed to answer a question asked by them—namely, what savings, if any, Respondent had made over the temporary contract—is based on Funk's credible testimony. I do not credit Perkins' denial that the Unions made this complaint, or his related testimony that Respondent never interpreted the Unions' requests as requesting a cost comparison between the temporary and the permanent contract, for demeanor reasons, because of Perkins' testimony that he ordered such an analysis owing to a union request, and because the draft answer undisclosed to the Unions gave such a comparison. Nor do I credit Perkins' testimony that before being shown Respondent's draft response by the General Counsel during cross-examination, he had never seen it before, or, at least, had never seen some of it. I so find for demeanor reasons and because of his testimony that on an undisclosed date, he had arranged for the preparation of an analysis of this matter pursuant to a union request. Respondent's reply brief (Br. 93–94 fn. 55) states that this latter testimony by Perkins was erroneous, that he had in mind Respondent's Exhibits 79 and 80, and that he mistakenly attributed their preparation to a request by the Unions rather than (as was in fact the case) for use in the instant litigation and several months after Respondent canceled the permanent BEK contract and dropped item 11. However, although Respondent called Perkins as a witness after procuring the receipt of Respondent's Exhibits 79 and 80, he was not asked whether these were the analyses he had previously described as an analysis prepared at the Unions' request.

The Unions had asked during the previous meeting on January 29 for Respondent's position regarding maintenance employees and severance pay. Respondent replied during the February 18 meeting that in the absence of any changes in the contract, maintenance employees would be allowed to bump union base-rated employees on a seniority basis and the most junior base-rated employees would be subject to

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[102] Respondent's reply brief (Br. 95) contends that this draft was prepared some time before February 3, and relies on a ''Fax notation'' on the exhibit. The copy of this exhibit in the original exhibit folder contains no such notation. However, because Schneider attached to his oral answer as to manning the date of January 1988, and because R. Exh. 81 (see infra, fn. 106) shows that the correct figures as to every week wholly within January varied between 266 and 273, it is immaterial when the draft was prepared. The figure for the last week in January was 271. At a conference with BEK representatives on February 2, 1988, Crawford was advised that BEK was then using 281 hourly maintenance employees, as compared with the 244 set forth in the May 1987 cost study.

[103] G.C. Exh. 50, the cost study supplied to the Unions in May 1987, had projected that during the first year, assuming the mill to be manned by the permanent production employees, BEK would be paid about $10,400,000, or about $800,000 a month. The study had also estimated ''transition costs'' that year of about $6,360,000. Inclusion of these estimated costs in the estimate of BEK costs for the first year would raise them to about $16,760,000 or about $1,397,000 a month.

[104] This finding is based on Funk's testimony, which I credit for reasons summarized infra.

[105] My finding in this sentence is based on Funk's undisputed testimony. Respondent's bargaining notes fail to reflect this remark.

[106] The parties do not dispute the continued viability of the entries on R. Exh. 81 for the period beginning on June 22, 1987. Respondent's opening brief attaches as Exh. D what purports to be that exhibit with certain adjustments (Br. 52 fn. 42 of Respondent's opening brief). In accordance with the General Counsel's request (see Br. 18 fn. 9 of her reply brief), Exh. D has not been considered as a substitute for R. Exh. 81.

layoff or reassignment as the case might be. Respondent further stated that it anticipated that most, if not all, maintenance employees would have enough company seniority to remain in the mill; and that any maintenance employees who were nevertheless laid off would have to exercise their severance-pay rights and would be terminated. In response to the Unions' question as to what fringe benefits BEK employees were receiving, Schneider said that Respondent did not know.[107]

In response to the Unions' questions, ''Does the company understand that [the Unions'] membership would have continued to work and would return to work under the implemented agreement of March 10, 1987, and continue to negotiate toward reaching a permanent settlement if the company would be willing to end the lockout?,'' Schneider replied:

> The circumstances which led the company to institute the lockout in [sic] March 21, 1987, have not changed. The lockout occurred because the mill did not have a signed labor agreement and the unions' stated intentions to coordinate bargaining with other company mills [cf. supra, part II,B, infra, ''The Remedy'']. The mill still does not have a signed labor agreement and the situation has been further complicated by the unions' inclusion of the Mobile Mill in pool voting with other mills.

Langham asked whether Respondent would end the lockout if the Unions agreed to sign ''the contract that was implemented prior to March 21.'' Schneider said that if this was a question, Langham should write it down and Respondent's negotiators would get the Unions a response. Langham said, ''I didn't think you could answer it, but I wanted to ask.'' Schneider asked whether Langham's remark was a question or a proposal; he replied that it was a question.

In connection with the extruder, Schneider said that Respondent would consider leaving the extruder in Mobile if the Unions could give Respondent a proposal that addresses the approximately $402,000 savings which Respondent anticipated from the proposed move to Jackson. After some further discussion about moving the extruder, Schneider asked whether it was still the UPIU International's position that it would not sign any labor agreement that called for the elimination of Sunday premium pay. Langham said, ''I cannot answer that at this time.'' After some discussion about whether the maintenance work previously performed by unit employees was being performed solely by BEK rather than (in part) by IP supervisors and other nonunit IP personnel and by persons employed by other contractors, Lynch asked how Respondent tied together its stated intention of not breaking with BEK and not having two maintenance forces in the plant. Respondent's bargaining notes state that Schneider replied, ''We have a legal obligation to bargain. We have and will fulfill that obligation.''[108]

After a recess, Schneider asked Langham whether he had the authority to sign ''the implemented contract of March 21, 1987.'' Langham said that he could not answer that until Schneider told him whether he was willing to and could end the lockout. Schneider said, ''So you don't have the authority?'' Langham said, ''I don't know. I can't answer that until you tell me whether or not you can end the lockout. If you can, I'll petition the International president.''

After a short caucus, Langham said that the Unions ''would be agreeable to submitting the offer of March 10, 1987, to the membership for a secret-ballot vote, provided the Company would leave the four shutdown Christmas holidays and [holiday] premium play intact [and] agree to a profit sharing plan, in lieu of Sunday premium pay . . . based on productivity and profits.''[109] In response to Respondent's inquiries, the Unions said that the proposal would not include items 9 or 11, or Respondent's extruder proposal, because these had not been part of Respondent's March 10 proposal. Schneider asked whether, if this was ratified by the membership, the UPIU International would sign it. Langham said, ''We would petition the International.'' Schneider asked, ''Can you deliver?'' Langham said, ''Not at this point. I have bosses just like you have bosses. If the membership ratifies this proposal, I would recommend to my boss that we sign it or that I be allowed to sign it.'' Schneider said that he felt ''we were being jerked around.'' Langham said that the Unions felt they were being ''jerked around.'' Schneider said that Respondent would consider the Unions' proposal and get back to them.

4. Events between the February 18 and March 11 bargaining sessions at Mobile

About mid-January 1988, Respondent's technical maintenance specialist, W. R. Lecky III, was asked by Mobile management to provide a critique of the Mobile mill maintenances. A memorandum dated February 19, 1988, from Lecky to then Mobile Operations Manager Crawford, with courtesy copies to Perkins and his immediate supervisor (Vice President Smith) states, inter alia:

> Mobile Mill is presently in a lockout, utilizing temporary workers to operate the mill. They have contract maintenance performed by BE & K. Recommendations/consents are based on continuing to operate in this environment.

The memorandum further stated that ''the major problem in maintenance'' appeared to be ''Lack of maintenance and troubleshooting expertise in contract maintenance personnel since most come from the construction industry.'' The memorandum further described, as one of the ''problem areas,'' ''Difficulties due to turnover of labor force, although

[107] The General Counsel's opening brief (Br. 36 fn. 18) asserts that this was not true. Counsel relies on an attachment to BEK's May 1, 1987, reconfiguration/construction contract with Respondent, which attachment describes certain fringe benefits provided by BEK to the employees covered by that contract. It is unclear whether BEK provides these same benefits to maintenance employees. On the other hand, Respondent did not show the Unions this attachment with the suggestion that it might be inapplicable.

[108] This finding is based on Respondent's bargaining notes. The transcript of Perkins' testimony before me states that he acknowledged a statement by Schneider, ''[W]e have a legal obligation to bargain. We haven't *fulfilled that obligation*'' (emphasis added). Either the court reporter or Perkins misheard the question.

[109] Funk's testimony indicates that the Unions mistakenly believed that a profit-sharing plan was referred to when Gilliland suggested a productivity bonus on November 5, 1987.

it appears to be stabilizing in some areas''; Crawford testified that turnover among BEK maintenance employees was higher than Respondent had expected when going into the permanent contract. In addition, the memorandum stated that as to the BEK lubrication crew, ''too much turnover, not fully effective, resulting in lack of lubrication.'' The memorandum further stated that in January 1988, ''mill performance'' was ''at or near standard,'' and that forced downtime on certain paper machines and on all boilers had decreased from 1986 to 1987. Perkins testified that ''I think'' it was he who asked for Lecky's help; that because ''trouble shooting'' requires intimate knowledge of and actual experience in the particular area, it was ''very predictable that trouble shooting would be the major problem in maintenance at this point in time''; and that as to maintenance status at that time, the report as a whole was ''really . . . very positive.'' Crawford testified that it was he who asked for Lecky's help, that Crawford was ''quite happy'' when he reviewed Lecky's report, that Crawford already knew about the problem areas referred to in the report, and that it substantiated that Crawford was working in the right areas.

In about March 1988, the UPIU membership (at least) received a letter approved by the UPIU and signed by Joint Negotiating Committee Chairman Funk, and the presidents of the Jay, Lock Haven, and DePere locals, under the letterhead of all these groups. Among other things, the letter stated, ''The campaign to roll back IP's contract concessions is in high gear . . . . We intend to keep the heat on IP, to continue spreading the message of the campaign, and to build support for our struggle.''

On March 1, 1988, the expiration date of Respondent's bargaining agreement with the UPIU and IBEW as to the Natchez mill, a letter urging rejection of concessionary demands during negotiations was sent to all Natchez UPIU members under the letterhead of the Paperworkers and the UPIU/IBEW joint bargaining committee. A UPIU Coordinated Bargainer issued between March 3 and 7 stated that the Mobile, Natchez, and Camden locals had met with UPIU staff members in connection with Respondent's proposals at Natchez for elimination of premium pay for holidays and for a ''mill-wide flexibility program.'' The document urged the Natchez employees to reject such proposals in a forthcoming vote on a contract proposal to succeed the expired contract. The Natchez employees nonetheless voted, on March 9, 1988, to accept this proposal. A newsletter issued by all 5 locals under a UPIU letterhead that day stated that the Natchez mill employees had voted to accept Respondent's offer ''by only 19 votes. Wayne Glenn has instructed the representatives in that mill not to sign a concessionary contract which this was. Three years ago . . . that mill gave up Sunday and took a wage cut.''

About March 10 or 11, Gilliland telephoned King, UPIU's vice president for the Natchez region, and asked him if he intended to sign the ratified Natchez proposal. King said no. Gilliland said that because of poor operating results there, half of that plant had narrowly escaped being shut down in 1986, and said that because of the continuous operating situation at that mill, it was not a good mill to ''drag into the war.'' King replied that he could not sign if he wanted to, because his instructions were not to sign any contract with Respondent which eliminated Sunday premium.[110] Glenn refused at this time to approve the ratified Natchez agreement, which was not executed until November 13, 1988. This agreement contained no provisions for Sunday premium, which had been eliminated in 1986 during midterm negotiations, and dropped holiday premium. No strike or lockout occurred in Natchez.

About early March 1988, UPIU Vice President Joe Bradshaw, UPIU Service Representative Waylon Brown, a CIC representative, Frase, and Funk went to a UPIU-represented IP bag plant in Camden, Arkansas, to urge the workers to reject an IP proposal which sought concessions from the workers. The UPIU Coordinated Bargainer issued between March 14 and 16 hailed these employees' unanimous rejection of a proposal by Respondent which included ''demands for gate-to-gate flexibility''; the article described these employees' action as joining ''the fight against corporate greed.'' A newsletter, issued by all five locals under the UPIU's letterhead on March 9, 1988, stated that the Camden primary paper mill was ''still holding on,'' and that no further negotiations had been scheduled. As to the UPIU-represented unit at the bag plant, the newsletter expressed the hope that at Mobile, where the next negotiating session was set for March 11, Respondent was ''beginning to come to [its] senses.'' A press release issued by the UPIU locals on March 14, 1988, after describing membership rejection at the Camden primary papermill and (thereafter) the bag plant of proposals calling for ''contract concessions'' and ''givebacks,'' alleged that in 1987 Respondent had locked out its Lock Haven and Mobile employees, and forced out on strike the employees at its Jay and DePere mills; that ''the union'' had responded by a corporate campaign directed against IP and its ''outside directors''; and that (according to Funk, chairman of the UPIU joint bargaining committee in Mobile), ''This new vote in Camden shows that our campaign is giving other IP workers the strength to resist management's unjustified and intolerable demands for concessions.'' The release quoted Funk as further saying that the only reason why the Machinists and Plumbers in Camden [see supra, fn. 101] or the UPIU members in Natchez . . . voted the way they did was that management had scared them into thinking they would lose their jobs otherwise. Our campaign is beginning to dissolve these fears.'' According to the news release, Funk went on to say that the UPIU's corporate campaign against IP and its allies was ''now in high gear.'' The release described mass-mailing activities at DePere. Funk was further quoted as saying, ''IP and its outside directors are most definitely feeling the heat . . . . We intend to keep raising the pressure until the company bargains fairly and gives us back our jobs.''

5. The March 11, 1988 bargaining session

At the next Mobile bargaining session, on March 11, Schneider stated that the Unions' February 18 proposal was unacceptable because it failed to address Respondent's option to run during the holidays, holiday premium pay, Respondent's experience in running the mill safely and efficiently

[110] Up to this point, my findings in this paragraph are based on the uncontradicted testimony of Gilliland, who then testimonially denied suggesting to King that the Natchez plant might close if the contract was not signed.

with 26 fewer production people (item 9), the extruder problem, and Respondent's ''high maintenance costs.[111] Schneider stated that of the 10 IP mills which had given up Sunday premium pay, none had a profit-sharing plan in lieu of Sunday premium. Schneider went on to ask why the Mobile mill would agree to keep paying holiday premium pay, and not to run the mill during the holidays, when no such agreements bound any other IP mills. Schneider stated that the Mobile mill was a marginal mill (cf. supra, part II,A), and asked why that mill would ''agree to their outdated additional cost items that most IP mills and a lot of the industry is moving away from.''

Then, Schneider asked Langham whether anything had changed regarding the voting pool, and whether Mobile was still tied to the DePere, Lock Haven, and Jay mills. Schneider asked whether Langham had ''the authority to sign an agreement here or is the best you can do petition Wayne Glenn to sign it?'' Schneider further stated that Respondent still felt strongly that the parties should continue to talk about the transition agreement. He stated that Respondent's counterproposal was the proposal that had been on the table since July 16.

After a 4-hour caucus, Langham stated that many companies in the paper industry were moving toward profit-sharing plans in lieu of such ''traditional'' methods as Sunday premium; and that Respondent had a profit-sharing plan at its Mansfield, Louisiana operation. He went on to say that the union membership were informed of the settlements in other IP locations, some of them having agreed to a gradual elimination of premium pay provisions and to greater incentives or bonus payments than proposed at Mobile. Also, he stated, the membership were aware of settlements with Respondent's competitors. Langham asked Respondent to end the lockout, to allow the return of ''all'' the members' ''to their rightful places in the mill,'' and to negotiate about the Unions' February 18 proposal.[112] IHEW Representative Coleman, too, asked Respondent to reconsider the Unions' February 18 contract proposal. Langham said that Gilliland had indicated at the bargaining table that Respondent might and could look more favorably on a profit-sharing plan. Langham further said:

> [W]e are trying to make some type of model agreement to solve [our] and IP's problems here and at other locations. I don't know what proposals are being made at other locations. I know what we are proposing here in Mobile may not be the most perfect solution, but it is a way to resolve the issue if both sides want to resolve the issue.

Schneider asked whether anything had changed regarding the voting pool, and whether Mobile was still tied to the DePere, Lock Haven, and Jay mills. Langham said (emphasis in original):

> We are not saying we are *anything* with Lock Haven. We are proposing a contract for Mobile . . . . Put a package out for the membership to ratify, provided you put something out we can both live with. If the membership ratifies it, I will go to the International president and recommend its signing.

Schneider asked whether Langham was saying there was no change. UPIU Representative Langham said. ''I did not say it had or had not changed . . . . You are asking one of those questions about a pig in a poke.'' IBEW Representative Coleman said, ''Let's go on with the negotiations . . . . You have another party to this, and all three of us will have to make an agreement.'' Langham said that his proposal had been made solely by himself, Coleman, and their respective committees, and that Langham had not consulted any other locations or the International president or vice president. Schneider asked whether the Mobile people would vote on a proposal, or whether the Mobile mill and 1300 others would have to vote on it. Langham said, ''We made the proposal. It's time for you to quit hiding behind this one issue. I think that is what you are doing.''

After a half-hour recess, Schneider stated that the Unions' proposal earlier that day was unacceptable. Langham and Coleman asked Respondent to let the employees return to work and that the parties continue to negotiate. Schneider replied that the circumstances which brought about the lockout had not changed.[113]

6. Events between the March 11 bargaining session and Respondent's termination of the lockout; the Louisville proposal

A UPIU Coordinated Bargainer issued between March 18 and 22 described UPIU President Glenn as planning to meet with a small group of senior IP management officials to begin the process of resolving disputed issues, and as expressing the hope that local union and management officials of the struck and locked-out plants would subsequently meet on the problems of the individual plants. A newsletter, under the UPIU letterhead, issued on March 24 by all five Mobile locals, stated, ''In the year that has passed since the lockout began, many things have changed—but not our minds. The conviction that we are right in our position that Sundays and Christmas are something special is even stronger than before.'' This statement was quoted, and attributed to a Mobile UPIU local, in a UPIU Coordinated Bargainer which went to press on March 28. The newsletter further stated:

> On Monday, March 28th a series of meetings will begin on a national level with top [IP] officials and union representatives from each location in an effort to reach a framework for local agreements between our unions and IP. These meetings will involve all 4 of the locations locked-out and on strike. These meetings must be successful in order for us to resume negotiations on a local level and reach a fair agreement.

[111] Respondent never made any proposal to reduce the maintenance employees' wages. Indeed, Respondent's February 1987 proposal included ratification bonuses and a wage increase in the third year for maintenance employees, and Perkins testified that Respondent felt that it could afford those wage increases and that it had few problems with wage rates.

[112] The quotations are from the written statement, received in evidence as a separate exhibit, which Langham read at the meeting.

[113] Cf. The Remedy, infra. There is no evidence that Schneider had anything to do with the Mobile plant until October 26, 1987, more than 7 months after Respondent locked out the Mobile employees.

Between March 28 and about April 15, 1988, various representatives of Respondent, the UPIU, and the Mobile, Jay, Lock Haven, and DePere locals met in Louisville, Kentucky. Much of the discussion during this period was devoted to the union demands that Respondent discharge all the strike replacements and reinstate all the strikers. The parties eventually agreed that whether individual strikers were disqualified for reinstatement because of alleged strike misconduct would be handled through the arbitration procedure. Although Respondent eventually proposed that within a year it would offer a job somewhere in the IP system to every striker who wanted one, the unions continued to insist on the discharge of all replacements for strikers who wanted to return, and no agreement was reached as to replaced strikers.

In addition, the parties tried to come up with a framework which could be superimposed over the bargains at the four locations and result in a settlement of each of the four work stoppages. The parties discussed what they called the framework issues—provisions for the resumption of normal relations, current related legal proceeding before the NLRB and the courts, Sunday and holiday premium, and the duration of the contracts. Eventually, Respondent proposed with respect to each location a separate package, which included Respondent's overall framework proposal plus proposals covering the issues at each respective mill. Respondent pressed Glenn to allow a separate vote at each location, because (Gilliland testified) Respondent believed that ''at that point in time'' the people at the three mills who had lost their jobs to permanent replacements would be less inclined to vote to let the Mobile employees go back than the Mobile employees would have been to let themselves go back. Glenn said that the votes would be taken at each location, would be sent to Nashville (where the UPIU is headquartered), and would be pooled. Glenn said that Respondent would have either four contracts or no contracts. A ratification vote was held at each of the four locations. The locals at each of the mills tallied the ballots of their own members and reported the tally to the UPIU in Nashville; each of the four proposals was rejected by a substantial margin.[114] This was the only occasion on which the ballots at these four plants were pooled.

Among other things, Respondent's Mobile proposal permitted maintenance and extruder employees with more than 20 years of service to apply for early retirement benefits; and called for extra severance pay to maintenance employees who resigned by the end of June. Maintenance employees were to receive no wage increases during the 3-year period of the contract. Holiday premium and Sunday premium were eliminated. Various pending legal proceedings were to be dropped, including the charges which eventually led to the initial (July 1988) complaint here. The Unions were to execute new labor agreements at certain locations (Moss Point, Corinth, Pine Bluff, and Natchez) where employees had ratified contract proposals made by Respondent. In addition, the proposal contained the following language:

> The parties agree that the need to reduce mill maintenance costs is a primary concern for the future competitiveness of many mills of International Paper. These high costs are attributable to a number of factors, an important one of which is the level of manning. . . .
>
> It is not the Company's intent to eliminate mill maintenance crews; however, it is recognized that it is in the best interests of the parties to reduce maintenance manning over the long term through more liberal utilization of outside contractors and eliminating any remaining contractual restrictions which limit the kinds of work that can be performed by other employees within the bargaining unit.
>
> . . . .
>
> Employees who elect to remain at the Mobile Mill will return to work in their former classifications and at the rate of pay for these classifications, up to a maximum of 140 General Mechanics and 60 Instrument-Electricians. [As previously noted, Respondent had locked out about 285 employees in such classifications.] If more than 140 General Mechanics and 60 Instrument-Electricians specified above as the [initial] staffing level desire to return to work, junior employees within each group will bump into non-maintenance jobs in accordance with the seniority provisions of the Labor Agreement. It is understood and agreed that these initial staffing levels in no way constitute a commitment of any maintenance manning for the future.
>
> It is understood and agreed that there will be no work jurisdictional restrictions between any classifications in the Mobile Mill, including production vs. production, maintenance vs. maintenance, and production vs. maintenance. Any employee may be assigned to perform any work which he or she is qualified to safely perform.
>
> It is further understood and agreed that there will be no restrictions on the kinds and amounts of work that may be assigned to outside contractors, except that no mill employees will be laid off as a result. Any further reductions in the mill maintenance work force, beyond the initial staffing level, attributable to the provisions contained herein will be handled through normal attrition. Mobile Mill Maintenance employees who elect to remain employed at the Mobile Mill will work with and cooperate with in every way employees of outside contractors.

The last two paragraphs of the quoted material are referred to in the record as Respondent's ''total flexibility'' proposal. Respondent's bargaining notes for October 19, 1988, which were offered and received into evidence without objection or limitation, set forth certain remarks by Langham and Funk which indicate that about April 15, the Unions expressed to Respondent strong objections to this ''flexibility'' language (see infra, part II,U,2). On April 27, 1988, one of the locked-out employees sent Perkins a memorandum which stated, inter alia, ''Young people afraid that [maintenance] will be put out and this would displace the younger employees.''

[114] The pooled vote was about 2900 to 200 for rejection. Of the 200 votes for acceptance, 160 to 170 were from Mobile. The Mobile and Jay units were represented, jointly with UPIU affiliates, by unions not affiliated with the UPIU; the record fails to show whether votes cast by members of the latter unions were included in the pool.

S. *Events Between the Cancellation of the Permanent Subcontract and Respondent's Production of Certain Documents Pursuant to Subpoena*

1. Respondent's termination of the permanent subcontract on May 3, 1988; Respondent's May 3 proposal

About mid-April 1988, Respondent's counsel advised Perkins that there was a pretty fair chance that a complaint would issue on the August 1987, September 1987, and January 1988 charges which underlie the initial complaint here. In consequence, Respondent told BEK that Respondent had to cancel the permanent contract. Notwithstanding a clause in that contract which entitled BEK to 30 days' notice of such cancellation, BEK agreed to immediate cancellation of the contract. Moreover, notwithstanding a provision in the permanent contract that required Respondent to pay BEK $250,000 if the contract was terminated within 3 years, Respondent never paid BEK anything other than the normal fees for which BEK periodically invoiced Respondent.

Between May 3 and 13, Respondent maintained for the first time in 16 months a ''cold shutdown'' which was the longest Perkins could remember, and during which the BEK maintenance employees worked very long hours. Perkins testified that when the mill resumed operations and hours came back to normal, BEK started to lose some of its better employees, and a lot of BEK employees stayed only long enough to find a better job somewhere else. Crawford testified that most of the BEK personnel had either relocated to the area or established a routine of commuting, and that Respondent never experienced or was threatened with a ''massive exodus of people.'' During discussions regarding the May 3, 1988 contingency contract which replaced the August 1987 permanent contract, and which was not preceded by a proposal, Patrick told Melton that because a work force was in place, there ''was not going to be any great difference between the permanent and the temporary,'' and Patrick saw no reason for BEK to increase the multiplier. The two also discussed whether, in order to avoid inordinate attrition, payment of subsistence or per diem, or an increase in the base hourly rate, would be necessary. The two decided to wait and see what turnover would be experienced. Melton later told Patrick that turnover was minimal, and none of these inducements was ever added. Other than the duration of the agreement and some items under discussion as changes to the permanent contract (including an increase from 1.36 to 1.38 in the multiplier because of the ''tremendous increase'' in BEK's health insurance costs), the new contingency contract contained the same provisions as the canceled permanent contract. Melton testified that when the May 1988 contingency contract was signed, no consideration was given to going back to the multipliers of the original contingency contract, because BEK had a local work force. Respondent's reply brief states (Br. 81 fn. 45), ''Although the contract became temporary, there was no significant change in de facto operating conditions.''

By letter dated May 3, 1988, Respondent advised the Unions that item 11 had been withdrawn from the bargaining table, and that the ''necessary effect'' of Respondent's present proposal was to cancel Respondent's contract with BEK executed in August 1987. By letter to the locked-out employees dated May 4, 1988, Respondent stated, inter alia (emphasis in original):

> The proposal provides for the return of *ALL* maintenance employees to maintenance positions, if they desire to return to work at the Mobile mill. The company has canceled its contract with BE&K Construction for handling of all maintenance work at the mill on a permanent basis. While BE & K is doing an excellent job of maintaining the total mill on a contractual basis, we are making this change in our proposal in order to move the dispute to an end.

In addition, the letter stated that all permanent employees as of March 21, 1987, would be returned to work ''if the proposal is ratified and executed.'' The General Counsel does not request backpay for any locked-out employees after May 3, 1988.

A meeting of Respondent's stockholders on May 10 was attended by various UPIU leaders, and locked-out and striking union members, who unsuccessfully moved for the return of strikers and locked-out employees to their jobs. A flier sent out by the Paperworkers and the UPIU/IBEW joint bargaining committee about March 1988 had urged stockholding members to attend this meeting or to give signed proxies or admission cards to the UPIU.

Respondent's May 3 letter to the Unions withdrew the proposals for a 2-percent wage increase for maintenance employees in the third year and for a pension buyout, undertook to bring back all maintenance employees to maintenance positions, and reduced to 60 days the length of the transition period to be observed when Respondent ended the lockout. The May 3 proposal (sometimes referred to in the record as the May 4 proposal) included items 1, 2, and 3, and the ''total flexibility'' language in the Louisville proposal. Schneider testified that this proposal was mailed to the Unions, rather than handed across the tables because of information from Federal Mediator Skillman that it would be 2 weeks before the Unions' bargaining committee would be able to meet.

2. The May 13, 1988 bargaining session

The Mobile parties conducted a negotiating session on May 13, 1988. UPIU Vice President Langham stated that he felt unable to discuss Respondent's May 3 proposal because he had not yet received a copy. He asked for documentation showing that Respondent had canceled its contract with BEK, and for backpay for all locked-out employees from the date of that contract until the date of cancellation. Schneider said that Respondent would ''think about'' the request for documentation, but was denying the backpay request as ''incredible.'' He went on to say that Respondent intended to implement on the following Sunday the first-year and second-year increases called for by Respondent's pending contract proposal.[115] Schneider said that Respondent hoped the Unions would allow the membership to vote on that proposal and would execute it if it were ratified. He further stated that Respondent assumed that Sunday premium was no longer an issue because a UPIU vice president had recently signed a contract eliminating Sunday premium at Respondent's mill in

[115] The record fails to show whether this was in fact done.

Panama City, Florida. Langham asked Respondent to end the lockout and allow the membership to return. He stated that the parties would continue to negotiate to reach an agreeable settlement, and that at that time ''we'' would petition the Paperworkers International to sign the contract. He said that he did not know about the Panama City facility or its bearing on Mobile,[116] but that he could name at least 25 other places that had not taken away Sunday premium. Further, Langham alleged that three of Respondent's competitors had expressed disagreement with withdrawal of Sunday premium.

Langham said that he understood Respondent's most recent proposal was worse than the April 13 proposal, which almost 90 percent of the employees had rejected. Respondent asked the Unions to vote on the most recent proposal. The Unions said that this Louisville proposal had been rejected 10 to 1, that they saw no reason to put the May 3 offer up to a vote, that they would not put a company proposal to the membership unless it contained a significant move on Respondent's part, that the Unions did not intend to accept the May 3 proposal, but that they would use it as a base to start from. The Unions went on to say that unresolved issues remained; ''that part of the issues were things that had been put before us during the lockout, and one being the length of the time of the transition period, the other being the total flexibility, because when we were locked out, total flexibility was not a part of [Respondent's] offer, and it had become another stumbling block after we got into the lockout.'' The Unions said that this ''total-flexibility'' proposal would permit Respondent to perform maintenance work by using, at production employees' pay scale of $7 or $8 an hour less than maintenance employees' pay scale, employees who had bumped back into production jobs from maintenance jobs.[117] Langham credibly testified that the Unions believed Respondent's ''total flexibility'' proposal, first advanced at the Louisville conference, was as bad as or worse than the company proposal it replaced, and that this ''total flexibility'' proposal was not ''going to fly . . . with the people.'' Funk credibly testified that the Unions opposed Respondent's ''total flexibility'' proposal for the following reasons, the record being unclear as to whether they were expressed to management:

> [w]e see this completely over a period of time eroding our bargaining unit when we don't have any employees left, because with this they can contract, and they can use a number of employees to do different functions and work with a lesser number than they have without some form of restriction on these flexibility issues, so we see us losing people right and left with total flexibility; production and maintenance.

Schneider asked whether ''you'' were still in the pool voting. Langham said, ''That's a fair statement.'' Schneider said that the only way to end the lockout was for the membership to ratify the agreement and ''the International union'' to execute the proposal. Langham said that Sunday premium and holiday premium were ''still a major issue in this dispute.'' This bargaining session lasted less than 10 minutes.

3. Events between the May 13 and June 24, 1988 bargaining sessions

A newsletter captioned United Paperworkers' Corporate Campaign News, issued about late May or early June 1988 under the letterhead of the Paperworkers and the UPIU/IBEW joint bargaining committee, and received into evidence without objection or limitation, states that on April 22, settlement offers which IP had made during the discussions in Louisville had been ''overwhelmingly rejected'' by the Mobile, Jay, DePere, and Lock Haven employees because, inter alia:

> All the scabs would have remained on the job.
>
> Only small numbers of strikers at Jay, Lock Haven and DePere would have been rehired immediately. (The locked out workers at Mobile would have gotten their jobs back as required by federal law but the scabs there would also have remained.)
>
> . . . .
>
> The union would have had to drop its unfair labor practice charges against IP, which in the case of Jay would have meant that a pending decertification vote could have proceeded immediately—with the scabs eligible to vote.
>
> All of the contract concessions implemented by IP would have remained in place.
>
> [W]hen the details were presented at the four locations, workers shouted in anger, flung the proposals in the air and stormed out of the meetings. Even the Mobile workers, who stood to get their jobs back were not for a moment taken in by IP's insulting offer.

The newsletter further stated, under the first-page headlines, ''The IP Campaign is on the Move'' and ''A New Phase for the Corporate Campaign,'' that the campaign against IP's ''concessionary demands is moving ahead on many fronts.'' At a planned series of ''in-plant-solidarity actions'' to support the strikers and locked-out employees in Mobile, Jay, Lock Haven, and DePere, the newsletter mentioned, among other things, the ''outreach'' program (supra, part II,P) and proposed boycotts of the products and services of firms whose boards of directors included IP board members. Such product boycotts were urged by the Paperworkers in other releases issued in June and July 1988. Also, the newsletter quoted a resolution, adopted in Memphis on May 23 and sent to CEO Georges, which said, in part:

> [W]e see no reason why we must accept a decrease in our standard of living . . . .
>
> [T]here can be no normalization or harmonious relations anywhere in the IP system until the striking and locked out workers . . . are all rehired and IP bargains in good faith with them. . . . .

---

[116] Frase testified that as to the Panama City mill, a major factor in Glenn's decision was a $9300 signing bonus. He further testified that as to the elimination of Sunday premiums in contracts with a Stone mill and a Champion (Bucksport) mill, the UPIU got something which the UPIU considered a trade off for Sunday premium. Frase also testified that as to a Champion (Cannon) mill, the contract approved by Glenn had nothing in exchange for Sunday premium, but ''we were looking at losing some thousand jobs there.''

[117] My findings in these two sentences are based on Funk's uncontradicted testimony.

> Until the situation at these four locations is resolved equitably, and IP goes back to bargaining in good faith with all its workers, we will decline to participate in any company programs that are not legally or contractually required.

In addition, the newsletter listed nine operations (including the primary mills at Gardiner, Camden, and Ticonderoga) where the employees had ''rejected IP's concessionary demands but have not yet gone on strike''; and four locations (the primary mills at Moss Point, Corinth, Pine Bluff, and Natchez) where locals had voted to accept the concessions but the UPIU had declined to approve the contract.

By letter to the board of directors of PNC Financial Corporation dated May 25, 1988, Glenn stated, in part, that IP had demanded ''to take back from its hourly workers millions of dollars in unjustified wage concessions''; that Respondent had locked out or ''forced out on strike'' paperworkers in Mobile, Jay, DePere, and Lock Haven; and that IP had ''adopted these disastrous labor policies in order to eliminate hundreds of jobs, slash employees' pay, and contract out these workers' jobs to non-union contractors.'' The letter went on to state that a named member of the PNC board of directors was also a member of IP's board of directors and, as the CEO of Hammermill Paper (an IP subsidiary), was directly responsible for IP's labor policies. Then, the letter noted that because of PNC's ties to IP, the UPIU would soon begin nationwide publicity requesting that the public close all accounts and end all other banking services with PNC and its subsidiaries, seven of which the letter named. The letter requested PNC's board of directors to ''exercise its own independent judgment to evaluate whether your continued relationship with International Paper is in the best interests of PNC.'' Similar letters were sent by UPIU to another bank; a firm which produced and distributed cosmetics; a firm which produced beer, wine, and food; and a firm which bottled fruit juice and soft drinks.

In June 1988, during an interview with a reporter for a Lock Haven newspaper, joint bargaining committee chairman Funk said that he would not seriously consider abandoning the other struck locations, because that would have been breaching the agreement that he made when he went into the pool. He further stated that the Mobile local of which Funk was then president (UPIU Local 2650) was in a slightly different position from the other locals, because a lockout existed and not a strike; but that the Mobile workers would stay out until a fair settlement was reached for all four unions. Funk said that a lot of people had told him that the Mobile workers could go back ''tomorrow'' if they got out of the pool; but ''we are standing strong with our brothers.'' On June 6, 1988, all five Mobile locals issued a newsletter, under a UPIU letterhead, which stated that six mills (in Jackson, Tennessee; Camden, Arkansas; Spring Hill, Louisiana; Georgetown, South Carolina; Wiggins, Mississippi; and Ticonderoga, New York) had turned down concessionary contracts and were now part of the corporate campaign and outreach program. The UPIU represents a bargaining unit of about 650 hourly employees at Respondent's primary mill at Ticonderoga, New York. During negotiations for an agreement to succeed a contract which expired at the end of May 1988, Respondent on June 2, 1988, presented to the UPIU a ''best offer'' which proposed ratification bonuses, the elimination of Sunday premium in step increments over the life of the agreement, the elimination of holiday premium at the end of 1988, and a 401(k) plan with 25-percent matching by Respondent. The unit employees rejected this proposal. During a negotiating session on June 8, 1988, Ticonderoga Mill Manager Paul Stecko advised union representatives that the bonuses would stay on the table for 10 days, but would be withdrawn if the contract was not ratified and executed within that period. The president of UPIU Local 5, Gillette Bartlett, replied that theoretically those cash payments were gone already, because UPIU President Glenn was not going to sign a contract. No comment was made by UPIU International Representative Mario Scarselletta, who was present. Later that day, Stecko asked Scarselletta whether it was true, as Bartlett had said, that Glenn was not going to sign a contract. Scarselletta said that if it contained elimination of premium pay, then Barttlett was correct in stating that Glenn would not sign the contract. During negotiations, the union at Ticonderoga made available a telephone number which, when called, would give the caller a message, usually spoken by the vice president of UPIU Local 497 or the chief steward of UPIU Local 5, the locals with whose officers the Ticonderoga mill deals in Scarselletta's absence. The message on June 15, 1988, stated, in part, that Glenn had ''reaffirmed [to the negotiating committee] that he would not sign a concessionary contract, therefore, the Company would not have paid the bonuses even if the locals would have accepted the proposal.'' As of November 17, 1989, the Ticonderoga employees were continuing to work. As of December 5, 1989, no contract had been ratified there.

4. The June 24, 1988 bargaining session

The next negotiating session as to the Mobile mill was held on June 24, 1988. Langham stated that no employee vote had been held on Respondent's May 3 proposal because it was less advantageous to the employees than Respondent's April 13 proposal, which the employees had rejected. Langham specifically referred to Respondent's withdrawal of its ''cash out'' proposal to the production people, the beaterroom employees who were subject to company item 9, and the extruder employees. Langham went on to say:

> The company states that they want to settle this on a mill by mill basis. We have to do something here in Mobile. The question keeps being asked about if we are a part of the pool. We are a part of the pool and we chose to be part of it, but that does not preclude an agreement here in Mobile. First, we have to do something here in Mobile. If it is the way the people feel and the contract offer is good enough, maybe then we can do something about the pool. There are 18 plants running without a contract that are in the IP system that are not locked out or on strike. We don't see why Mobile is any different, but it is a fact of life here that we are a part of the pool. We are willing to sit here and talk and bargain about anything and try to reach some kind of agreement.

At this point, Langham asked IBEW Representative Coleman whether he had ''anything''; Coleman replied, ''I think you covered it.'' Schneider said that notwithstanding Respondent's omission from its May 3 proposal of some bonuses for

termination or retirement, Respondent felt that this omission was more than made up for by Respondent's offer to bring back all the maintenance employees. Coleman said that the withdrawn incentives had been good for some people and not others. Schneider said that Respondent had moved with respect to its proposal that no maintenance employees come back. Langham said, ''You moved because the law made you move . . . you did that to eliminate your liability.'' Schneider said, ''We have nothing further to propose. Our proposal is out there.'' Funk proposed that employees be allowed to sell their vacations up to the point where the locked-out employees went back to work, if Respondent would schedule them in the mill. Schneider agreed. Funk testified that at this meeting the Unions ''were still in a mode of we didn't have an offer that we could vote on, because we still had flexibility before us, and we still had the transition period before us, and we didn't have an offer we could agree on.''

5. The July 15, 1988 bargaining session

The next Mobile negotiating session, on July 15, 1988, was the first attended by Robert B. Goins, who had recently replaced Perkins as mill manager. Perkins and Schneider were also present. Goins said that he would be the person responsible for the negotiations, but that Schneider would continue to be Respondent's spokesperson. Goins said that he wanted to reach an agreement with the Unions. The Unions said that they wanted to and felt they could reach an agreement for Mobile, and ''if we had an offer that we voted on and accepted it, we felt we could go back to work.''[118]

As previously noted, during the January 29 meeting Langham had said that Respondent's then-current proposed transition agreement was acceptable, except for the 75-day length of the transition period and the failure to undertake to recall all the locked-out employees who wanted to return. The proposed transition agreement which had accompanied Respondent's May 3 letter to the Unions was much the same as the proposal pending on January 29, except that the May 3 proposal called for recall of all locked-out employees who wanted to return. Much of the July 15 meeting was directed to the length of the transition period, with Respondent wanting up to 60 days and the Unions proposing 14. UPIU Representative Langham stated that ''This may not be the biggest labor battle for the IBEW, but it is for our union.'' He further stated, ''On contracting out—Mr. Perkins, I understand, for the record, that this was solely your decision—to contract out the maintenance work at the time of the signing of the permanent contract with BE&K. Is that correct?'' Perkins said, ''It was a Mobile Mill decision'' (cf. supra, part II,L).

As to Sunday premium, Langham said that the Unions were willing to discuss giving it up in exchange for a 401(k) plan. As to work on Christmas, Langham proposed that Respondent be contractually permitted to operate the plant on December 24 and 25, with volunteers who would receive ''certain incentives, like premium pay.''[119] Schneider asked whether Langham was ''still in the mode that the best your side can do is petition Wayne Glenn if we reach a settlement.'' Langham replied:

> Yes, but it should not be an impediment to reaching an agreement. I think this should not be a crutch that you have used several times. We need to work out an agreement and then see what we can do about getting a signature. First let's get that worked out, but don't use the pool as a crutch. I am not going to sit here and threaten you about how you have to satisfy everyone in Jay and DePere in order to get an agreement here. This is my responsibility and this is what I am here for.

Funk credibly testified that Schneider said ''that he felt sure that we weren't going to leave those other folks [inferentially, the Jay, DePere, and Lock Haven employees] out in the cold, that if we reached agreement in Mobile, he didn't feel we could sign a contract in Mobile, and we told him, 'Try us and let's see; put an offer before us where we can vote on it, and we can see. But we will ask Wayne Glenn to sign our agreement.'''

In response to an inquiry from Schneider about holiday premium aside from Christmas, Langham said that he had not really thought about that, that he was ''throwing this out just to get something started here.'' In addition, Langham again requested backpay for the period of the permanent contract with BEK. Respondent rejected this, but agreed with the Unions that this could be disposed of by the NLRB and should not impede a settlement.

After a caucus, Respondent rejected the Unions' proposal as to Christmas, on the ground that this proposal did not give Respondent its desired flexibility to run the mill without restrictions and was not much different from the provisions in the expired contract. Respondent also rejected the Unions' proposal for a 401(k) plan in lieu of Sunday premium. Langham asked Respondent to end the lockout. Schneider replied, ''As we have said all along, the way for the lockout to end is to ratify the contract and have the International union execute it'' (cf. infra, The Remedy).

During this meeting, UPIU Local 1940 President Howell questioned, and Respondent defended, the practicality of moving experienced beater-room employees to laborers' jobs while moving into the beater room some employees who had never worked there before.[120]

The Corporate Campaign News issued in July 1988 under the letterhead of the Paperworkers and the UPIU/IBEW joint bargaining committee stated that the Unions' ''campaign against IP and its allies is getting stronger each day . . . sol-

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[118] My findings in this sentence are based on Funk's testimony.

[119] Schneider testified that Respondent already had the right to request the local union's permission to ask for volunteers to work on Christmas. He further testified that Manager of Industrial Relations Fayard had told him that using volunteers at Christmas time in Mobile had not been successful; Fayard was not asked about this matter. Also, Schneider testified that he ''knew from personal experience at Moss Point [where he had been working until the fall of 1987] and throughout the Company that the Company had never had any success to my knowledge of getting employees to volunteer to work the Christmas holidays.'' Funk testified that Respondent had obtained volunteers to perform maintenance work during ''cold shutdowns,'' although not as many as Respondent asked for and those who worked on Christmas Day worked only 8 hours; but that during one December 23–26 holiday period when Respondent wanted to operate the mill, Respondent could operate for only 3 days because not enough employees volunteered to run the mill on Christmas Day.

[120] This finding is based on Respondent's bargaining notes. Schneider testified that during this meeting, item 9 ''was not mentioned, as I recall.''

idarity among IP employees and with the rest of the labor movement is growing steadily.'' The newsletter listed UPIU locals which since May 23, 1988, had indicated their endorsement of the ''solidarity'' statement in Memphis. The newsletter described various activities in support of this campaign, including product boycotts of firms sharing members of IP's board of directors.

About August 1988, during an interview with a reporter for Pulp and Paper (inferentially, a magazine for persons concerned with that industry), Frase stated, ''I think that [pool voting] has sent a very clear message to the companies that, try as they may to keep [us] divided, we are going to do everything we possibly can to tie ourselves together.''

6. The negotiations in Memphis, Tennessee, on September 20 or 21, 1988

On September 20 or 21, Oskin and Gilliland met in Memphis, Tennessee, with UPIU representatives who included Glenn and Langham. That meeting was directed primarily to negotiations involving Respondent's Vicksburg, Mississippi, mill, which was the first mill where Respondent had eliminated Sunday premium. The parties agreed that at least as to this matter, any agreement reached as to Vicksburg would serve as the pattern for future settlements in each of the mills as they came up. The parties agreed that in at least partial exchange for the elimination of Sunday premium, Respondent would increase shift differentials and contribute to a 401(k) plan.

During the Memphis meeting, Glenn continued his efforts to induce Respondent to take back permanently replaced strikers. Also, he asked Respondent, ''as a gesture of good faith,'' to end the Mobile lockout and let the people return to work while negotiations continued. Oskin said that he would like to end the lockout, but that he was not willing to end it unless the parties had a ratified executed contract at the Mobile mill. He asked Glenn if he was in a position to authorize the signature of a contract in Mobile, assuming one could be negotiated. Glenn said that he was not in a position to do that so long as he had the strikes in progress to deal with. Langham asked whether there was any possibility that the extruder could stay in Mobile. Gilliland said no. The parties discussed what could be done to take care of displaced extruder employees. The UPIU representatives (inferentially) suggested the application to them of the plant-closing provision. Gilliland expressed the view that this provision was inapplicable. Gilliland asked Langham what ''the union's'' problem was with the subcontracting language which Respondent had put on the table, in view of Respondent's undertaking to bring everyone back to work. Langham said that the language was too open-ended, and would allow Respondent to eliminate the entire maintenance department, over time, through attrition. Gilliland said that this ''was not our intent, that what we wanted to do was to be able to take advantage of lower-cost outside contractors to do some kinds of maintenance work, but that it was our expectation there would always be a core of maintenance people in the mill doing the kinds of things for which the high rates and pay are justified, trouble shooting stuff that is indigenous to a paper mill.'' Langham said that although he did not question Gilliland's sincerity, Gilliland was ''not going to be there forever,'' and that the language was still too open-ended. Gilliland said that Respondent had similar language in a contract covering the Natchez mill, and undertook to send Langham a copy.[121]

By the conclusion of this conference, Gilliland and Langham felt reasonably comfortable that they could achieve a contract at Mobile on the basis of the Vicksburg agreement ar some variation of it. However, Gilliland told Langham that Respondent was not about to make this proposal at the Mobile mill until Respondent had assurance that if Respondent made it, and ''the people'' ratified it, the contract would be executed by the International. Langham said that Gilliland had heard Glenn say that he was not in a position to authorize that at ''this point in time.'' Gilliland said, ''Well, then, there is no point in us going back to the bargaining table at this point.'' Langham agreed.

About September 23, Oskin advised Gilliland that on the preceding day, Oskin and Glenn had agreed to a 25-cent wage adjustment for production shift workers at Vicksburg.[122]

7. UPIU President Glenn's September 29, 1988 letter to the Pine Bluff employees

As previously noted, in September 1987 Respondent's Pine Bluff employees had voted to ratify a proposal which the UPIU regarded as concessionary. A letter under UPIU president Glenn's letterhead to the Pine Bluff employees, dated September 29, 1988, basically urged them to take another vote. This letter stated, in part:

> [No] group of workers is immune from International Paper's plan to gut the contracts of its unionized employees.
>
> . . . .
>
> As more contracts come up, IP continues to ask for needless concessions.
>
> . . . .
>
> Workers in Mobile were locked out just for rejecting a concessionary contract. Then workers in Jay, DePere, and Lock Haven went on strike against concessions and in support of Mobile.
>
> . . . .
>
> There are now close to 6,000 IP workers in 20 locations who are working without contracts.
>
> If we are going to win the battle, IP locals must act together. The test of our solidarity will come on October 8, when representatives of all IP locals meet in Nashville and discuss coordinated actions. This will be made possible by getting as many locals as possible into a bargaining pool. The formation of a pool, which is supported by Pres. Glenn, will show IP that workers in different locations are going to stand up for one another and be sure that everyone is treated fairly.

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[121] The Mobile bargaining agreement executed in October 1988 contained as to this matter the same language as the Natchez contract.

[122] My finding in this sentence is based on Gilliland's testimony, which was obviously receivable to show that Oskin made this report to Gilliland, but not to show the truth of the report. To the extent that I stated otherwise at the hearing, this ruling is withdrawn. The General Counsel's motion to strike Respondent's brief, to the extent that it relies on the truth of the report, is denied, but that assertion will be disregarded.

. . . .

There is only one way to defeat IP's concessionary drive—and that's for all locations to band together. Until now the company has gotten a lot of mileage out of its divide and conquer strategy. Now is the time to turn the tables and show them that all IP workers are going to stand up for justice.

The letter was signed by all the local union presidents at Pine Bluff (including the president of IBEW Local 2033), and by two UPIU International representatives.

8. The September 1988 DePere decertification election; the October 1988 end of the strikes at the DePere, Lock Haven, and Jay plants

As previously noted, on September 14, 1988, the UPIU lost a decertification election at Respondent's DePere plant, which by that time had been struck for 15 months.[123] A Corporate Campaign News issued later that month (under a masthead naming the Paperworkers and the UPIU/IBEW joint bargaining committee), urged all locals who represented IP employees and were working without a contract to join the coordinated bargaining pool established in 1987 by the Mobile, Jay, Lock Haven, and DePere locals. The Campaign News stated:

The reason for the coordinated bargaining pool is to prevent [Respondent] from pitting one location against another in the process of settling the dispute. By joining the pool a local is agreeing that no location will settle with [Respondent] until all the participants in the pool have gotten satisfactory offers.

The Campaign News further stated that implementation of this projected expansion of coordinated bargaining would begin at a meeting of IP locals on October 8 and 9 in Nashville, Tennessee.

Gilliland testified, in effect, that management had seen this document before October 8. On or before October 9, Oskin received a copy of a telegram to Respondent from the UPIU and the IBFO stating:

Please be advised that the strikes at DePere, WI; Lock Haven, PA; and Jay, ME; are hereby terminated immediately and we will offer to return to work unconditionally. Please consider this a continuing request for employment.

Gilliland testified that this telegram came as a complete surprise to Respondent. Immediately after the decision was made to end the strikes, Langham called the FMCS to set up meetings at Mobile.

T. *The October 1988 Charges Regarding Failure to Provide Information at Mobile*

The hearing as to the July 1988 complaint began before me in Mobile, Alabama, on October 4, 1988. On October 5, 1988, the Paperworkers and the Electrical Workers, through their respective counsel, filed with the Board's Regional Office in New Orleans, Louisiana, the respective charges which underlie the April 1989 complaint. The Paperworkers' charge reads as follows:

Since on or about May 21, 1987, and continuing to date, International Paper Co. failed to furnish requested information that is relevant and necessary for the Union to bargain meaningfully.

The Union just discovered these critical documents and this concealment of information October 2, 3, and 4, 1988.

Such concealing of information and critical documents so tainted the bargaining process and so tainted the lockout as to convert the lockout to an illegal lockout from May 21, 1987 to the date this unfair labor practice is remedied.

The Electrical Workers charge reads as follows:

Since on or about May 21, 1987 and continuing to date, International Paper Company has refused and failed to furnish information which was relevant and necessary for the union to bargain intelligently and meaningfully. The union just discovered this critical concealment of information on or about October 2, 1988. Such concealment of information so tainted the bargaining process as to convert the existing lockout to an illegal lockout from May 21, 1987 to the date this unfair labor practice is remedied.

Respondent's opening brief states at page 44, ''while reviewing information produced pursuant to subpoena, Counsel for the General Counsel and counsel for the charging parties discovered documents which they allege should have been produced during the course of negotiations pursuant to the Unions' May 21, 1987, document request.'' Pages 101–104 and 117 of Respondent's reply brief, and the testimony of Funk and Lynch, show that the documents of whose existence the Unions first learned in early October 1988 included (1) pages 7, 8, and 11 of General Counsel's Exhibit 50 (the May 1987 cost study) (supra, part II,G); (2) the May 27, 1987, memorandum reflecting the changes in billing rates under the contingency contract (supra, part II,H,5);[124] (3) the July 13, 1987, memorandum from BEK site manager Kosak to Crawford discussing manpower levels and quality (supra, part II,I); and (4) the ICS documents (supra, part II,K). The documents which the April 1989 complaint alleges should have been supplied to the Unions consist of the documents listed in the preceding sentence plus the 1987 contingency contract with BEK.

U. *Events after the Filing of the Instant October 1988 Charges*

1. Respondent's Vicksburg proposal

Sunday and holiday premium had been eliminated in a contract executed about October 1985 with respect to Respondent's Vicksburg mill. During negotiations on October 8 and 9, 1988, Respondent made with respect to the succeeding Vicksburg contract certain proposals that the UPIU regarded as a trade off for Sunday premium. Upon so concluding,

[123] Inferentially, the replaced strikers were ineligible to vote; see Sec. 9(c)(3) of the Act.

[124] Counsel for the Paperworkers had this document marked for identification on October 4, 1988, the first day of the hearing on the July 1988 complaint.

Glenn released UPIU representatives from the restriction against signing IP contracts without his approval. Frase, who at that time was Glenn's executive assistant, testified that before IP's Vicksburg proposal was ''floated with the union,'' there was in place a prohibition against UPIU representatives' signing contracts on their own without Glenn's approval; that during this period no IP contract was signed which eliminated Sunday and holiday premium pay; that during this period the UPIU did sign with other companies contracts which eliminated Sunday premium pay but also included ''something for Sunday premium pay that was looked at as being a trade off or at least a close trade off;'' and that the UPIU was not signing contracts with IP until UPIU had something which it regarded as a trade off for Sunday premium. He further testified that the pool did not change at all in October 1988, and that at a meeting among the pool members on October 9, when the strikes were called off at DePere, Lock Haven, and Jay, ''it was our position that the pool did not change.''

During a meeting on October 14 between Gilliland, Oskin, Glenn, and Langham, Glenn asked Oskin to end the Mobile lockout. Oskin said that Respondent would very much like to end it, but could not ''until we have the prospect of negotiating the contract that will be executed by the international unions.'' He asked whether Glenn would sign the contract if the parties reached agreement at the table. Glenn replied, ''Now that the strikes are out of the way, I can sign a contract.'' By letter dated October 19 to the UPIU vice presidents over the areas which encompassed the Lock Haven, DePere, and Jay mills, Glenn stated, in part:

> We are going to try to focus the next few months on the replacement issue, keeping all the pressure we can on International Paper Company with the media and with boycotts; keep trying to force them to change their position and bring our people back to work.
>
> Since the Company has agreed to modify their position in so far as giving us something in lieu of Sunday premium at the other mills, I will release the other Vice Presidents and Representatives from their prohibition of signing contracts. If the Company offers the Vicksburg settlement in lieu of Sunday pay and the people ratify the contract, they will be free to sign.

By letter dated November 4, 1988, to the president of the United Steelworkers of America local, Glenn stated, in part:

> [T]he concept of [the pool] has worked very effectively in this campaign as well as others. We will continue to employ it wherever and whenever it is appropriate. The original IP pool lost its effectiveness with the decision by the locals to end the strike.

2. The October 19, 1988 bargaining session at Mobile; the IBEW's execution of a Vicksburg contract

The next bargaining session at Mobile was held on October 19, 1988. Among Respondent's representatives was Robert G. Goins, who about early July 1988 had replaced Perkins as mill manager and had attended only the July 15 bargaining session. Langham and Coleman asked Goins to end the lockout and continue to negotiate. Schneider said that Respondent was anxious to end the lockout, but ''the only way to end the lockout is to have a ratified and executed agreement.'' At the request of a mediator (one of three present) who had not attended any of the earlier sessions, each party summarized what it believed to be the major issues between them. Each party gave, as major issues, Sunday premium and holiday premium pay (including straight time for work on Christmas), elimination of jobs in the beater room, and the extruder. As to the extruder, Schneider stated that (as Perkins had told him in August or September 1988), Respondent no longer planned to move it, but, instead, planned to shut it down. Schneider went on to say that an additional issue was a transition agreement; the Unions tacitly agreed.

Schneider said that another major issue was ''the union's inability to deliver a signed labor agreement if we reach an agreement. Once again, if something comes about, Don [Langham], I will ask you, if something comes about if it is ratified.'' Langham said, ''you ask the same question every time we sit down across the table. Our answer is that we demand that you end the lockout and then we will negotiate an agreement and then we will sign it, but we are not going to buy a pig in a poke.'' Schneider said that it was ''ridiculous'' to try to work out an agreement that might or might not be signed; ''We need a ratified, executed agreement.'' Langham said, ''You have nine plants operating without a contract. Why is Mobile different?'' However, he said that he was not saying he would not sign an agreement if one was reached. The new mediator said that if both sides agreed, he would expect both sides to sign, that Langham could ''still hold out for whatever you want, but let's not get hung up on signing . . . . Both sides are committed to sign an agreement if you should reach one.''

Langham emphatically said that he was not going to sign Respondent's May 3 proposal. Goins said, ''First we have to get an agreement here at this table. Then your members have to agree to it. Then the international union must sign it. Let's not get hung up over not talking . . . other mills have already implemented agreements that include the things we are talking about.'' Langham said, ''if the company takes the same posture, no, I won't sign it. If the company says it wants to talk, then O.K., I will take another look at it, but I will not sign what's before us today. I will not sign this contract . . . If we can resolve some of the things that are near and dear to our members' hearts, then I am willing to take another look at it. If we can resolve [the] issues, I will sign.'' Schneider said, ''If we come to some agreement, will you sign it? . . . Our position is that we will not pay Sunday premium any longer. You're talking to us, asking us to negotiate, and you are asking us to buy a pig in a poke . . . and then *maybe* you will sign.'' (Emphasis in original.) Langham said that for 18 months Respondent had been saying ''take what we give you or we will keep you locked out;'' and that if Respondent did not get off what Langham characterized as a ''hard-assed position,'' Langham would not sign it. Schneider said that Langham was telling him that Langham would not sign if the parties reached an agreement. The new mediator said that he understood Langham to be saying that if the parties reached an agreement he was willing to sign it, but that he would not sign when he did not know what the agreement was. Langham said, ''You have hit the nail on the head.''

After a break of about 2 hours, the parties again convened. Goins began the meeting by saying:

> I don't like the situation that we are in today. I don't like managing a mill where I don't have a relationship built with people, but that is where we are. I am managing a mill with people I don't know and with no foundation to build on. There are people around this table and out in the community that I want back to work and need back to work.
>
> There are people who, had the members of the Mobile Mill been treated fairly over the years and not been beat up at every opportunity, we would not be in this situation right now.
>
> The Mobile Mill right now is not a competitive mill . . . once we can utilize your skills, experience and knowledge of your job, and your pride in your job, the productivity of the Mobile Mill will increase and improve. The quality will improve. The profitability will improve . . . . I am in a position of being a beggar. I want you back. I need you back. I am begging you to let's get an agreement and come back to work.

In reply, Langham said:

> [T]his committee has my complete trust and the members' complete trust, and this is proved by the fact that these people have held together for 18 months . . . If and when we reach an agreement and the membership ratifies it, I will sign it. You hit the nail on the head when you said these members have been beat up . . . . You locked us out, but they probably would have struck anyway if you had not locked us out. We want to get this mill back to a world competitive state. This is my home here, and I want to see this mill run. I don't like to have to be involved in this type of situation. It's the damndest thing I've ever seen and it was uncalled for . . . . The committee is ready and willing to compromise. We have been a little hard nosed too. We have some positions that we would not change and that we need to get off of.

After a lunchbreak, the parties discussed item 9. Langham stated that the Unions were not feeling very agreeable about the elimination of jobs in the pulp mill but ''we can talk about it.'' He further said that the Unions understood, although this had never been put as strongly as Schneider had put it, that the extruder would not run in Mobile; Langham said that the displaced extruder employees should be covered by the contractual plant-closing provisions. Schneider said that the extruder situation did not fit into the plant-closing language, that only 19 people were involved, and that to include them would set a bad precedent. As to the beater room, Goins and Schneider said that Respondent was presently proposing a net loss of two people per shift, with machine people displacing some beater-room people. The Unions protested this proposed manning cut, and also Respondent's proposal that the displaced beater-room employees be put the line of progression in the paper machine.

Then, the parties discussed Respondent's May 3 ''flexibility'' proposal. Langham said that the Mobile mill already had ''the best flexibility deal in the country . . . . You added this thing after the lockout and you are going to get all you can while you have us locked out.'' Schneider said, ''Others have it.'' Langham said that Respondent did not need it at the Mobile mill; ''It was not an issue when you locked us out. You threw that in after you locked us out. You are just trying to punish us. We are not going to take that.'' Similar remarks were made by Coleman. Goins said that Respondent needed the flexibility to make the mill run, and that Respondent wanted to be able to manage the mill according to the work load. UPIU Local 1940 President Howell asked why Respondent needed more flexibility in his department than it had already. Funk said that this had not come up until Gilliland brought it up during the Louisville negotiations (supra, part II,R,6), and that he had there said that Respondent needed something to bring maintenance back. Funk alleged that this proposal had been made ''strictly to take . . . another pound of flesh . . . another stumbling block.'' According to Respondent's bargaining notes (the only record evidence as to this matter, the following exchange then occurred:

> COLEMAN: Really, guys, this [flexibility proposal] would cause more problems than it would solve. You have everything you need right now.
>
> LYNCH: You don't use what flexibility you have out there now. It is causing more problems than it will solve.
>
> GOINS: I agree.

IBEW Local 1315 President Lynch asked why Respondent was asking for more when it was not using what it had. Schneider said that Respondent was trying to compete with the world and that the Unions were trying to tie Respondent's hands. Coleman said that Respondent's proposal would not make Respondent more efficient or productive, that Respondent already had enough flexibility, and that Respondent ''put something in just to be putting it in.'' Goins said that making paper at the Mobile mill cost Respondent $150 per ton more than Respondent's competitors. Funk said, ''Is that $150 per ton come from the last 18 months? Flexibility didn't come up until the lockout . . . . Was the day after we got out of Louisville the day that the competition got stiff?'' UPIU Local 2650 Representative Wayne Fisher asked for Goins' definition of flexibility. Goins said, ''I think you can read what it says . . . . What do *you* think flexibility is''? (Emphasis in original.) Fisher said, ''Honestly? I think it's a way to destroy seniority.'' Goins denied this. UPIU Local 265 President Frank Bragg said that existing limitations on which employees could be assigned to which jobs had not hindered production, that Respondent had not used all of the ''free will'' Respondent had now, and that ''This sounds like a way to put stumbling blocks in. If you will remove the stumbling blocks, we probably will reach an agreement here.'' Schneider said that he was ''amazed,'' and that this was the first time this had been brought up at the table. A chorus of union representatives denied this. Fisher said that the parties had in fact talked about the matter, ,and Funk said that this had occurred on April 15.[125] Fisher said that Perkins

[125] The only bargaining notes in the record for April 15, 1988, in what appears to be the handwriting of UPIU Local 337 Representative Richard Thomas, state that in connection with (inferentially) Respondent's April 1988 Louisville proposal, which contained ''flexibility'' language (see supra, part II,R,6), ''JN'' (inferentially, UPIU Local 1940 Representative James Neno) asked for a clear definition of ''initial staff;'' Perkins said ''The level of maintenance could re-

Continued

had defined ''flexibility'' as ''any job you can safely perform.'' (See, supra, part II,R, 6.) Schneider said, ''You take the absolutely most bizarre cases and use them as examples.'' Lynch asked whether Respondent wanted to make production people out of ''all of us.'' Coleman said that Respondent had made its flexibility proposal after negotiations had begun, and to hinder getting an agreement; ''Use what you already have, and later, if you need some additional, we will talk about it.'' Funk said that Respondent had been informed after making the Louisville proposal that flexibility was one of the major reasons the Unions had turned the Louisville proposal down. Langham said, ''How could you say it had not been discussed? It was one of the biggest issues.'' Schneider said that he did not ''recall,'' but that he did not think it had been brought in until May or July. Funk said, ''It is a problem and has been a problem, and it was one of the reasons that the proposal was rejected after Louisville.'' Goins asked why the Unions were contending that flexibility would eliminate seniority. Langham said that Respondent's flexibility proposal would empower the foreman to assign sweeping duties to back tenders with 25 or 30 years of seniority. He said that he did not think Respondent would do this, but ''this is one of the things that has our people most upset. The people really went up in the air. They were as upset about this as they were about Sunday premium. Whether it will or will not destroy seniority, if it is in the contract it can be used. We will not agree with it. The fact is, somebody else could use it. That is the big issue.'' Lynch said that Respondent's proposal would empower Respondent to shut a machine down, 25 bump the maintenance people back into the labor pool, and then use them to perform maintenance work at laborers' rates. Funk said that Respondent not only could do it, but would do it; ''You said before, 'any job they could safely perform.'''[126]

Schneider said that the examples and ''theoretical things'' cited by the Unions reflected ''an incredible amount of distrust.'' Funk said that the Unions had suffered by accepting during negotiations for earlier contracts Gilliland's requests to ''trust us,'' and that the Unions could not ''sell'' to the membership Respondent's flexibility proposal even where accompanied by such assurances. UPIU Local 2650 Representative Fisher said that Gilliland was ''still the man we have to deal with down the road.'' Funk said that it was the foremen who would have to administer Respondent's ''flexibility'' proposal, and that his and Goins' word would ''not be good to the next mill manager and union president. We need an agreement in writing that we can live with.'' Goins said, ''We have to establish something that will prevent some idiot from doing these kinds of things. Not all mill managers are as good as I am.''

Then, the parties discussed about whether to apply the contractual plant-closure rules to the shutdown of the extruder. In connection with an observation by Langham earlier that day that he had heard that ''as soon as we get back to work, [Respondent planned] to contract out maintenance,'' Schneider said that Respondent wanted to hold off on that discussion until the next meeting. Langham said that the issues of Sunday premium and holiday pay were ''still out there.'' Schneider said that Respondent's position for the last 18 months had not changed. Langham said, ''My position on signing or not signing the contract has not changed.''

After caucusing, the parties discussed Respondent's plans for performing maintenance work after Respondent ended the lockout. Goins said ''Maintenance costs at the Mobile Mill is one of the biggest in the mill system;'' it is unclear whether he was referring to prelockout costs, costs during the lockout, or both. He stated that as to correction of this problem, Respondent had already made progress by assigning maintenance responsibility to various departments. He went on to say that no maintenance employees who had been classified as maintenance employees before the lockout would lose such jobs in consequence of contracting out after Respondent ended the lockout. The Unions expressed doubt that this would be the case in the long run. Further, joint bargaining committee chairman Funk, a maintenance employee, remarked, ''How do you expect me to work alongside BE&K while there is so much animosity between us?'' Goins said, ''You have done it all your life. PAPCO, for example.'' (The record fails clearly to show what this firm is.) Funk replied that when PAPCO was working in the plant, Respondent's own maintenance employees already had more work than they could handle. Moreover, Funk said, ''PAPCO is a union contractor. We don't love BE&K. In fact, we don't feel as strongly about those temporaries as we do about BE&K. BE&K can be put on our jobs easily. The temporaries go out when we come back. I see it as a big problem.'' Funk further said that if the returnees among the locked-out maintenance workers were too few to fill Respondent's maintenance jobs, these vacancies should be filled by returnees who had at one time filled maintenance jobs but, at the time of the lockout, had been filling production jobs; Funk expressed doubt that these employees would ever be returned to maintenance work when outsiders could be obtained for less money. Goins said that he would rather have these production employees fill maintenance jobs, when he knew their skills, than someone from the pool hall.

Then, the parties again discussed whether to apply the plant closure provision to the move of the extruder. Funk said that the discussion did not involve a great number of people; that there were about 19 altogether, but that because the older employees probably would not want to return to work, the discussion really involved about 6 to 8 people. After another break, Langham submitted a contract proposal which, among other things, called for consideration of the extruder shutdown under the plant closure provision; he expressed disagreement with the transition agreement ''as proposed,'' with Respondent's ''flexibility'' proposal, and with company item 9. In addition, the Unions' proposal called for lump-sum bonuses in lieu of Sunday premium and holiday

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duce, but only by attrition;'' and ''Broke off miscellaneous discussions at 5:00 p.m.'' The notes total three pages, and cover more than 3-1/2 hours of negotiations. According to the notes, among those present were ''WF'' (the union negotiators at Mobile included William Larry Funk, usually referred to as ''Larry,'' and Wayne Fisher), Langham, Schneider, Perkins, and Gilliland. Funk's testimony shows that during the May 13, 1988 bargaining session, the Unions expressed strong opposition to Respondent's ''flexibility'' proposal (supra, part II,S,2). Moreover, his testimony in connection with the June 24 meeting suggests that during that meeting the Unions expressed continued objections to that proposal (see supra, part II,S,4).

[126] As between base-rate employees, retention and recall rights were determined by length of service in the multiple. As between other employees, such rights were essentially determined by seniority within the employees' ''line of progression.''

pay. Also, this proposal expressed disagreement with Respondent's pending proposal with respect to the subcontracting of maintenance work.[127] Langham testimonially described this union proposal as adding to Respondent's pending Mobile proposal the terms of Respondent's Vicksburg proposal, which ''the union'' regarded as a form of compensation for Sunday premium. The Vicksburg proposal included a 401(k) plan, an increase in shift differentials, and a wage increase for shift workers; one reason Langham regarded this wage increase as compensation for Sunday premium was that shift workers would be most affected by the loss of premium pay. At Respondent's request, the parties adjourned until the following morning.

On October 11 and 17, 1988, respectively, the UPIU membership and the IBEW membership ratified separate contracts at Respondent's 225-employee Vicksburg mill. The IBEW executed the ratified IBEW contract on October 19, 1988.

3. The October 20 and 21, 1988 bargaining sessions at Mobile; the UPIU's execution of a Vicksburg contract

The next bargaining session between the Mobile parties was held on October 20, 1988. Schneider said that the Unions' October 19 proposal included some things that had been negotiated at other IP mills in the second round after Sunday premium elimination; that ''something innovative'' had to be done to settle the Mobile dispute; and that if the parties could agree in principle to adding the Unions' October 19 proposal to Respondent's pending proposal, and to a 6-year ''deal'' from January 1987 (the expiration date of the most recent agreement), Respondent could do some of the things in the Unions' October 19 proposal. In connection with Langham's October 19 proposal of a general wage increase, Schneider said, ''We have talked for years about the high maintenance costs at the Mobile Mill and we would have absolutely no credibility, talking about high maintenance costs all that time, and then giving the maintenance employees a raise. You mentioned maintenance rates yesterday for several IP mills, but you failed to mention Camden, Ticonderoga, Lock Haven, and several other mills.'' Langham said that the maintenance employees at the mills named by Schneider were dual crafts, rather than multicraft as in the Mobile Mill. Schneider said that some of them were in fact multicraft.

Schneider went on to say that as to company item 9, Respondent had been running well with reduced manning and did not think it was unreasonable to eliminate the beater-room line of progression and add it to the machines. As to the extruder, he reiterated Respondent's refusal to apply the contractual plant-closing provisions. Langham said that the Mobile maintenance employees had not had an increase in 5 years, and that Respondent had agreed to increase the pay of maintenance employees at its Moss Point mill, although they received higher pay than those at Mobile. He went on to say, ''Talk about maintenance cost compared to the other mills—I haven't heard anything about Moss Point or Pine Bluff.'' Gilliland, who was present because Goins was absent owing to illness in his family, said that Respondent had been complaining about these mills' costs too, and that these mills were not the subject of the present negotiations. Funk said, ''But you are not trying to take a pound of flesh out of [them]—face it.'' Funk further said that Respondent had ''already made a switch by rescinding the permanent contract with BE&K. You did that out of the goodness of your heart, I suppose. I am just talking about being fair. You are trying to make us eat crow.'' After some discussion of the lockout, Langham stated:

> We need to clear the record. I understand yesterday that your note takers there got really excited when I made the statement that said we might have struck anyway and I think they took that out of context. I was having a private conversation with Bob Goins and I said we probably would have gone on and struck anyway, but if it was misconstrued, to say we would strike, I retract that statement. Our people were sitting here watching just like you all have been watching us, and I want to say again, we had no intention of striking. I apologize, commissioner, but I just felt like I needed to clear the record. We need to get past the place of trying to trap one another.

Gilliland then said, ''I hope neither side is sitting here trying to trap the other. Who caused or did not cause the lockout doesn't matter now. Let's just try to settle it.'' The parties exchanged economic proposals all of which assumed a tentative contract expiration date of 1993, a 401(k) plan, the elimination of Sunday and holiday premium, and periodic wage increases for production employees; the parties differed as to, inter alia, whether maintenance employees would receive wage increases and/or cash bonuses.[128] The parties also discussed arrangements for the transition period following Respondent's termination of the lockout; a major issue then discussed was the length of the transition period, with Respondent urging a longer period (60 days) than the Unions believed acceptable.

During this October 20 meeting, the Unions expressed extreme dissatisfaction with Respondent's ''flexibility'' proposal. Gilliland stated that Respondent wanted this proposal for reasons of efficiency, and that the proposal would not cause any layoffs. Gilliland said, ''We want to get you back in the mill to help us try to reduce these maintenance costs. We need your expertise to help Bob [Goins] and his people get the mill running where it should be.'' Funk, a mill employee, said, ''The problem with credibility with that is that this was not even an issue prior to the lockout. If you would have said this prior to March 21 of 1987, then I probably would not have as much a problem with it now, but when you added this, you are just trying to take more.'' IBEW representative Coleman said that if the ''flexibility'' proposal had originally been on the table, he could see its being a legitimate issue now, but Respondent already had flexibility

[127] This finding is based upon the photocopy, attached to Respondent's bargaining notes, of Langham's written proposal, which refers to art. XVII, the article which deals with such subcontracting. The notes themselves refer to art. XVIII, which (so far as the record shows) was a bargaining issue with respect only to premium pay for salaried unit personnel.

[128] Respondent's bargaining notes attribute to Gilliland the statement, during the October 20 negotiations, ''You just can't not give maintenance a wage increase—that is no way to control the maintenance cost. You keep talking about high cost, but that is no way to control them.'' From the content of these remarks, I am inclined to believe that they were made by a union representative.

and he did not understand why Respondent ''threw'' this issue in 6 or 7 months ago. UPIU Local 265 President Bragg said that 19 of the locked-out employees whom he expected to return were involved in the extruder and a third of them would go back into base-rated jobs in the over-55 age bracket in jobs they were not familiar with. He expressed the opinion that they should be encompassed by the plant-closure language. Gilliland said that the language of this clause was plainly inapplicable to the extruder problem. Funk said that the Louisville package (see supra, part II,R,6) had included buyouts for the maintenance, beater-room, and extruder employees, and suggested that Respondent look at that for the extruder and beater employees.

The parties met again on October 21, 1988. The union representatives asked a number of questions about Respondent's proposed transition agreement and how Respondent expected to handle various problems connected with the locked-out employees' displacement of the temporary workers. However, the Unions' only proposals as to this matter were to fill vacancies by preferring employees displaced at other IP mills, and to shorten the transition period from 35 to 30 days. Eventually, the parties agreed that the BEK maintenance employees would be out of the mill when Respondent's own maintenance employees returned, that Respondent's temporary employees would be out of the mill in 30 days, and that for the next 30 days, Respondent could use its supervisors any way it wanted to.

UPIU Vice President Langham proposed that the subcontracting provisions of the expired contract be amended by adding the ''Natchez language'' and the ''Ticonderoga language;'' the record suggests that ''Natchez'' and ''Ticonderoga'' were much the same. As previously noted, the Mobile contract eventually agreed to contained as to the subcontracting matter virtually the same language as the Natchez contract, which was ratified in March 1988, but not executed until November 13, 1988; no contract was ever ratified at Ticonderoga. Later that day, Respondent proposed a ''package'' which included, inter alia, increases in the shift differential to employees who worked every fourth Sunday; a 401(k) plan similar to the Vicksburg plan; increases (contingent on going to a comprehensive plan) in Respondent's contribution to medical coverage; certain lump-sum cash payments to all employees on the payroll on particular dates; general 2-percent increases for all unit employees (including maintenance employees) effective February 1991 and February 1992; and as to subcontracting, the ''Natchez/-Ticonderoga'' language proposed by Langham. As to this matter, Gilliland stated:

> We've agreed to leave a clause in the contract that says we'll maintain a sufficient maintenance crew in each department to do the maintenance work . . . . This is not a commitment that will limit our ability to contract out, but we are leaving the language in the contract to provide written assurance that we won't eliminate the maintenance work force at the Mobile mill . . . . The second section mentions that we can contract out routine maintenance. We will leave this in, but will repeat that it is not our intent to contract out all maintenance.

Langham said, ''The reason we requested it was to not eliminate the work force.'' Respondent's proposal included the same language as its original proposal with respect to Sunday and holiday premiums and working on Christmas.

In addition, Langham brought up the problem of the extruder employees. Gilliland said that the extruder shutdown had already taken place, for reasons which had nothing to do with the work stoppage. Langham said, ''I understand that. When you first included this, I thought you did it because you just wanted to get rid of people, but after talking to the people, I understand the problem with the extruder.'' He said that the Unions had not known until then that the extruder was so unprofitable in Mobile; that the Unions now understood that the extruder would not run in Mobile; and that the Unions wanted to negotiate, not on keeping the extruder, but on obtaining what was right for the people who would lose their jobs when the extruder was shut down. As to the extruder employees, the Unions proposed to invoke the plant closure clause, which would have qualified for pensions those over 50 (rather than the otherwise applicable eligibility date of 55). Gilliland asked how many people in the extruder room were over 50. UPIU Local 265 President Bragg said that about a third of the 19 people there were over 50. Gilliland made an oral undertaking to try to apply the plant-closure clause to the extruder; Langham said that he would take Gilliland's word.[129] Langham said that there was no pending proposal about where the displaced beater-room employees would go. UPIU Local 1940 President Howell said that they would go to the beater room. Gilliland said that as to the beater room, Respondent's offer called for them to blend the displaced employees into the papermill line of progression. Schneider said that this would be done if the Unions were agreeable, and that otherwise, these employees would go back to base rate. Respondent stated that they would be able to bid successfully on an anticipated large number of vacancies. The Unions said that some of the older beater-room employees would be physically unable to perform the work required by such jobs or by base-rate jobs. The Unions proposed a buyout for the beater room, similar to the Louisville proposal. Respondent's representatives said that they would do whatever they could for these older displaced beater-room employees, but could not make any formal commitment across the table.

On October 21, 1988, the UPIU executed a Vicksburg contract (ratified 10 days earlier) succeeding a contract which expired on September 26, 1988.

4. The ratification and execution of a contract in Mobile; Respondent's termination of the lockout; and subsequent events

On October 28, 1988, the Mobile employees voted to accept Respondent's October 21 proposal. The votes were counted in Mobile; the other locations in the pool did not vote on the Mobile offer, or on any kind of offer, during that period of time. During a single telephone call to UPIU president Glenn, he was apprised of the results and approved the agreement. The Mobile agreement was executed by the Unions on October 29, 1988. The agreement states on its face that it is effective between February 1, 1987 (the expira-

[129] None of the displaced extruder employees ever opted to take advantage of this clause.

tion date of the 1983–1987 agreement), and January 31, 1993 (4 years and 3 months after the execution of the new agreement). Langham testimonially described the basic format of this contract as ''the offer [Respondent] had on the table would stay but that you would add three more years to the contract with the Vicksburg package coming in the fourth, fifth, and sixth years.'' Funk testified that the Unions gave in to Respondent's position on items 1, 2, and 3, in return for a 401(k) plan and 25 cents an hour for shift production workers. Gilliland testimonially described this agreement as, ''we took the salient provisions of the Vicksburg contract and tacked them on the end of what was already on the table at Mobile and had been on the table, and with a few other cosmetic changes.'' After the execution of the contract, Respondent terminated the lockout and permitted the locked-out employees to return to work.

As previously noted, the October 5, 1988 charges which underlie the instant April 1989 complaint alleged, inter alia, that Respondent's concealment of information ''so tainted the bargaining process as to convert the existing lockout to an illegal lockout from May 21, 1987 to the date this unfair labor practice is remedied.'' The April 1989 complaint alleged, inter alia, that ''Since on or about August 10, 1987, and continuing until on or about May 3, 1988 [the effective dates of the permanent subcontract] the [March 1987–October 1988] lockout . . . was in furtherance of, and/or prolonged by, ''Respondent's unilateral permanent subcontracting. The Unions' appeal of the Regional Director's action in dismissing other portions of these charges was denied on June 28, 1989, by the General Counsel's Office of Appeals. That letter stated, in part:

> It was concluded that failure to provide information relevant to bargaining did not taint the lockout at the Mobile, Alabama facility from the time the request was denied until information was provided. Thus, under *Hess Oil & Chemical Corp.*, 167 NLRB 115, 117 (1967), not every violation of Section 8(a)(5) will taint a lockout. Rather, the lawfulness of the lockout turns on whether the unfair labor practice(s) materially affected the parties' ability to reach an agreement. In the instant case, the parties were far apart on other issues, such as premium pay, and the failure of the Employer to furnish additional relevant but arguably supplementary information on subcontracting could not be shown to be designed to frustrate collective bargaining on the other issues or to contribute to impasse on such issues. Nor could it be shown that resolution of the subcontracting issue otherwise held up reaching an agreement so hat denial of the information prolonged the lockout. Significantly, the lockout had been implemented in support of lawful bargaining demands at least two months before the permanent subcontracting proposal for which the information was sought had been introduced, and the parties remained far apart on key issues for several months even after that proposal had been withdrawn from negotiations. Thus, we adhere to the determination that the lockout was tainted only during the period in which the Employer permanently subcontracted the work, namely August 1987 through May 1988.
>
> Contrary to your contention on appeal, *Hess Oil* was decided only after consideration of the U.S. Supreme Court's decision in *American Shipbuilding Co. v. N.L.R.B.*, 380 U.S. 300 (1965). In addition, those cases cited on appeal, such as *Bagel Bakers Council*, 174 NLRB 622 (1969) [enfd. in part 434 F.2d 884 (2d Cir. 1970), cert. denied 402 U.S. 908 (1971)], and *Vore Cinema*, 254 NLRB 1288 (1981), were deemed distinguishable inasmuch as they dealt with violations, often occurring contemporaneously with or prior to the lockout, having a significant impact on the lockout.

At the struck DePere, Jay, and Lock Haven mills, Respondent operated at all times during the strikes with permanent replacements, crossovers, and recalled and returned strikers. The UPIU was decertified at the DePere mill on an undisclosed date before December 5, 1989. At the Lock Haven mill, a decertification election was scheduled (at least as of that date) for December 14, 1989, pursuant to a petition filed about May 1987. As of December 5, 1989, a decertification petition with respect to the Jay mill, and filed about November 1987, was still pending.

At the Pine Bluff, Corinth, and Natchez mills, Respondent gave the bargaining representative the choice between tacking on the Vicksburg package to effect a 6-year contract or executing the proposed agreements which had been ratified by the employees in September 1987, December 1987, and March 1988, respectively. All of these mills had been operating continuously without a work stoppage. In each case, the already ratified agreements were the ones which were executed on December 12, 1988 (1100 employees in Pine Bluff), December 16, 1988 (500 employees in Corinth), and November 13, 1988 (fewer than 774 employees in Natchez), respectively. On November 17, 1988, the UPIU executed two contracts (both ratified on November 13, 1988) which respectively covered a 360-employee unit in Beckett, Ohio, and a unit of the same size in Hamilton, Ohio. On January 30, 1989, the employees ratified, and the UPIU and IBEW signed, a contract covering the primary papermill in Camden, Arkansas. The contract ratified on May 31, 1987, by an 870-employee unit in Respondent's Moss Point, Mississippi, mill, whose employees were represented by the UPIU and the IBEW, was never executed. A Board order which required the UPIU to execute that contract on IP's request did not issue until July 14, 1989, after that contract had expired by its terms and a successor agreement had been reached;[130] and Gilliland told the UPIU that he did not care whether the UPIU signed 1987–1989 agreement.

[130] See *Paperworkers (International Paper)*, 295 NLRB 995 (1989). So far as material here, the Board adopted the order of the administrative law judge, which issued on May 5, 1989, and to which the UPIU filed no exceptions. At Moss Point, the UPIU and the IBEW were the joint bargaining representatives. The IBEW, which did not deny the existence of the agreement which the UPIU refused to sign, was named in the Moss Point complaint as a party to the contract, but not as a respondent.

V. *Analysis and Conclusions*

1. The 8(a)(5) allegations

a. *The allegedly unlawful failure to provide information*

(1) Introduction

As the Court of Appeals for the 11th Circuit stated in *NLRB v. Postal Service*, 888 F.2d 1568, 1570 (1989):

> Section 8(a)(5) of the National Labor Relations Act (29 U.S.C. 158(a)(5)) makes it an unfair labor practice for an employer to ''refuse to bargain collectively with representatives of [its] employees . . . .'' In this regard, it is well established that under the NLRA, an employer has a duty ''to provide information that is needed by the bargaining representative for the proper performance of its duties.'' *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–36, 87 S.Ct. 565, 568, 17 L.Ed.2d 495 (1967). This obligation ''unquestionably extends [to] the period of contract [negotiations].'' *NLRB v. Acme Industrial Co.*, 385 U.S. at 436, 87 S.Ct. at 568 . . . The duty to furnish information turns upon ''the circumstances of the particular case.'' *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153–54, 76 S.Ct. 753, 756, 100 L.Ed. 1027 (1956). The key question in determining whether information must be produced is ''one of relevance.'' *Emeryille Research Center, Shell Development Co. v. NLRB*, 441 F.2d 880, 883 (9th Cir. 1971). Information that pertains to employees in the bargaining unit is presumptively relevant. *NLRB v. Rockwell-Standard Corp.*, 410 F.2d 953 (6th Cir. 1969). Conversely, information concerning non-unit employees, including supervisory personnel, does not enjoy a presumption of relevance, and it is incumbent upon the requesting party to prove relevance. *NLRB v. Jaggars-Chiles-Stovall, Inc.*, 639 F.2d 1344, 1347 (5th Cir.), cert. denied 454 U.S. 826, 102 S.Ct. 116, 70 L.Ed.2d 100 (1981). In determining the relevance of the requested information, relating to non-unit employees, a liberal discovery-type standard is employed. *NLRB v. Acme Industrial Co.*, 385 U.S. at 437, 87 S.Ct. at 568 (1967). The NLRB need . . . only find a ''probability that the desired information [is] relevant, and that it would be of use to the union in carrying out its statutory desires and responsibilities.'' *NLRB v. Acme Industrial Co.*, 385 U.S. at 437, 87 S.Ct. at 568.

This duty to provide information is predicated upon the union's need therefor in order to provide intelligent representation of the employees. *F. W. Woolworth Co.*, 109 NLRB 196, 197 (1954), enf. denied 235 F.2d 319 (9th Cir. 1956), court of appeals reversed 352 U.S. 938 (1956); *Graphic Communications Local 3 (Oakland Press Co.) v. NLRB*, 598 F.2d 267, 272–273 (D.C. Cir. 1979); *Westwood Import Co.*, 251 NLRB 1213, 1226 (1980), enfd. 681 F.2d 664 (9th Cir. 1982); *Clemson Bros.*, 290 NLRB 944 fn. 5 (1988); *General Electric Co. v. NLRB*, 466 F.2d 1177, 1183 (6th Cir. 1972); see also *NLRB v. Insurance Workers (Prudential Insurance)*, 361 U.S. 477, 488–490 (1960).

(2) Whether the documents specified in the complaint were relevant to Respondent's subcontracting proposals

The April 1989 complaint alleges, and the answer thereto admits, that Respondent's ''proposals concerning the permanent subcontracting of maintenance unit work previously performed by the Unit'' constitute a subject which ''relates to wages, hours and other terms and conditions of employment of the Unit and are [sic] mandatory subjects [sic] for the purposes of collective bargaining.'' As previously noted, Respondent concedes (opening brief, p. 102 fn. 68; reply brief, p. 113 fn. 66) the relevance, to such proposals, of pages 7 and 8 of the General Counsel's Exhibit 50 (consisting essentially of detailed manning tables at least allegedly contemplated by the cost study). Nor does Respondent appear to question the relevance of page 11 of General Counsel's Exhibit 50, which page covers about the same material as the portions of General Counsel's Exhibit 50 that Respondent either supplied, or whose relevance it now concedes. Contrary to Respondent, I agree with the General Counsel that the remaining documents specified in the April 1989 complaint were likewise relevant to the bargaining issues. It is true that at least most of such documents deal with matters outside the bargaining unit and, therefore, the Unions have the burden of showing their relevance. However, that burden is not exceptionally heavy. Such documents need not be dispositive of the issues between the parties, but, rather, need only have some bearing on these issues; for a broad discovery rule is crucial to the full development of the role of collective bargaining contemplated by the Act. *Boise Cascade Corp.*, 279 NLRB 422, 429 (1986).

Initially, I agree that the Kosak memorandum to Crawford dated July 13, 1987, was relevant to the Respondent's subcontracting proposals. This July 1987 memorandum stated, in part, that good workers were leaving BEK, they were not being replaced with good workers, some BEK workers were performing only marginally or were frequently tardy, and ''top people'' in the instrument and electrical crafts were becoming more and more difficult to find. My finding that the July 1987 memorandum was relevant because it made such representations is based on Perkins' representation to the Unions, when initially proposing item 11 on May 21, 1987, that Respondent had learned during the lockout that the mill could be maintained with ''far fewer people than our normal manning. Our experience with contract maintenance thus far has been outstanding,'' on his May 28 representation to the locked-out employees that contract maintenance had been ''so successful that we have proposed to the joint bargaining committee that the company have the right to temporarily or permanently contract out any and all maintenance,'' and on the essentially similar representations by Perkins to the employees in his May 21 and July 21 letters, and by Respondent's ''information line'' on June 20 and July 31–August 7; such statements in support of item 11 are inconsistent with Respondent's assertion (opening brief pp. 112–113) that ''the decision to propose permanent subcontracting had nothing to do with . . . manning levels experienced when BEK was operating with a temporary work force on 12-hour shifts,'' and Respondent's suggestion that BEK's experience with a temporary work force working 12-hour shifts during a lockout was irrelevant to assessing projected postlockout manning and costs with a permanent work force working 8-hour shifts under a different contract. As IBEW Local 1315 President

Lynch testified when asked what significance the Kosak document would have had to the Unions during negotiations, ''We would have had strong reaction to it probably. This is in direct conflict with what the company was telling us. They said that things were going real smooth—that they were satisfied with that work force out there, and this [document] is indicating that they had some serious problems.''

In disputing the relevancy of the contingency contract and of the May 27, 1987 memorandum concerning reduced billing rates, Respondent claims that as to its reasons for proposing its right to subcontract maintenance, the only relevant information consisted of information in connection with its reasons on May 21, 1987, for proposing on that date that the bargaining agreement under negotiation include such a clause; and that as of that date Respondent's only reason for seeking such a clause was its belief that subcontracting maintenance after Respondent ended the lockout would be cheaper than performing maintenance with Respondent's own bargaining unit employees. Initially, I conclude that the credible evidence fails to support Respondent's contention that on May 21, 1987, perceived savings after Respondent ended the lockout were Respondent's sole reason for proposing the contracting-out clause; rather, the credible evidence preponderantly shows that on May 21, 1987, a desire to reduce during the lockout the BEK multiplier which Respondent had been paying during the lockout played at least a part in Respondent's proposal. Thus, the testimony of Patrick and Melton establishes that about the third week in April, Patrick and Perkins began to complain that BEK's charges under the contingency contract were exorbitant, and began to request a reduction in the multiplier. Further, Melton testified that it was on a date between April 27 and May 1, 1987, when he and Patrick discussed BEK's proposal for a permanent contract, and that it was Respondent which requested BEK to submit such a proposal; a third draft of that proposal (with a multiplier lower than called for by the contingency contract at any time before July 24, and the same one called for by the permanent contract executed on August 11) was sent to Respondent under a covering letter dated May 8, 1987. In addition, Gilliland gave testimony (consistent with Perkins' testimony) that Perkins asked him on May 4 or 5 about proposing to ''permanentize'' the relationship with BEK.[131] Further, Perkins credibly testified that at all material times he was aware that performing maintenance work during a lockout by means of a temporary subcontract was much more expensive than performing such work during a lockout by means of a permanent subcontract. Moreover, Patrick testified at one point, in effect, that Melton told him shortly after Respondent received BEK's May 8, 1987 proposal for a permanent contract that reductions in the multiplier could be obtained by executing a permanent contract. Further, Perkins' May 28 letter to the employees, purporting to describe Respondent's May 21 contracting-out proposal, described it as affording Respondent the right to ''permanently contract out any and all maintenance at the mill, even after an agreement on a new labor contract has been reached,'' the words ''even after'' plainly imply that the proposal also encompassed the period before a new contract was reached. Moreover, Crawford's May 15, 1987 memorandum to BEK seeking to curb ''excessive work hours,'' admittedly to cut down maintenance costs, preceded Respondent's proposal of item 11. In view of the foregoing, I conclude that by May 21, 1987, a desire to reduce maintenance costs during the lockout played a part in Respondent's motives for proposing item 11. Moreover, Respondent has from time to time stated that its decision to execute the permanent subcontract on August 11, 1987, was motivated by a desire to reduce the costs of the lockout.[132] A connection between that decision as thus explained, and Respondent's motivation for proposing item 11, is further shown by Vandillon's May 27, 1987 statement, during the negotiating session immediately after the session when Respondent proposed item 11, that if the Unions would not deal with item 11, Respondent would implement it; by Perkins' July 28, 1987 letter to the Unions, with copies to the locked-out employees, that Respondent had asked the Unions to meet on June 11 and July 16 ''for the specific purpose of bargaining over the decision to subcontract and its effects,'' although Respondent admits (opening brief p. 16) that it convened these two bargaining sessions specifically for the purpose of bargaining over items 9 and 11;[133] by the statement (in effect) on Respondent's ''information line'' on August 26, 1987, after the execution of the permanent subcontract, that Respondent had convened these two negotiating sessions for ''the specific purpose of giving the unions an opportunity to bargain about subcontracting;'' and by Per-

[131] The dates in this sentence are derived from Perkins' and Gilliland's testimony that such events occurred in specified temporal relationship to May 9, 1987. In accepting such testimony, I take into account my disbelief of management's testimony that the event to which they related their testimony as to dates—the completion of the cost study—occurred on May 9. I note that part of the cost study was in fact prepared on May 8.

[132] Thus, Perkins testified (Tr. 1631, LL. 8–10), ''The reason we implemented the contract was to reduce the cost, specifically the maintenance cost, during the lockout.'' See also Tr. 1026, LL. 3–14; Tr. 1251, LL. 9–10; Tr. 1566, LL. 18–3; and Tr. 1631, LL. 15–6. Moreover, while the General Counsel was putting in her evidence on rebuttal, Respondent's counsel stated that Respondent's subcontracting proposal ''was implemented to save costs during the lockout and to reduce the multiplier and to bring down overtime and all of these other factors. And that is the only business justification issue in the case. [Management] witnesses have said clearly that the difference between the permanent and the temporary of BE&K was the basis for that decision [to implement the permanent subcontracting proposal. The witnesses] talked about the specific cost factors that they considered, none of which had anything to do with . . . the comparison to the permanent work force'' employed by IP (Tr. 2835, LL. 21–25; Tr. 2848, L. 2 - Tr. 2849, L. 8). Similarly, Respondent's opening brief states (pp. 109–110), ''IP implemented Company Item 11 in August 1987, rather than waiting for the lockout to end, in order to reduce its charges *from BE&K* and eliminate costs associated with the contingency contract *during* the lockout'' (emphasis in original).

However, Respondent's reply brief states (p. 125) that ''savings as against the contingency contract'' were not ''a reason for permanent subcontracting.'' Moreover, Respondent's opening brief states (pp. 73, 76), ''IP did not implement item 11 for the purpose of exerting pressure on the union or to enable it to operate during the lockout; it did so to reduce costs on a long range basis and improve efficiency . . . IP's purpose was not to maintain operations during the lockout, but to change permanently its mode of operations and reduce costs on a long-term basis . . . ''Cf. infra, fns. 140, 160.

[133] In relying on this letter, I accept Respondent's contention (reply brief p. 98) that the words ''decision to subcontract and itself effects'' were intended to mean whether to subcontract and its effects.

kins' May 3, 1988 letter that the ''necessary effect'' of Respondent's withdrawal of item 11 on that date was to cancel the permanent subcontract. Furthermore, during the July 16, 1987 bargaining session, Vandillon repeatedly said that it was Respondent's intent to contract maintenance. Moreover, Perkins testified that Respondent had tentatively decided to execute the permanent contract, in order to reduce the costs of the lockout, by the time he sent the Unions his July 28, 1987 letter claiming that Respondent had provided the Unions with copies of all documents and internal analyses that provided the basis for item 11. This letter was sent after the Unions' request for documentation had been reiterated (1) on May 27, 1987 (after the first reduction in the multiplier, effective May 18 and reflected in the withheld May 27 memorandum), (2) on June 11, 1987 (admittedly, after the preparation of p. 11 of G.C. Exh. 50), and (3) on July 16, 1987. In addition, on October 5, 1988, during the second day of the hearing and as to whether the hearing should be adjourned pending disposition of the charges filed that day, the following colloquy occurred:

> MR. ZELMAN [counsel for Respondents]: . . . we gave the [Unions] volumes of information . . . . We gave them the basis upon which the company made this decision was handed over to the [Unions] . . . they were given all the documents that formed the basis upon which this decision was made. So my initial reaction—
>
> JUDGE SHERMAN: By the decision, you mean the decision to subcontract the work?
>
> MR. ZELMAN: Yes. . . . we gave [the Unions] the entire proposal from BE&K and the cost analysis that the company prepared that showed why and how they were going to achieve these savings. . . . I am somewhat astounded by a charge that says that because they didn't get one or two more pieces of paper, that that somehow tainted a lockout . . . .

Further, after the issuance of the April 1989 complaint and upon the resumption of the hearing on October 16, 1989, Zelman stated, ''The decision by the Company permanently to subcontract maintenance work was based on the [May 1987] analysis.'' Moreover, Respondent's opening brief (p. 86) states that the May 1987 cost study given to Perkins, which purports to compare costs of subcontracting maintenance with costs of performing it with Respondent's employees, ''was the document used by higher management in reaching its decision to contract maintenance to BE&K on a permanent basis.'' Furthermore, Crawford, who during the effective period of the subcontract was the mill manager of operations, testified that after the August 1987 execution of the permanent subcontract, he was given the instructions that the May 1987 cost analysis was ''the cost analysis on which the decision was made—proposed and made and this is the budget that we need to work toward.'' In view of the foregoing statements by and letters from Respondent's representatives, and for demeanor reasons, I do not credit Perkins' testimony that Respondent's reasons for proposing item 11 had nothing to do with the desire to cut its costs in maintaining the lockout, which Perkins testified was the reason for the execution of the permanent subcontract.[134]

In any event, even assuming that the motives for Respondent's bargaining position about subcontracting did not include until after the Unions' last material requests for documentation a desire to lower Respondent's costs in maintaining the lockout, I conclude that such a change in the reasons which underlay Respondent's subcontracting proposals rendered relevant to the bargaining those documents which were relevant to these alleged new reasons. I regard as beside the point Respondent's seeming reliance (opening brief pp. 109–110, reply brief pp. 85, 125–128) on the absence of any duty by Respondent to bargain about the cost levels of Respondent's subcontracting during the lockout. Counsel for the General Counsel has borne her burden of showing that such documents were relevant to Respondent's at least alleged motives (to decrease its costs in maintaining the lockout) for its position as to a mandatory subject of collective bargaining—namely, permanent subcontracting after the lockout ended.[135] More specifically, the contingency contract was relevant because Respondent's position as to permanent subcontracting was at least allegedly motivated by a desire to reduce the costs of operating under the contingency contract; and the May 27, 1987 memorandum concerning changes in BEK's billing rates was relevant because it had the effect of altering the costs of the contingency contract.

Finally, I agree with the General Counsel that the ICS documents were relevant to Respondent's subcontracting proposal. As previously noted, the field-instrumentation segment of the ICS-II work was actually being performed, before Respondent locked out the unit employees, by CIE's in the bargaining unit (and, perhaps, by other, nonunit personnel also) who when performing it were covered by the 1983–1987 bargaining agreement and by an August 1986 agreement between Respondent and the IBEW: further, CIE's in the bargaining unit had substantially completed training (pursuant to the IBEW agreement) for the performance of the remaining, maintenance segment of the ICS-II work. The evidence of the interconnection between the ICS-II work and Respondent's proposal and decision to subcontract maintenance work to BEK establishes the relevance of the ICS documents. Thus, Perkins testified that although Respondent was willing to listen to and consider any proposals concerning the ICS-II work as long as Respondent was negotiating over subcontracting maintenance work to BEK, once that subcontract was signed the Unions could not have made any proposals

[134] To support the claim that ''All Company witnesses testified that the reasons for proposing Item 11 differed from the reasons for implementing on August 10,'' Respondent's reply brief (p. 105) cites only the testimony of Perkins and Gilliland. Gilliland testified at the cited page that in late July 1987, he asked Perkins why he wanted to sign a permanent contract ''now,'' and ''*one of the things* [Perkins] mentioned was possibility or the certainty of a significant reduction in the multiplier'' (emphasis added), as called for by the BEK contract which allegedly led to Respondent's proposal of item 11. Gilliland was not asked what other reasons were given by Perkins.

[135] Cf. *Postal Service*, supra, 888 F.2d at 1571, 1572, holding that the absence of a duty to bargain with respect to supervisors' working conditions did not excuse the employer's failure to provide information with respect to such matters, where the union had shown it to be relevant to bargaining with respect to mandatory subjects as to unit employees.

which would have interested Respondent in having unit personnel perform the ICS-II work. Accordingly, Respondent's full costs in subcontracting the maintenance work included the costs of subcontracting the ICS-II work—a circumstance recognized by the May 1987 cost analysis, which included a figure for ICS costs for CIE replacement; and by Colley's testimony that in calculating for that cost study how many ''bodies'' had been performing maintenance work, the cost-study team deducted 9 CIE's because the team felt that such work could be subcontracted to ICS. Consequently, in view of Respondent's contention to the Unions that Respondent was proposing item 11 because Respondent believed that subcontracting maintenance would be cheaper than having it performed by Respondent's own employees, the relevance has been shown of General Counsel's Exhibits 38(b) and (c) (which, taken together, show what Respondent's June 1987 contract with ICS with respect to the ICS-II work required Respondent to pay ICS for each hour of labor, the number of employees to be used by ICS, and what markup Respondent had to pay ICS for material and equipment rental);[136] General Counsel's Exhibit 38(d) (ICS estimates to Respondent, before the execution of the permanent contract with BEK, as to Respondent's costs of having ICS-II work performed by ICS either with or without ICS-I work and with various contract durations); and General Counsel's Exhibit 38(e) (an internal IP analysis estimating the cost of a 1-year agreement with ICS limited to ICS-II work).[137] In addition, Respondent's contention (at least from time to time) that it decided on the permanent subcontract in order to cut its costs in maintaining the lockout not only further shows the relevancy of General Counsel's Exhibit 38(b–c), but also shows the relevancy of General Counsel's Exhibit 38(a), which on its face covers only ICS-I work but was in fact applied to ICS-II work during the lockout until June 1987. Finally, the relevancy of General Counsel's Exhibit 38(b–c), which shows that the actual cost of subcontracting the ICS-II work was $531,504 annually, is shown by the fact that the May 1987 cost study which the Unions did receive estimates the annual cost as $432,948, which was derived from the ICS-I (G.C. Exh. 38(a)) contract and was about $100,000 less than Respondent in fact paid for the ICS-II work.

(3) Whether the Unions' requests for documentation imposed on Respondent the duty to supply the documents specified in the April 1989 complaint

At least ordinarily, an employer's duty to supply his employees' statutory representative with information relevant to the proper performance of its duties does not arise unless and until such information is requested. Whether particular, relevant information is to be deemed within the scope of such a request depends upon all the circumstances, including (without limitation) whether the union possessed sufficient knowledge to make a clearer request, whether the circumstances surrounding the request were reasonably calculated to put the employer on notice of its purpose, whether the employer has made an honest and reasonable attempt to supply relevant information which he honestly and reasonably believed to be encompassed by the request, whether the employer has made a reasonable effort to obtain clarification from the union of any request which the employer is honestly unable to understand, whether the union has to the best of its ability attempted to comply with any such clarification request, and whether the employer's failure to provide information had anything to do with any inadequacy in the union's communication.[138] Many of these considerations boil down, in the case at bar, to the fact that at no material time did Respondent ever suggest to the Unions that Respondent's position with respect to permanent subcontracting had anything to do with a desire to make the lockout cheaper. Thus, Perkins testified that he never told the Unions that the reason why Respondent was going to have a permanent contract with BEK was that it was going to be cheaper than a temporary contract. Moreover, during the bargaining session on February 18, 1988, Respondent in effect ignored the Unions' request to be advised what savings, if any, Respondent had realized with respect to the permanent over the temporary contract. Indeed, in connection with such evasive statements, Respondent untruthfully understated to the Unions the size of BEK's current maintenance force at the Mobile plant (supra, part II,R,3).[139] In short, Respondent had good reason to believe, and may well have hoped, that the Unions were unaware that Respondent's bargaining position regarding subcontracting was motivated at least partly by a desire to save

[136] G.C. Exh. 38(b) is ICS' proposal and covering letter. G.C. Exh. 38(c) is the executed contract, which as to the contractor's fee (p. 8) refers to G.C. Exh. 38(b).

[137] Funk gave honest testimony that if provided with G.C. Exhs. 38(d) and (e), the Unions would have argued that the ICS-II work covered by these documents could be performed by unit personnel as well and as cheaply as by ICS personnel.

Respondent's reply brief contends (pp. 118–119, fn. 70) that G.C. Exh. 38(e) was not subject to production because, allegedly, Parnell did not likely receive it until after Patrick had executed the permanent subcontract. However, the job title of the person who prepared it (''supervisor of technical services'') indicates that he too was a member of management. In any event, negotiations as to item 11 continued after the execution of the permanent subcontract, and (as found infra) no legally cognizable impasse ever arose as to item 11.

[138] See generally *A.M.F. Bowling Co.*, 303 NLRB 167, 168–170 and fn. 8 (1991); *Westwood Import*, supra, 251 NLRB at 1227; *Brazos Electric Power Cooperative*, 241 NLRB 1016, 1018–1019 (1979), enfd. 615 F.2d 1100 (5th Cir. 1980); *Wilson & Sons Heating & Plumbing*, 302 NLRB 802 (1991); *United States Smelting & Mining Co.*, 179 NLRB 1018 (1969), affd. 442 F.2d 893 (D.C. Cir. 1971); *Postal Service*, 276 NLRB 1282, 1287 (1985); *E. I. du Pont & Co.*, 291 NLRB 759 (1988).

[139] Respondent's reply brief (pp. 94–95)) seeks to deprecate this inaccuracy by claiming that it could not be assumed that the negotiating team had this kind of information. The short answer to this is that Schneider, Mobile's manager of human relations, tendered the inaccurate figures in purported response to questions asked by the Unions more than 2 weeks earlier. Moreover, then Mobile Mill Manager Perkins, who also attended this meeting, testified that he and Schneider were involved in drafting the answers to the Union's questions. In addition, Schneider was called by Respondent as a witness after all of the relevant documents had been received into evidence; but he was not asked either whether he had seen before the February 18 meeting the draft response which gave an accurate number as to the January staffing, or whether on February 18 he knew the accurate number. Further, Perkins, who testified to a substantial concern with maintenance manning numbers during the preparation of the May 1987 cost study, was also called by Respondent as a witness after all the relevant documents had been received, but was not asked whether he knew the inaccuracy of the number given by Schneider in Perkins' presence.

money during the lockout.[140] Furthermore, as exemplified by Respondent's conduct at the February 18 meeting, Respondent has displayed a niggardly and dissembling approach to the Unions' request for documentation in connection with subcontracting. Thus, on June 11, 1987, when Vandillon told the Unions they had been given all the Company had, Perkins admittedly made no effort to correct him, although Perkins testified that he had received page 11 of General Counsel's Exhibit 50 that morning or the previous day. Further, as to why Perkins never gave the Unions page 11, he weakened his eventual explanation (which for that and demeanor reasons I do not credit) that he did not think the Unions asked for it, by initially giving the reason that he suspected the Unions were ''not very serious'' about wanting more information;[141] and accompanied such testimony by the inherently unlikely and discredited testimony that Vandillon (Respondent's principal spokesman during the negotiating sessions before October 1987) never saw page 11 and never had it drawn to his attention by Perkins, who had allegedly arranged for its preparation in order to assist him in answering anticipated questions by the Unions. Moreover, after admittedly receiving a copy of all 11 pages of General Counsel's Exhibit 50, Perkins never asked the Unions whether they wanted any of the pages they had never been given, but, instead, stated (by letter to the Unions dated July 28, 1987, with copies to the locked-out employees) that Respondent had ''promptly'' provided the Unions with ''copies of all documents and internal analyses that provided the basis for the Company's [subcontracting] proposal'' (the Unions had asked for documentation ''which supports, justifies or tends to supply the basis for'' that proposal). In view of his phrasing of this letter, the considerations previously mentioned in this paragraph, and demeanor reasons, I do not think that Perkins was telling the truth when he testified that he interpreted the Unions' information request as asking for what ''I had used in making the decision to propose'' (indeed, there is no evidence that the Unions believed this decision was made solely by Perkins), and as not encompassing ''any information that is generated in the future'' or the honesty of his testimony, which obviously suggests a highly inappropriate standard for one party's duty to supply information to the other, that ''We gave them everything that I thought they needed in order to sit down and negotiate.'' Furthermore, when on August 24, 1987, the Unions gave Respondent a written request for ''copies of all signed contracts'' between Respondent and BEK for contracting out maintenance work (a request which at least arguably included the March 1987 contingency contract and the May 27, 1987, memorandum showing the agreed-upon changes in the multiplier under that contract), but made oral statements which could be construed as requesting the permanent August 1987 subcontract only, Respondent did not supply any contingency-contract material, or ask whether the August 1987 subcontract was the only one the Unions wanted, but instead gave the Unions that document alone.[142] Further, Respondent reiterated on its August 26, 1987, information line that Respondent had ''promptly furnished to the unions, on request, all written documentation that we had in support of the subcontracting proposal, including the complete BE&K proposal and our internal analysis of it.'' Indeed, and notwithstanding the Unions' foreseeable and consistent opposition to Respondent's subcontracting proposal, Respondent contends at one point (reply brief, p. 120 fn. 72) that the Unions' May 21 request did not extend to material which would show that the cost analysis was defective or that Respondent's subcontracting proposal was not justified. Moreover, I do not credit Gilliland's testimony that he believed the Unions' requests did not extend to material generated after the initial request, for demeanor reasons, and because he must have known of any change after May 21 in Respondent's motives for its subcontracting position. The sincerity of the foregoing testimony by Respondent's witnesses about their interpretation of the Unions' request for documentation is further drawn into question if I am correct in finding (supra, part II,G) that the portions of General Counsel's Exhibit 50 which Respondent did supply to the Unions were prepared after the Unions' initial documentation request.

For the foregoing reasons, I find that the Unions' requests for documentation extended to all the material specified in the complaint. Such requests encompassed material which came into existence after they were received. *A. O. Smith Corp.*, 223 NLRB 838, 842 (1976). To limit the effect of such requests to preexisting documents would interfere with the intelligent bargaining whose promotion is the very purpose of the statutory duty to provide information; such an adverse effect on the likelihood of informed discussion would be particularly great where, as here, the party requesting the information is unaware that thereafter, the other party's motives for its bargaining posture at least allegedly changed.

I find unsupported by the record Respondent's contention that the Unions' requests for documentation were not made in good faith. Respondent's opening brief contends (pp. 90–91):

> [A]lthough repeatedly pressed by the company to specify what additional types of information they wanted, the Unions repeatedly refused to do so. If the Unions

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[140] Respondent's reply brief states at pp. 105–106 (emphasis in original):

> If, in May 1987, the Company had proposed permanent subcontracting in order to reduce costs *during* the lockout, the Unions (and presumably the General Counsel) would undoubtedly have claimed that that proposal was illegal as a matter of law, *i.e.*, that a company cannot propose permanent subcontracting for the purposes of reducing costs during a lockout. Moreover, such a proposal would have had a questionable business justification [see infra, part II,V,2]. Could IP—or any company—justify proposing the *permanent* elimination of 285 jobs in order to reduce costs for a *short* period *during* a lockout? Cf., supra, fn. 132, infra, fn. 160.

[141] He testimonially based this alleged inference on the brevity of the Unions' May 27 examination of BEK's proposal for a permanent contract, before the Unions said that Respondent had not supplied enough information. A 35-minute caucus was held a few minutes later. There is no evidence or claim that during any negotiations thereafter the Unions evinced a failure adequately to examine BEK's proposed permanent contract.

[142] Respondent's opening brief (pp. 110–111) seeks to explain Respondent's action on the ground that the August 1987 contract was the only ''currently effective signed contract with BE&K for maintenance.'' The Unions' written request did not specify any such limitation. Moreover, Perkins testified that for some period after the execution of the August 1987 contract, the parties continued to operate under significant portions of the contingency contract, and there is no reason to suppose that the Unions knew this.

> were seeking information in good faith for the purposes of collective bargaining, what possible reason would they have had for refusing to tell the company the kinds of documents they were looking for, particularly after repeated requests that they do so? There is only one reasonable explanation—the Unions had no interest in obtaining information about subcontracting; their objective was simply to harass the company and/or to induce the company to commit an unfair labor practice.

The short answer to this contention is that the Unions were disabled from clarifying their request by Respondent's action in omitting relevant portions of one of the only two documents Respondent gave the Unions in response to their repeated requests for documentation, and in failing to tell the Unions that Respondent's bargaining position as to subcontracting was allegedly based at least partly on Respondent's desire to save lockout costs—a claim which, if revealed, would have enabled the Unions to describe with more particularity the documents they wanted. Respondent's opening brief (pp. 91–93) also relies on the Unions' conduct in holding in abeyance on and after May 27, 1987, their previous request for a mill tour. However, as the Unions explained, their action in deferring the tour was based largely on the belief that the full benefits of the tour might not be realized if it was taken before the Unions had received the documentation they had requested. That the Unions were likely correct in their belief is shown by the fact that although the produced documents showed only the total manning level from which most of the projected subcontracting costs were derived, the withheld documents broke down that total by setting forth as to each area or machine the number of employees in each craft. Manifestly, this breakdown would have made it much easier for the Unions, when touring the plant, to ascertain whether the projected manning levels differed from those in fact being used or were otherwise realistic in view of the currently used production techniques.

Finally, in contending that the Unions' documentation requests were not made in good faith, Respondent relies on the Unions' at least alleged refusal to bargain with respect to the subcontracting issue. However, the most that can be inferred from the Unions' unresponsiveness to Respondent's subcontracting proposal is an unwillingness to commit themselves, even tentatively, as to the continued existence of almost a quarter of the jobs in the unit, without having received as much information as the Unions were legally entitled to about Respondent's basis for its bargaining position about subcontracting. It has been said that a union's execution of a bargaining agreement without receiving requested information does not affect the union's right to receive it, because the union could properly feel that the advantages of a contract in hand outweigh those which the union might later obtain when all relevant information would be available to it. *Oil Workers Local 6–418 (Minnesota Mining) v. NLRB*, 711 F.2d 348, 357 fn. 17 (D.C. Cir. 1983). Correlatively, the union can properly make the opposite choice, without thereby affording the employer the right to act as if he had complied with his statutory duty to provide the information. It is true that the Unions further alleged that because item 11 was a new proposal, the parties' prior impasse legally precluded Respondent from advancing it. However, because Respondent's unlawful withholding of information has rendered uncertain what the Unions would have done if they had received it, Respondent cannot claim the benefit of any assumption that the Unions' erroneous legal position would have led them to continued inaction as to item 11 once they had found out—as they would have had an opportunity to find out if Respondent had provided them with the original contingency contract and the document which showed the reductions in the multiplier thereunder—that Respondent was seeking to give up its maintenance employees' jobs as a means of lessening Respondent's cost of obtaining by means of the lockout the concessions which Respondent was seeking with respect to the production employees' paychecks.[143]

(4) Whether the complaint as to the failure to provide information is partly time-barred

As previously noted, the Unions' last request for information was made more than a year before the filing of the charge which is specified as the underlying charge in paragraph 1 of the complaint alleging that Respondent violated Section 8(a)(5) by failing to provide certain documents in respond to the Unions' request. However, I find unmeritorious Respondent's contention that Section 10(b) of the Act bars the complaint as to the contingency contract, the document showing reductions in the multiplier under that contract, and the document showing manning reduction requests by Respondent under that contract.

As the Board said in *John Morrell & Co*., 304 NLRB 896, 899 (1991) (footnotes omitted):

> . . . the 10(b) period does not begin to run until the charging party receives clear and unequivocal notice—either actual or constructive—of the acts that constitute the alleged unfair labor practice, i. e., until the aggrieved party knows or should know that his statutory rights have been violated. As a corollary—and a fortiori—when a party deliberately misrepresents or conceals from another the operative facts concerning its actions so that the other party is unable, even through the exercise of due diligence, to discover these facts, the 10(b) period does not begin to run until the deceived party obtains the relevant facts.

Moreover, the burden falls upon Respondent to show that the Unions had clear and unequivocal notice of the unlawful conduct. *Desks, Inc*., 295 NLRB 1, 11 (1989). Respondent has failed to discharge that burden.

Respondent misconceives the thrust of the rule articulated in *Morrell* in urging (pp. 102–103 of Respondent's reply brief) that the Unions had to know about the existence of the unproduced contingency contract,[144] and (emphasis in origi-

[143] Because until October 21, 1988, no agreement was reached at the Mobile bargaining table or ratified by the Mobile employees, and because the October 1988 agreement was ratified by the employees a week later and executed the next day, there is no factual predicate for the contention in Respondent's reply brief (p. 150 fn. 90, emphasis in original) that by ''refusing to sign a contract at Mobile until strikes terminated in *other* bargaining units, the UPIU was committing a blatant unfair labor practice.''

[144] Although discussions with BEK about such a contract began in October 1986, the contract was not executed until several days after Respondent began the lockout (supra, part II,A). Moreover, Re-

Continued

nal) ''had to know that there would be *some* documents reflecting BEK's actual performance and experience under that contract.''[145] The operative fact of which the Unions had no notice was the circumstance which rendered these documents relevant to the bargaining—namely, Respondent's claim before me that its subcontracting position was due at least partly to a desire to reduce its costs during the lockout. See *Barnard Engineering Co*., 295 NLRB 226, 226–227, 249–251 (1989); *Wilson & Sons*, supra; *Burgess Construction*, 227 NLRB 765, 766 (1977), enfd. 596 F.2d 378 (9th Cir. 1979), cert. denied 444 U.S. 940 (1979); *ACF Industries*, 234 NLRB 1063 (1978). Although the memorandum revealing manning problems under BEK was also relevant to Respondent's representation to the Unions that Respondent wanted to include item 11 in the bargaining agreement because subcontracting maintenance after Respondent ended the lockout would be cheaper than performing maintenance with Respondent's own employees, Respondent persistently advised the Unions that it had given the Unions all the requested documents in its possession. Likewise without merit is Respondent's seeming contention (opening Br. 114), for which Respondent gives as its sole record reference Perkins' testimony that during the lockout he was unaware of the existence of the May 1987 memorandum regarding changes in the multiplier, that Respondent did not violate the Act by failing to give the Unions this document and the July 1987 memorandum regarding BEK manning problems because ''IP's negotiators'' did not know about the existence of ''these documents.'' Respondent was obligated to make a reasonably diligent effort to obtain the information requested by the Unions. *John S. Swift Co*., 124 NLRB 394, 395 fn. 1 (1959), enfd. in relevant part 277 F.2d 641, 645 (7th Cir. 1960); *Minnesota Mining & Mfg.*, 261 NLRB 27, 41 (1982), enfd. 711 F.2d 348 (D.C. Cir. 1983). At a minimum, discharge of this duty would have involved consultation with Crawford, who in Respondent's managerial hierarchy was separated from Negotiator Perkins by only operations manager Walker,[146] and who was the person primarily responsible for dealing with BEK on a day-to-day basis. Because both these documents were sent to him, such consultation would have disclosed their existence. Moreover, Perkins must have at least suspected that Respondent had some documents reflecting that his urgent requests for deceases in the multiplier had led to BEK's agreement to an 8-percent decrease in BEK's charges for straight-time work.

(5) Conclusion

For the foregoing reasons, I find that Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide the Unions with pages 7, 8, and 11 of General Counsel's Exhibit 50 (the cost study); with the contingency contract; with the May 27, 1987 memorandum reflecting a change in billing rates under the contingency contract; with the July 17, 1987 memorandum regarding manning reductions requested by Respondent during performance of the contingency contract; and with the ICS documents. There is no merit to Respondent's contention (opening brief pp. 105–106) that it was under no obligation to provide page 11 of General Counsel's Exhibit 50 in view of *Boise Cascade*, supra, 279 NLRB at 432, where the administrative law judge found that the employer could lawfully withhold a document which revealed the employer's future bargaining strategy.[147] On its face, page 11 does not appear to reveal bargaining strategy; rather, on its face it purports to set forth factual assumptions which at least allegedly underlay management's conclusion as to the number of BEK maintenance employees who would be needed during the first year of subcontracting. Nor is such a purpose shown by Perkins' testimony (somewhat difficult to reconcile with Parnell's and Colley's testimony; see supra, part II,G) that Perkins asked Parnell to prepare page 11 in order to enable Perkins to respond accurately to anticipated questions from the Unions as to how Respondent determined that the contractor could perform the work with the number of people and at the cost set forth on pages 1–6.

b. *The allegedly unlawful permanent subcontracting*

An employer violates Section 8(a)(5) and (1) of the Act by unilaterally implementing its proposals with respect to a mandatory subject of collective bargaining, in the absence of a legally cognizable impasse. *Litton Business Systems v. NLRB*, 111 S.Ct. 2215, 2221 (1991). Further, no such legally cognizable impasse can be reached if a cause of any deadlock which may have been reached is the employer's failure to comply with its statutory bargaining obligation, including its duty to provide relevant information on request.[148] I find that Respondent's unlawful failure to provide information was a cause of any deadlock as to subcontracting, and that Respondent has failed to discharge its burden[149] of showing that the parties would have deadlocked even if Respondent had complied with its statutory bargaining obligations.

Thus, so far as the record shows, the Unions were not advised until hearing Perkins' testimony on October 20, 1989, more than a year after the parties had executed a new agreement, of Respondent's claim that its posture with respect to

spondent gave the Unions a copy of only the August 1987 permanent subcontract after receiving a written request for ''*all* signed contracts between [Respondent] and B&K, for contracting out [Respondent's] maintenance work'' (emphasis added).

[145] Respondent's opening brief states, with a record reference which does not support this assertion, that Respondent's negotiators themselves did not know about the existence of the memoranda regarding reductions in the multiplier and manning reduction requests (p. 114).

[146] Moreover, Manager of Financial Controls Piacentino, to whom the billing-rate memorandum was addressed, was separated from Negotiator Perkins by only the controller.

[147] As Respondent tacitly recognizes, no exceptions were filed to this determination.

[148] *A.M.F. Bowling*, supra; *Reece Corp*., 294 NLRB 448, 453 (1989); *NLRB v. Marystone Mfg. Corp*., 785 F.2d 570, 581 (7th Cir. 1986), union's petition for cert. denied 479 U.S. 821 (1986); *Pertec Computer Corp*., 284 NLRB 810, 812 (1987); *Cowin & Co*., 277 NLRB 802, 817 (1985); *Clemson Bros.*, supra, 290 NLRB at 945; *Palomar Corp*., 192 NLRB 592, 598 (1971), enfd. 465 F.2d 731 (5th Cir. 1972). The Board has recently indicated that under some circumstances a legally cognizable impasse may exist even where a request for relevant information is still outstanding or has been the subject of misrepresentation. *Brewery Products*, 302 NLRB 98 (1991); *Decker Coal Co*., 301 NLRB 729 (1991). However, the Board nonetheless based its *Decker* finding of no preimplementation impasse on the employer's failure to provide requested information until after the implementation.

[149] *Dependable Maintenance Co*., 274 NLRB 216, 219 (1985); see also *NLRB v. Transportation Management Corp*., 462 U.S. 393, 403 (1983).

permanent subcontracting was based at least partly on a desire to make the lockout cheaper. However, if Respondent had given the Unions copies of the March 1987 contingency contract and the May 27, 1987, memorandum reflecting reductions effective the week of May 24 in the multiplier, these documents might have enabled the Unions to figure out, by inference if not by explanatory statements from Respondent, that Respondent's posture with respect to subcontracting was affected by the consideration that permanent subcontracting would lead to lower maintenance costs during the lockout itself and, therefore, to an increase in Respondent's economic power to prevail in the labor dispute. Indeed, even before Perkins so testified, UPIU Local 2650 President Funk, an IP maintenance employee who was chairman of the joint negotiating committee, testified that if Respondent had given him the May 27 memorandum, he ''would have wondered why [Respondent] would need to sign a permanent contract if they could get a reduction in rate without it.''[150] If the Unions had learned in mid-summer 1987 about their impending loss of relative economic power in consequence of the threatened immediate permanent subcontracting, they might well have altered at that time (as they eventually did alter) their bargaining position as to other issues dividing the parties, or proposed a contractual clause resembling the new subcontracting clause eventually agreed to, which contained fewer restrictions on subcontracting than had the expired bargaining agreement. Respondent's withholding of these documents created a situation like *Michigan Ladder Co.*, 286 NLRB 21 (1987), finding that the employer failed to afford the bargaining representative a meaningful opportunity to bargain over a subcontracting decision where the employer had left the bargaining representative in the dark about the employer's real motives for the decision. Moreover, if the Unions had been given pages 7, 8, and 11 of General Counsel's Exhibit 50, and particularly if they had thereafter been permitted to tour the plant in order to ascertain Respondent's existing production techniques and the number of BEK maintenance employees who were in fact being used in the various respective operations, as compared to proceeding only on the basis of pages 1–6 the Unions would have been in a significantly better position to assess whether Respondent's projected manning (and, therefore, projected costs) under a permanent BEK contract were realistic. For example, although pages 1–6 fail to specify the number of paper machines to be operated, pages 7–8 indicate that only four machines were to be operated. Although management witness Colley testified at certain points that manning requirements would be unaffected by whether the number of paper machines to be operated was four or five, other portions of his testimony described supra, part II,G, not only draw into question the honesty of the conclusion to which he testified, but also indicate that the Unions might have reasonably concluded and argued that five machines required more maintenance employees than four.[151] Further, Funk credibly testified that as to the pulp, caustic, and bleach plant, page 7 (but not pp. 1–6) shows one shop rather than the two which existed before the lockout begin, and also shows fewer people in the one shop than had worked in the two shops; and ''I [am] assuming by this, seeing it now, that they have a smaller number by assuming some of the jobs of the other areas. I don't know. I would have had to question that.'' Moreover, he credibly testified that page 8 shows that Respondent planned to do lubrication work with fewer people than had performed such work before the lockout, and he wondered how Respondent could do the lubrication with this number of people.[152] Further, if the Unions had received the July 17, 1987, memorandum regarding BEK's manning difficulties, the Unions could have used this as a basis for arguing that Respondent was underpredicting the level of manning needed under BEK—and, therefore, Respondent's costs under BEK—because Respondent was not sufficiently taking into account the relatively low quality of the BEK employees who remained on BEK's payroll.[153] Finally, if the Unions had received the ICS documents, the Unions would have been able to point out not only that the cost study had erroneously underestimated the cost of subcontracting the ICS-II work, part of which was being performed by unit personnel before the lockout and most of which was projected to be performed by them, but also the fact that the permanent subcontract to BEK would lead Respondent to foreswear the option of saving money on the ICS work by simultaneously signing a subcontract with ICS with respect to both the ICS-I and the ICS-II work (supra, part II, K).

For the foregoing reasons, I conclude that Respondent's unlawful failure to provide the Unions with the documents

[150] Before Perkins testified and when asked on cross-examination whether Respondent's ability to obtain reductions in May 1987 under the temporary agreement had some bearing on Respondent's decision to propose permanent subcontracting, Lynch testified: ''I don't know. I don't know what other factors were involved there . . . I have no idea that this was the reason they made the decision they made.''

[151] Rather similarly, process control superintendent Parnell's specification of only four paper machines when he prepared p. 11 of the cost study at least seemingly draws into question his testimony that he, Colley, and Jones had previously concluded that a fifth paper machine would not require extra manning. Certain portions of Perkins' testimony (Tr. 1123, LL. 7–15) suggest that the August 1987 reactivation of the fifth paper machine was one reason why the BEK maintenance force after the execution of the permanent subcontract was larger than the estimate in the May 1987 cost study.

[152] At p. 8 the General Counsel's exhibit called for eight employees to perform lubrication work. When BEK became the permanent subcontractor and took over that work (see supra, fn. 86), BEK used at least 13 rank-and-file employees, and perhaps as many as 15, to perform it. Although Perkins suggested in his testimony that BEK's lubrication employees initially lacked experience in what he described as ''site specific'' work, Crawford testified that BEK's lubrication personnel had been performing the same lubrication work on IP's payroll.

[153] In view of the assistance which pp. 7 and 8 would thus have provided Funk, who was the president of UPIU Local 2650 and the chairman of the joint negotiating committee, there is little materiality to whether these pages would have assisted IBEW Local 1315 President Lynch, whose union and its parent had jurisdiction over significantly fewer employees than did the Paperworkers. In any event, the most that can be concluded, from his mistaken October 1989 testimony that certain specifics were set forth on pp. 7 and 8 but not on pp. 1–6, is that after he first saw pp. 7 and 8 in October 1988—about 6 months after Respondent had dropped item 11—he did not carefully compare them with pp. 1–6. His incomplete recollection in October 1989 of pp. 1–6—which the Unions received in May 1987—hardly indicates that he did not carefully review them at that time.

described in the April 1989 complaint precluded the existence of a legally cognizable impasse as to Respondent's subcontracting proposals.[154] Although the parties may have been at an impasse on the package implemented by Respondent in March 1987, the subcontracting proposals were not reasonably comprehended within the negotiations before May 1987 and could not be implemented before a legally cognizable impasse was reached on the subcontracting issue itself. *Greensboro News & Record*, 290 NLRB 219, 219 fn. 2, 232 (1988). Accordingly, I find that Respondent violated Section 8(a)(5) and (1) of the Act on August 11, 1987, by unilaterally implementing its subcontracting proposals, and that this unfair labor practice continued until the subcontract was rescinded on May 3, 1988.

2. The 8(a)(1) and (3) allegations

NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967), considered the reinstatement rights of certain individuals who had participated in a protected economic strike in order to induce their employer to make more favorable contract proposals to its employees' collective-bargaining representative (*Fleetwood Trailer Co*., 153 NLRB 425, 426–428 (1965)). The Supreme Court held in *Fleetwood* (389 U.S. at 378–380) that under the standards set forth in *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967), unless the employer had sustained the burden of proving legitimate and substantial business justification, the employer's refusal to reinstate such participants in a protected bargaining strike would violate Section 8(a)(1)and (3) of the Act without reference to intent. In so finding, the Court relied on Section 2(3) of the Act, which provides, in part, that the term ''employee . . . shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute . . . and who has not obtained any other regular and substantially equivalent employment.'' This same language in Section 2(3) preserves the continued employee status (and, therefore, the statutory rights concomitant to that status) of individuals whose work has ceased because their employer has lawfully locked them out in an effort to induce their bargaining representative to accept his contractual proposals. See *Harter Equipment*, 293 NLRB 647 (1989) (*Harter II*). Accordingly, I conclude that the job protection afforded by *Great Dane* to individuals who are subject to a lawful bargaining lockout is no less than the job protection afforded, by *Fleetwood's* reading of *Great Dane*, to participants in a protected bargaining strike. Indeed, in at least one significant respect the job protection afforded to lawfully locked-out employees is greater than that afforded to economic strikers. *Fleetwood* held that as to economic strikers, a ''legitimate and substantial business justification'' for refusing to reinstate them is made out by a showing that the jobs claimed by the strikers are occupied by workers hired as permanent replacements during the strike in order to continue operations. 389 U.S. at 379. However, *Harter II* held that such a showing would not constitute a ''legitimate and substantial business justification'' for failing to reinstate locked-out employees at the end of the lockout; rather, the Board said (293 NLRB at 648) that the locked-out employees ''could not lawfully be . . . permanently replaced. Indeed, the finding that the replacements were temporary was essential to the dismissal of the complaint'' in *Harter I*, supra, 280 NLRB 597, 829 F.2d 458, where the Board had found lawful the lockout of the employees found in *Harter II* to be the sole employees eligible to vote in a requested decertification election. This ban on the permanent replacement of locked-out employees flows partly from the fact that such employees (unlike strikers) have no way of protecting their jobs by electing to return to work before the end of the work stoppage.[155]

For the foregoing reasons, I conclude that if Respondent had chosen to end the lockout during the effective period of the permanent subcontract with BEK, but had failed and refused to recall locked-out employees on the ground that the maintenance jobs had been permanently contracted out, Respondent would have violated Section 8(a)(1) and (3) of the Act. Accordingly, I conclude that Respondent violated such statutory provisions by executing that permanent subcontract, thereby advising the locked-out employees that no maintenance jobs would be available to them even after the end of the lockout. My finding supra, part II,V,1,b that the execution of this subcontract violated Section 8(a)(5) renders unsupportable Respondent's claim (supra, fn. 132) that the monetary savings at least allegedly anticipated and/or realized by that subcontract constitute ''legitimate and substantial business justification'' for its action with respect to the job rights of its locked-out employees. See *Land Air Delivery*, 286 NLRB 1131 (1987), enfd. 862 F.2d 354 (D.C. Cir. 1988), cert. denied 110 S.Ct. 52 (1989); *Great Western Produce*, 299 NLRB 1004 (1990).

My finding that the parties failed to reach a legally cognizable impasse makes it unnecessary to resolve the issue to which Respondent directs its seeming contention that in view of the April 1989 complaint allegation (admitted in Respond-

[154] Citing *Gilberton Coal Co*., 291 NLRB 344, 347 (1988), enfd. 888 F.2d 1381 (3d Cir. 1989), Respondent contends that it was under no duty to provide most of the ICS documents because they did not come into existence until after all the bargaining as to subcontracting had been concluded. However, Respondent's failure to provide the other documents specified in the complaint was sufficient to preclude the existence of a legally cognizable impasse such as the one found to exist in *Gilberton* before the respondent employer acquired the documents in question. Moreover, bargaining about subcontracting continued until October 21, 1988, more than a year after the compilation of the ICS documents; indeed, Respondent did not withdraw item 11 until May 1988, 7 months after the creation of the most recent ICS document.

[155] In upholding the legality of bargaining lockouts during which the employer continued business operations, the courts have repeatedly referred to the temporary status of the locked-out employees' replacements. See, e.g., *Boilermakers Local 88 (National Gypsum)* v. NLRB, 858 NLRB 756, 763–769 (D.C. Cir. 1988); *Harter I*, supra, 829 F.2d at 461–463; *Inter-Collegiate Press v. NLRB*, 486 F.2d 837, 845, 847 (8th Cir. 1973), cert. denied 416 U.S. 938 (1974). Cf. *Johns-Manville Corp. v. NLRB*, 557 F.2d 1126 (5th Cir. 1977), union's petition for cert. denied 436 U.S. 956 (1978), finding lawful the lockout and subsequent replacement of employees who were involved in what amounted to an in-plant strike including sabotage.

Respondent's information line for August 28, 1987, recognized that locked-out employees cannot be permanently replaced. However, Respondent's opening brief states (pp. 76, 78) that whether an employer can permanently replace employees during a lockout ''is presently an open question under Board law.'' Although *Harter II*, supra, 293 NLRB 647, is cited in the opening briefs of the General Counsel, the Electrical Workers, and the Paperworkers, this case is not cited in either Respondent's reply brief or its opening brief.

ent's answer) that Respondent's proposal concerning the permanent subcontracting of unit work constituted a mandatory subject of collective bargaining, a legally cognizable impasse as to that proposal would preclude any finding that Respondent's unilateral implementation of that proposal violated Section 8(a)(1) and (3).[156] I am by no means clear that such a rule would be invariably applicable.[157] On the other hand, neither would I be spontaneously impressed by any contention that permanent unilateral subcontracting during a lawful bargaining lockout constitutes a per se violation of Section 8(a)(1) and (3) of the Act.[158] Rather, I conclude that in order to determine whether Respondent's permanent contracting out would have violated Section 8(a)(1) and (3) even if the parties had reached a legally cognizable impasse as to Respondent's contracting-out proposal, I would likely have to engage in the rather complicated inquiry described in *Great Dane*, supra, 388 U.S. at 33–34. I shall not engage in such an essentially academic exercise with respect to an issue mooted by my finding as to the alleged impasse.[159] Accordingly, I need not and do not consider the factual and legal support for the counsel for the General Counsel's seeming contention that assuming (as she disputes) *Great Dane* would ever permit a finding of legitimate and substantial business justification for permanent subcontracting of unit work during a lockout, no such justification exists here because the real motivation for Respondent's subcontracting proposal was allegedly a desire to frighten the Unions into making concessions in other areas, because these motivations allegedly entered into Respondent's execution of the permanent subcontract, and because Respondent allegedly acted in the allegedly justifiable belief that BEK would not insist on the rights newly afforded it under the permanent subcontract if events connected with the labor dispute led Respondent to forswear the ''permanent'' aspect of the subcontracting in effect after August 1987. However, it might be appropriate to note that as to certain aspects of the *Great Dane* issue, I am confused by Respondent's briefs and arguments. Thus, as to Respondent's reasons for permanently subcontracting the work, Respondent has sometimes claimed (1) that it took this action solely to reduce its maintenance costs on a long-term basis, and has sometimes claimed (2) that it took this subcontracting action solely for the purpose of reducing its maintenance costs while it was continuing the lockout (see supra, fns. 132, 140). Further, Respondent's reply brief at one point questions whether Respondent could justify its permanent subcontracting for reason 1,[160] and at another point questions whether Respondent could justify proposing the permanent subcontracting for reason (2) (see supra fn. 140). Also, as noted supra, part II,V,1,a(2) (especially fn. 132), as to its real reasons for permanently subcontracting the work, Respondent has taken positions which I am unable to reconcile with each other.

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 Unions are each labor organizations within the meaning of Section 2(5) of the Act.

3. At all material times, the Unions by virtue of Section 9(a) of the Act have been the exclusive representative, for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment of Respondent's employees in the following unit, which is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees at Respondent's Mobile, Alabama, facility.

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[156] Respondent's May 1989 answer admits the April 1989 complaint allegation that ''the subject set forth above in paragraph 12, relates to wages, hours and other terms and conditions of employment of the Unit and are [sic] mandatory subjects for the purposes of collective bargaining.'' Par. 12 of that complaint alleges, ''Since on or about August 10, 1987, and continuing until on or about May 3, 1988, Respondent unilaterally implemented its proposals concerning the permanent subcontracting of maintenance work previously performed by the Unit.'' Accordingly, the instant case does not present the issue of whether such proposals were mandatory subjects of collective bargaining to the extent that they contemplated permanent subcontracting during the period of the lockout. Compare *NLRB v. Longshoremen (Dolphin Forwarding)*, 447 U.S. 490 (1980), with *Fiberboard Corp. v. NLRB*, 379 U.S. 203 (1964); *Dairylea Cooperative*, 219 NLRB 656 (1975), with *Shipbuilders (Bethlehem Steel Co.) v. NLRB*, 320 F.2d 615, 619–620 (3d Cir. 1963), employer's petition for cert. denied 375 U.S. 984 (1964). See also *Service Electric Co.*, 281 NLRB 633 (1986).

[157] See, e.g., *Litton*, supra, 111 S.Ct. at 2221–2222; *Gaso Pumps, Inc.*, 274 NLRB 532 (1985); *Continental Winding Co.*, 305 NLRB 122 (1991); *NLRB v. McClatchy Newspapers*, 140 LRRM 2249, 2250, 2252, 2260 fn. 6, 2261–2262, 2263 (statement of Circuit Judge Edwards), 2268–2269 (statement of Circuit Judge Silberman) (D.C. Cir. 1992).

[158] For example, during an at least initially lawful bargaining lockout of a unit consisting of tractor-trailer drivers whose work the employer proposed to permanently subcontract, after reaching a legally cognizable impasse the employer would not self-evidently violate the Act by unilaterally entering into a permanent subcontract as to such work because of a new Federal statute, enacted after the lockout began, requiring tractor-trailer drivers to be younger than any of the locked-out drivers.

[159] In connection with Respondent's contention that its permanent subcontracting was lawful because of legitimate and substantial business justifications, Respondent relies on documents attached to its opening brief as Exhs. B and C, which Respondent describes as revisions of Respondent's Exhs. 79 and 80, respectively. Because addressed to an issue which I have found it unnecessary to resolve, both Exh. B and Exh. C have been disregarded. However, the General Counsel's motion to strike Exh. C is denied. I note that because the record in this case does not include either Exhs. B and C or the brief to which they are attached (see Sec. 102.46(b) of the Board's Rules and Regulations), in the normal course these documents will not be seen by the Board itself or by any reviewing court.

[160] Respondent's reply brief (p. 28) states that under *Great Dane*, the objective of establishing a long-term relationship with BEK and saving Respondent money

> *could not* be asserted as a business justification for implementation *during* the lockout . . . . The *only* reason that the company *could* logically assert as a justification for implementation *during* the lockout—rather than after—was to save money and improve efficiency during the lockout. [Emphasis in original.]

Cf. supra fn. 132. The brief at least seems to go on to contend that the quoted proposition is irrelevant to the instant case, because Respondent had initially elected to perform its maintenance operations during the lockout with BEK's employees rather than employees employed by Respondent. Cf. *Land Air*, supra, 286 NLRB 1131, enfd. 862 F.2d 354.

4. Respondent has violated Section 8(a)(5) and (1) of the Act by failing to provide information to the Unions.

5. Respondent has violated Section 8(a)(1), (3), and (5) of the Act between August 11, 1987, and May 3, 1988, by permanently subcontracting maintenance work previously performed by members of the bargaining unit.

6. The unfair labor practices set forth in Conclusions of Law 4 and 5 affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has violated the Act in certain respects, I shall recommend that Respondent be required to cease and desist from such conduct, and from like or related conduct, and to post appropriate notices.[161] Because Respondent has ended the lockout and no claim has been advanced that Respondent failed to offer reinstatement to any locked-out employee, no reinstatement order is called for. Nor is an order called for which would affirmatively require Respondent to furnish the Unions with information; during the hearing the Unions obtained copies of the documents in question in response to subpoena.

The General Counsel and the Unions seek a backpay order with respect to all the locked-out employees during the effective period of the permanent subcontract. Respondent contends that no backpay order should issue, on the ground that Respondent would have continued to maintain the lockout throughout the proposed backpay period even if no permanent subcontract had been executed. Respondent further contends that in any event, the backpay order should be limited to the employees who were terminated in consequence of the subcontract.

Although Respondent contends otherwise, the backpay rights of the employees whom it terminated in violation of Section 8(a)(1), (3), and (5) are clearly controlled by *Abilities & Goodwill*, 241 NLRB 27 (1979).[162] The Board there stated that the unlawful discharge of an employee while he is on strike creates an ambiguous situation, because one cannot really be certain whether his continuing failure to work is voluntary—that is, a result of his adherence to his predischarge decision to strike—or is due to the dischargee's belief that an application for reinstatement would be futile because of the employer's unlawful action in discharging him. The Board concluded that because the uncertainty was caused by the employer's unlawful conduct, the Board would not presume that the unlawful discharge itself played no part in keeping the employee out of work, but that it would be more equitable to resolve the ambiguity against the wrongdoer and presume, absent indications to the contrary, that even though the strike did in fact continue after his discharge, but for his discharge the discharged striker would have made an immediate application for reinstatement. Contrary to Respondent, the locked-out employees who lost their jobs in consequence of the unlawful subcontract are in a stronger position than the *Abilities* strikers to claim the presumption that their continued failure to work for Respondent was due to their unlawful termination. Unlike strikers, these locked-out employees could not have resolved, by applying for reinstatement, any ambiguity created by Respondent's conduct in unlawfully terminating them; rather, the contention that Respondent would have maintained the lockout for lawful reasons at all material times is the very basis for Respondent's contention that Respondent does not owe any backpay to the employees whom Respondent unlawfully terminated. *Transportation Management*, supra, 462 U.S. at 403.

Different, although related, considerations are involved in determining the existence vel non of a backpay period as to the unterminated locked-out employees during the period of the unlawful permanent subcontract of maintenance work. If Respondent had begun the lockout simultaneously with or after the unlawful execution of the permanent subcontract, a backpay period as to the unterminated employees (although not, of course, whether any backpay was in fact due) would be established if (but only if) the evidence preponderantly showed that an object of Respondent's action in locking out the employees was to compel the Unions to agree to the unlawful subcontracting. See *Movers & Warehousemen's Assn. of Metropolitan Washington, D.C.*, 224 NLRB 356, 357 (1976), enfd. 550 F.2d 962 (4th Cir. 1977), cert. denied 434 U.S. 826 (1977); *American Stores Packing Co.*, 158 NLRB 620, 622 (1966); see also *Transportation Management*, supra, 462 U.S. at 401–403. On the basis of these precedents, I find that a backpay period as to the unterminated locked-out employees would be established by a showing that such was an object of Respondent's continuation of the lockout. However, where the General Counsel has so shown by a preponderance of the evidence, I disagree with Respondent's contention that because it locked out the employees for lawful reasons before unlawfully contracting out the maintenance work, in order to establish the existence of any backpay period as to the unterminated locked-out employees the General Counsel must also show by a preponderance of the evidence that Respondent's unlawful subcontracting caused Respondent to prolong the lockout. This contention overlooks both the consideration that ''proof of [the employer's] motivation is most accessible to him ''(*Great Dane*, supra, 388 U.S. 3 at 34), and the general legal principle that a wrongdoer may fairly be required to bear the risk that the influence of his own legal and his own illegal motives cannot be separated (*Transportation Management*, supra, 462 U.S. at 403). This latter principle is not applied in the cases, relied on by Respondent, which are directed to whether an initially economic strike has been converted by subsequent employer unfair labor practices into an unfair labor practice strike; in such cases, because both the initial decision to strike and the subsequent decision to continue it were made by the employees and/or their union, the relative inaccessibility of their motives to the employer is believed to outweigh the equities created by the employer's wrongdoing. However, where the issue is whether the employer's maintenance of a lockout initiated by him was prolonged by his decision to pursue it for an unlawful object, the equities of requiring him to bear the risk created

[161] The General Counsel has moved to strike, as irrelevant and unsupported by the record, the assertion in Respondent's brief that Respondent would have been willing to do this much without litigating the case. The motion is denied, but that assertion will be disregarded.

[162] Enf. denied on other grounds 612 F.2d 6 (1st Cir. 1979). However, the practice for which I have cited this case has met with uniform judicial approval. See, e.g., *Garrett Railroad Car & Equipment v. NLRB*, 683 F.2d 731, 740–742 (3d Cir. 1982); *NLRB v. Tamara Foods*, 692 F.2d 1171, 1177, 1178, 1183 (8th Cir. 1982), cert. denied 461 U.S. 928 (1983).

by his own unlawful conduct reinforce, rather than militating against, the equities of requiring him to bear the burden of proof as to his own motives.

A preponderance of the evidence shows that during the effective period of the subcontract, an object of Respondent's action in maintaining the lockout was to compel the Unions to agree to the unlawful subcontracting. Thus, during the first meeting (August 21, 1987) following the execution of the subcontract, Respondent told the Unions that the maintenance people would not have jobs even if the parties reached a settlement. Later, during the bargaining session on December 4, 1987, when the Unions said that they would change their position on items 1, 2, and 3 if Respondent would withdraw items 9 and 11, Respondent stated that it had no intention of withdrawing these items. Thereafter, during the bargaining session on December 17, 1987, Respondent again said that Respondent had no intention of dropping item 11, that BEK would remain in the plant, and that item 11 stood intact. Further, Respondent's description of its proposed transition agreement during the February 18, 1988 bargaining session assumed the permanent contracting out of maintenance. Finally, even Respondent's April 1988 ''Louisville proposals'' called for the continued performance by BEK of some of the maintenance work covered by the unlawful permanent subcontract, and for the Unions' withdrawal of the 8(a)(3) charges which underlie the July 1988 complaint. Accordingly, I conclude that the General Counsel has established the existence of a backpay period, during the effective period of the subcontract (August 11, 1987, to May 3, 1988), with respect to the locked-out employees who were not terminated during this period.

For purposes of determining the appropriate remedy in the instant case, the performance of the work by means of subcontracting does not constitute the status quo ante to whose restoration a remedial order is at least ordinarily limited; see *Land Air*, supra, 286 NLRB 1131. *Land Air* found economic strikers to be entitled to offers of reinstatement on application, and to backpay until receiving such offers, where during the strike their work had been permanently subcontracted without giving the bargaining representative notice and an opportunity to bargain (the legal equivalent of permanently subcontracting, as here, without the existence of a legally cognizable impasse). Moreover, *Land Air* further found that the strikers would have been entitled to such relief even if the subcontracting had been privileged by the strike because temporary in character.

However, none of the locked-out employees is entitled to receive any backpay during the backpay period if Respondent can show, by a preponderance of the evidence, that Respondent would have maintained the lockout during the backpay period even if Respondent had not unlawfully contracted out the maintenance work. See *Abilities*, supra, 241 NLRB at 28. To this issue I now turn.

As an initial matter, it is convenient to clarify the precise factual showing Respondent must make in order to support its claim that none of the locked-out employees is entitled to backpay. To repeat, what Respondent must preponderantly show is that during the approximately 9-month period of the unlawful permanent subcontract (August 11, 1987, to May 3, 1988), Respondent would have continued to maintain the lockout even if Respondent had not unlawfully subcontracted the maintenance work. Respondent would not necessarily meet this burden by preponderantly showing that during this period no collective-bargaining agreement would have been agreed to, ratified, and executed. Thus, Perkins, who was the Mobile mill manager and on Respondent's negotiating team until after the termination of the permanent maintenance contract, and who (according to Gilliland) made the final decision to lock out at Mobile, denied that Perkins made this decision because of concern about the effect of not having a signed labor agreement. Rather, Perkins testified, his reasons were to put ''some pressure'' on the Unions ''to get a contract'' and to make sure that Respondent could obtain regular and dependable production from the Mobile mill if the Unions elected to strike a number of other IP mills at the same time. Rather similarly, Respondent's radio ''spot'' in late July 1987 explained the lockout as the ''only way to ensure customer service and encourage ratification'' (supra, part II,J).[163] Moreover, Gilliland merely testified that ''after some point in time'' Respondent would have gained nothing from ending the lockout ''without a signed contract or a no-strike agreement or *some protection*'' (emphasis added); and he attached no date to this ''point in time,'' either directly or by attaching a date to the allegedly associated events of ''the mill was . . . running well [and] earning good money after some point in time.'' Further, over a period of at least the preceding 19 years, Respondent had never locked out its Mobile employees, although during this period no contract had ever been agreed to before the expiration of its predecessor, and only one strike had been called. When during the Mobile lockout the UPIU refused to approve (and, therefore, precluded execution of) agreements ratified by the employees at four other IP primary papermills (Corinth, Natchez, Pine Bluff, and Moss Point), Respondent did not lock out these employees, and these mills continued to operate without interruption. Likewise, so far as the record shows, no work stoppage occurred at Respondent's primary papermill in Camden during a 1-year contractual hiatus encompassing the last 9 months of the Mobile lockout, although the Camden employees did not ratify a new contract until the day it was executed. Nor did a work stoppage take place at Respondent's primary papermill in Ticonderoga, where the employees did not ratify any proposal by Respondent, but nonetheless continued to work for at least 18 months after the expiration of the most recent bargaining agreement. Moreover, so far as the record shows, Respondent's primary papermill at Gardiner, Oregon, at all times operated without interruption, although Respondent averred that the UPIU had ''targeted'' this mill for inclusion in its coordinated bargaining effort against Respondent and, as of December 5, 1989, there had been no ratification of any agreement to replace a contract which had an expiration date of September 1, 1987 (to which the parties had agreed to extend a contract with an expiration date of March 15, 1987) (supra, part II,H,5). Furthermore, at least as of until the end of May 1988, employees who had rejected a contract were still working at Respondent's con-

[163] This late July 1987 ''spot'' refutes Respondent's contention (reply brief, p. 147 fn. 88) that Respondent's earlier references to ratification but not execution were due to the Unions' at least alleged prior practice of invariably executing ratified contracts. The footnote states that Respondent learned of the Unions' at least alleged policy change by May 1987. Moreover, no company witness attributed to Respondent's prior experience Respondent's references to ratification alone.

verting mills in Murfreesboro, Tennessee; Jackson, Tennessee; Georgetown, South Carolina; and Spring Hill, Louisiana.[164]

The record contains cogent evidence that Respondent would have terminated the lockout, during the effective period of the unlawful permanent subcontract, if Respondent had not unlawfully executed that subcontract. Thus, Respondent contends that operations during the lockout under the permanent subcontract were ''literally *millions* of dollars'' cheaper than operations under the temporary subcontract would have been (Co. opening brief p. 58, emphasis in original).[165] Plainly, the cheaper Respondent believed maintaining the lockout to be, the more likely Respondent was to continue it. Moreover, the permanent subcontract afforded Respondent a further incentive to adhere to item 11, because the $250,000 ''minimum fee'' which Respondent was required to pay BEK on the effective date of the permanent subcontract did not become refundable until that subcontract had been effective for 3 years.[166] Furthermore, the permanent subcontracting blocked negotiations which might have obviated the negotiating issues produced by item 11. Thus, in January 1988 Gilliland suggested to UPIU Vice President Dunaway that Respondent's perceived maintenance cost problem might be dealt with by means other than subcontracting the work, such as lower wages and reducing the crew over time. Although this was Respondent's first specific suggestion to this effect, Dunaway declined to pursue it, on the ground that the Unions would let the Board take care of the issue by acting on the charges which attacked the permanent subcontract and underlie the instant meritorious July 1988 complaint. In addition, the permanent subcontract slowed down the progress of negotiations with respect to other issues. Thus, during the December 4, 1987 negotiating session, the Unions said that they would ''move'' on items 1, 2, and 3, which before Respondent's interjection of item 11 had been the principal unresolved bargaining issues, if Respondent would drop item 11. However, during that and the next bargaining session, on December 17, Respondent stated that Respondent had no intention of dropping item 11. Moreover, because Respondent anticipated that at the end of the lockout many of its maintenance employees displaced by the permanent subcontract would bump some of the locked-out production employees, much of the February 18, 1988 discussion of Respondent's proposed transition agreement was directed toward anticipated bumping problems; indeed, during the January 4 session, the Unions had said that they could not agree to a transition agreement until items 9 and 11 were resolved. As negotiating—Committee Chairman Funk remarked at the first bargaining session after the execution of the subcontract, ''How in the hell do you ever expect to get an agreement out of this now?'' Indeed, Respondent advised the locked-out employees on May 4, 1988, that it had canceled the permanent subcontract, and had tendered a proposed bargaining agreement calling for the return of all maintenance employees to maintenance positions, ''in order to move the dispute to an end.''

In addition, a few days before or during the effective period of the permanent subcontract, some of the considerations which had led to the initial decision to lock out substantially diminished. Thus, taken together, the testimony of Perkins and Gilliland indicates that the initial lockout decision was due largely to a desire to withhold from the Unions the opportunity of calling simultaneous strikes at several mills at a time that best suited the Unions' purposes, and to make sure that Respondent could fill orders with production from the Mobile mill if other primary paper mills were struck. However, by the day preceding the execution of the permanent contract, Respondent anticipated replacing the entire striking DePere work force by the end of the week, was taking the position that the Jay strikers had largely been permanently replaced, had replaced more than a third of the Lock Haven strikers, and was continuing the replacement process there. Moreover, in January 1988, the UPIU acknowledged, in effect, that the jobs of the Jay, DePere, and Lock Haven strikers had been filled by what Respondent contended were permanent replacements.[167] In addition, Respondent repeatedly admitted that the temporary production employees whom it employed during the lockout under the terms of Respondent's March 1987 proposal were less efficient than the locked-out production employees; and all the locked-out unit employees were probably willing at all times to return to work under the same conditions—including items 1, 2, and 3—which Respondent applied to the temporary replacements on its own payroll.[168] Further, during the effective period of

[164] This finding is based partly on p. 5 of R. Exh. 51, received into evidence without objection or limitation. Gilliland testified that Respondent regarded ratification as rendering strikes unlikely; that the Pine Bluff local presidents had written a letter to the mill manager in which they pledged no strikes or slowdowns during the period when an executed document would be effective; and on a ''ruling from the Board that indicated the contract was valid,'' possibly referring to the *Moss Point* case (supra, fn. 130). He was not asked about the situations at Camden, Ticonderoga, Gardiner, Murfreesboro, Jackson, Georgetown, or Spring Hill.

[165] I need not and do not consider the extent of Respondent's actual savings, an issue extensively addressed in the briefs of the General Counsel and Respondent.

[166] However, as of mid-October 1989, IP had never paid the $250,000 (see supra, part II,S,1).

[167] Gilliland testified to the opinion that if Respondent had ended the lockout, the employees would have returned to work immediately, ''But at some point in time in the future when the Union had three other mills lined up ready to strike at once, or whatever, . . . the Mobile employees would join them.'' He was not asked whether this opinion extended to the strikes at the Lock Haven, Jay, and DePere mills after all the strikers had been permanently replaced. As previously noted, all the strikers at all three of these mills were permanently replaced by the first week in December 1987. Moreover, all the DePere strikers, and most of the Jay strikers, were permanently replaced by mid-August 1987.

[168] I infer such willingness from the employees' action in continuing to work after Respondent implemented that proposal and until Respondent locked them out; from the Unions' statement during the February 18, 1988 bargaining session that the membership would have continued to work, and were ready to return to work, under Respondent's implemented proposal; from the Unions' request during the March 11, 1988 session that Respondent let the employees return to work and that the parties continue to negotiate; and from Glenn's similar proposal to Oskin in late September 1988. In finding that at least by August 1987 the locked-out employees were likely willing to return to work under Respondent's implemented proposal, I am aware that during the October 19, 1988 session, UPIU Vice President Langham stated that if Respondent had not locked out the employees, they would probably have struck—an assertion which he withdrew at the next meeting; and that in June 1988 Funk told a

the subcontract the Unions repeatedly described prevention of contracting out existing jobs as one of the Unions' primary goals in the Mobile negotiations.

In contending that Respondent would have maintained the lockout even if Respondent had not unlawfully subcontracted the maintenance work, Respondent relies partly on the parties' failure to agree, during the effective period of the subcontract, on two issues raised by Respondent after executing the subcontract—namely, the transition agreement and the move of the extruder. However, as pointed out supra, the evidence specifically shows that the permanent subcontract substantially interfered with the progress of negotiations with respect to the transition agreement, because that subcontract would have limited the number of locked-out employees who would be able to return when Respondent ended the lockout and, therefore, both created issues as to who would be entitled to return and created or complicated such issues as retirement or severance-pay rights for locked-out employees who could not return, the length of the transition period, which returning employees would be assigned to which jobs, and how much refamiliarization they would need. As to the extruder, at the first negotiating session after receiving Respondent's proposal to move the extruder, the Unions told Respondent that the issue was not going to be a stumbling block; and the move of the extruder affected at most 19 employees, and perhaps as few as 6, in a 1200-employee unit. Moreover, Langham's statement during the last negotiating session, that he had initially believed that Respondent had proposed to move the extruder because Respondent ''just wanted to get rid of people,'' suggests that this initial belief had been due at least partly to the permanent subcontract which had been executed about 2 months before Respondent's initial proposal to move the extruder.

Further, Respondent also relies on the parties' dispute regarding item 9, which Respondent submitted at the bargaining session preceding the submission of item 11. However, item 9 never involved more than 34 employees, 19 of whom worked in the extruder. Moreover, after the Unions accepted the discontinuance of the extruder, Respondent modified the rest of item 9 by proposing the discontinuance of only two people per shift.[169]

In addition, Respondent relies on the continued pendency of items 1, 2, and 3, which Respondent had proposed well before locking out the employees. Initially, I note that during the negotiating session on December 4, 1987, Langham said that the Unions would change their position on these three items if Respondent would withdraw items 9 and 11; and, when Respondent refused to drop either of them, said that the Unions would move on items 1, 2, and 3 if Respondent would drop item 11, which Respondent did not do until it terminated the permanent subcontract 5 months later. In nonetheless contending that Respondent would have maintained the lockout throughout the 9-month period encompassed by the permanent subcontract even if Respondent had never executed it, Respondent heavily relies on the statements made by both parties, that they had no intention of changing their position as to these three items, between the January 1987 expiration of the 1983–1987 bargaining agreement and shortly before a successor contract was agreed to in October 1988. In assessing the weight (if any) which these statements should be accorded in speculating whether Respondent would have terminated the lockout between August 1987 and May 1988 if Respondent had not executed the permanent subcontract effective during this period, the context of such statements must be considered. As pointed out in *NLRB v. WPIX, Inc.*, 906 F.2d 898, 902 (2d Cir. 1990), cert. denied 111 S.Ct. 299 (1990)—in connection with union statements that it ''would never accept'' certain ''ridiculous'' company proposals which were ''a slap in the face,'' ''What a party tells its partisans during negotiations, perhaps to rally support, may well have little bearing on the terms of employment that party ultimately accepts.''[170]

Moreover, certain conduct by all parties indicates that none of them unreservedly meant what they said. Thus, during the bargaining session on November 5, 1987, Company Representative Gilliland suggested a productivity bonus in exchange for elimination of Sunday and holiday premiums, whereupon UPIU Representative Langham suggested a profit and productivity bonus.[171] During the February 18, 1988 negotiating session, Langham at one point hinted that the Unions would sign Respondent's implemented proposal (which included items 1, 2, and 3) if Respondent would end the lockout, and later that day strongly hinted that the Unions might agree to the elimination of Sunday premium in return for a productivity and profits bonus. Rather similarly, during the next bargaining session, on March 11, 1988, Langham evinced receptivity to exchanging Sunday premium for a profit-sharing plan. During the December 4, 1987, negotiating session the Unions said that they would ''move'' on items 1, 2, and 3, if Respondent would drop item 11. On February 16, 1987, the Unions offered to agree to Company item 1 (the Sunday—premium proposal, which was financially more significant to both parties than Respondent's holiday—premium proposal) in return for a 7-1/2-percent wage increase. In the fall of 1987, Gilliland advanced the suggestion to UPIU Vice President Dunaway, who rejected it by reason of the ''pool,'' that Respondent would end the lockout without a signed bargaining agreement, if the Unions would agree not to strike for what would otherwise be the duration of the bargaining agreement. On August 5, 1987, when Respondent for the second and last time dropped its

newspaper reporter that the Mobile workers would stay out until a fair settlement was reached with all four unions.

[169] I note, moreover, that Respondent's unlawful failure to provide documentation in connection with item 11 caused the Unions to defer (as it turned out, indefinitely) a plant tour which would have assisted the Unions in assessing the accuracy of their initial belief that item 9 called for insufficient manning levels.

[170] Thus, in connection with authenticating a union flier issued about March 1988, which began with the assertion that ''the campaign to roll back IP's contract concessions is in high gear,'' Frase testified, ''Well, I don't have a problem with the statement if you understand that you are involved with public relations. I mean how many times can you expand and enhance and make stronger?'' Rather similarly, UPIU Representative Langham confessed during the bargaining session on November 5, 1987, ''We can run ads and we can say our people are well off but you people know better than that.''

[171] Particularly in view of this discussion (which is summarized in Respondent's bargaining notes), and for demeanor reasons, I do not credit Gilliland's testimony that after locking out the employees, Respondent never internally discussed or considered ending the lockout, because, inter alia, ''everything we saw and heard and were told was that there would be no more contracts signed by the UPIU with IP that eliminated Sunday premium.''

proposal at the Jay mill (which was part of the ''pool'') to permanently subcontract all maintenance work, Vice President Oskin internally attributed this action to a desire to achieve ratification by the strikers, and stated that the ''maintenance cost problem'' at Jay could be solved by means of ''greater flexibility.'' In September 1987, Glenn impliedly gave his subordinates authority to sign concessionary contracts, provided they did not eliminate Sunday premium and he had previously been advised ''what was out there.'' Also in September 1987, Glenn impliedly expressed willingness to approve contracts which ''resolved'' all the issues on givebacks. In addition, in September 1987, Respondent, the IBEW, and the appropriate UPIU locals agreed to a contract at the Pine Bluff mill which continued premium pay for Sundays for the first 2 years of the agreement but not thereafter, and which eliminated premium pay for holidays.[172] Furthermore, as to the mills where concessionary contracts had been executed before 1987 because the union parties had been persuaded that such ''givebacks'' were called for by Respondent's then financial condition, Respondent agreed in 1987–1988 to certain economic improvements in return for these prior concessions; and in connection with the Mobile mill eventually concluded that such improvements should be immediately afforded in return for the Mobile ''givebacks.'' Also, Glenn's assistant (Frase) testified in substance that as early as June 1987, the Unions were receptive to a proposal for elimination of premium pay at Mobile if something were offered in return. The difference between the Unions' expressed and their real intentions is indicated by the October 9, 1988 termination of the strikes at DePere, Lock Haven, and Jay on the very day that the *Corporate Campaign News* had announced about late September 1988 as the date of a meeting of IP locals to expand coordinated bargaining (supra, part II,S,8).

In support of Respondent's contention that it would have maintained the lockout during the effective period of the unlawful subcontract even if Respondent had not unlawfully executed that subcontract, Respondent further contends that during this period no ratification of an agreement reached with the Paperworkers and the Electrical Workers at the bargaining table could have occurred, and no such ratified contract could have been executed, because of the existence of the UPIU pool. Particularly as to execution, Respondent's contention in this respect proceeds on the questionable assumption that Respondent would never have terminated the lockout at Mobile unless the Unions had executed a bargaining agreement. Furthermore, Perkins testified that as of the negotiating session on November 5, 1987, Respondent was not waiting on the Unions to give Respondent anything more with respect to their authority to sign the contract. Moreover, the record refutes the assumption on which Respondent's contention is connection with the UPIU pool at least impliedly proceeds—namely, that between its formal announcement in May 1987 and October 1988, the UPIU pool consisted of a definitive and unchanging procedure laid down by the UPIU as a necessary precondition of a collective-bargaining agreement at Mobile.

Respondent's opening brief (pp. 151–152) chooses to describe this procedure as follows:

> Local union members will vote on their contract proposals and then ballots will be held at International headquarters until all mills have voted. The voting results will be pooled and acceptance of a contract by a majority of all the votes will constitute approval at any one mill.

The pool was in fact so described in the UPIU's formal announcement on June 16, 1987, in the prepared portions of Glenn's press conference that same day, and in the account of that June 16 press conference in the first issue of the UPIU *Coordinated Bargainer*, and in the Kamber packet released on June 16 and July 27, 1987. Also, versions of the ''pool'' consistent with that given on June 16, 1987, were set forth in the July 1987 *Paperworker*, by Glenn to Gilliland in July 1987 and by UPIU President Glenn's speech on Labor Day 1987 (supra, part II,H,11, J, M). Further, in the fall of 1987, Dunaway told Gilliland that because the Mobile employees were in the pool, nobody was going to come back to work until everybody came back to work.

However, Company Vice President Oskin's August 5, 1987, internal memorandum to Respondent's managers stated that Respondent had dropped its subcontracting proposal at the Jay mill, which was part of the pool, ''in an effort to achieve a ratification by the striking employees.'' Moreover, at the Mobile negotiations during the effective period of the unlawful subcontract, UPIU representatives made statements to Respondent which are almost impossible to reconcile with the supposition that an agreement reached at that time was subject to rejection by a vote which included UPIU members at the other three mills. Thus, during the negotiations on December 4, 1987, UPIU Representative Langham said that he had ''the full authority for the UPIU and [IBEW representative] Coleman had the full authority to settle the agreement for the IBEW. I am not going somewhere else for approval'' (supra, part II,Q). Similarly, at the December 17 meeting, Langham stated that he had the authority to sign a ratified agreement, and Coleman said that he did also (supra, part II,Q),[173] Also, during the meetings on October 26 and November 5, 1987, and March 11, 1988, Langham stated that if the individuals at the bargaining table reached an agreement, they would follow essentially the same procedure which had been followed during the negotiations which had led up to earlier, executed agreements—namely, to petition Glenn to sign it (supra, part II,N, O, R,5),[174] Rather similarly, during the meeting on June 24, 1988 (after the permanent contract had been rescinded), Langham stated that if Respondent's contract offer was good enough, ''maybe then we can do something about the pool'' (supra, part II,S,4). At the next meeting, on July 15, 1988, when IP Representative Schneider expressed the opinion that the situation of the employees at the other three mills would prevent the Unions from signing a contract at Mobile, the Unions told him to ''Try us and let's see''; stated that they felt a ratified con-

[172] However, the UPIU did not sign this agreement until December 1988.

[173] Compare the assertion on p. 40 of Respondent's opening brief that the October 19, 1988 bargaining session was the ''first time'' that Langham assured Respondent that if the parties reached an agreement which was ratified by the membership, he would sign it.

[174] As previously noted, Perkins testified that as of the November meeting, Respondent was not waiting on the union representatives to give Respondent anything more with respect to their authority to sign a contract.

tract at Mobile would enable the employees to return to work; and said that the UPIU representatives would ask Glenn to sign any agreement reached at the table (supra, part II,S,5). Also, Frase's credible testimony shows that when the pool was first set up, in order to conduct a vote a pooled location was merely expected to get ''something close to'' the pool's primary goals. Moreover, if an agreement reached across the table at Mobile had been subjected to a ''pooled'' vote which involved no other contracts, it is uncertain whether a majority of the voters would have rejected it. By the first week in December 1987, the striking union members at DePere, Jay, and Lock Haven had all been permanently replaced, and were likely working or seeking work elsewhere. Accordingly, if asked to cast ballots on the limited issue of whether to approve a contract proposal limited to Mobile and approved by the locked-out Mobile employees, the replaced strikers who troubled to vote might have approved such a contract in sympathy with the plight of the lockedout Mobile workers and/or because such a contract would likely do little damage to striking employees whose jobs with Respondent had been permanently filled. The contrary representations made to Respondent's representative Gilliland by UPIU President Glenn on July 27, 1987, and by UPIU Vice President Dunaway in the fall of 1987, preceded the strikers' total replacement and, in any event, did not necessarily represent Glenn's and Dunaway's honest opinion rather than an attempt to bluff Respondent into acceding to the Unions' bargaining position.

Furthermore, as to the UPIU pool, the record contains certain evidence which, while indicating that an agreement across the table at Mobile would not necessarily have resulted in a contract which the Paperworkers would consider binding, further shows that the UPIU ''pool'' was a very flexible procedure which was conceived as quickly adaptable to perceived changes in circumstances. Thus, the ''media statement'' issued by Glenn on August 3, 1987, contained the limited assertion that votes would be pooled ''on four key issues.'' The August 1987 *Paperworker* merely stated that the pool members had agreed to ''coordinate'' bargaining on such ''key issues'' and expressed the intention to ''stand behind our locked out and striking brothers and sisters.'' In September 1987, about 3 months after the beginning of the strike at the Jay mill (a member of the pool), a UPIU International representative advised the governor of Maine that the Jay local would negotiate its own contract and (in effect) that the UPIU was not in control of the negotiations there. During the bargaining session at Mobile on February 18, 1988, UPIU Representative Langham at least implied at one point that if Respondent would end the lockout, the Unions would sign the proposal which Respondent had implemented on March 21, 1988, and which included Respondent's items 1, 2, and 3. During the May 21, 1987 bargaining session, when the Paperworkers first described the ''pool'' to Respondent, the description was vaguer than the June 16 version cited by Respondent, the UPIU representatives were evasive as to the details, and Perkins testified that after hearing this ''pool'' description, he believed that the lockout would end soon; even though Perkins' May 28 letter to all the locked-out employees averred, inter alia, that Respondent had interpreted the UPIU's May 21 description as meaning that ''employees at company mills in the North must approve a Mobile mill settlement before it can become effective.'' Further, the UPIU's May 27, 1987 press release described UPIU's announced coordinated bargaining campaign as merely involving ''greater supervision by the International Union of the bargaining process in order to seek primary collective bargaining goals for all the plants involved.'' Somewhat similarly, during a meeting with the UPIU officers on June 1, 1987, Glenn stated that he would refuse to sign any contract with Respondent unless they resolved all the issues on givebacks. A March 24, 1988 newsletter from the Unions merely stated that ''in order for us to resume negotiations on a local level and reach a fair agreement,'' a ''framework'' would have to be agreed upon by top company and union officials. Moreover, during the bargaining session on June 24, 1988, after the permanent subcontract had been rescinded, Langham stated that if Respondent's contract offer was good enough, ''maybe we can do something about the pool.'' Further, both Frase's explanation of the UPIU affiliates' May 19, 1987 pool agreement, and the version read to Respondent on May 21, are uncertain as to whether the pool applied to all contractual provisions or merely to the primary bargaining goals; whether the relevant provisions had to be approved by a numerical majority of all members who worked in the pooled mills, or simply by enough members to make the coordinator willing to approve it; whether the pool procedure would necessarily lead to four bargaining agreements or to none; and whether a particular contract approved by the pool would nonetheless be invalidated by the disapproval of a numerical majority of the members in the affected mill, or by a majority so overwhelming as to lead the coordinator to conclude that the employees in that mill should not be subjected to it. Moreover, Funk credibly testified that the president of the UPIU local at the Jay mill had privately advised the Unions at Mobile, DePere, and Lock Haven that any mill could get out of the pool any time it wanted to, and to the opinion that the pool was a moral agreement and that ''the situations change at locations.'' That Respondent understood the indeterminate nature of the pool is shown by Gilliland's testimony that he believed that the purpose of the pool was to enhance bargaining leverage, and his further testimony that he believed the union representatives gave inconsistent and evasive answers about the pool because they did not know the answers and it was a delicate legal subject. Only vague descriptions of the pool were expressed by Glenn to IP board members and investment analysts in mid-September 1987 (''we refuse to accept [unjustified] concessions''); by Glenn to the locked-out Mobile employees on September 24, 1987 (''there will be no ratification by the International Union [of the Pine Bluff agreement, which eliminated Sunday premium after 2 years], so long as the other 4 locations are locked out and on strike''; by Frase during an August 1988 newspaper interview that ''we are going to do everything we possibly can to tie ourselves together;'' and by Funk during a June 1988 newspaper interview, that the Mobile workers would stay out until a fair settlement was reached at all four locations.

Particularly in view of the amorphous nature of the UPIU pool, I conclude that Respondent's position is further eroded by the fact that the pool involved only the Paperworkers and did not encompass the Electrical Workers, which jointly represented the Mobile unit. The record does indicate that among the unit employees who were union members, a majority were members of the Paperworkers rather than the

Electrical Workers. It is also true that during the March 11, 1988 bargaining session, IBEW Representative Coleman interrupted some bickering between UPIU Representative Langham and Schneider by saying, ''Let's go on with the negotiations. You have another party to this, and all three of us will have to make an agreement.'' In addition, an August 6, 1987 letter to the membership from the Mobile joint bargaining committee for all the Unions cited the pool as showing the solidarity and support expressed by all members of the UPIU. Further, a flier issued by the joint bargaining committee in September 1988, after the cancellation of the permanent subcontract, urged other IP locals to join with Mobile in the pool, which the flier described as an agreement that no location would settle with Respondent until all pool participants had received satisfactory offers. However, at the Moss Point mill, where UPIU and IBEW affiliates were joint representatives, the IBEW had conceded as to the entire unit the binding effect of a bargaining agreement which the UPIU refused to sign (see supra, fn. 130); Respondent's counsel conceded at the hearing before me that if one of the two Unions signed the contract, that would be a binding contract for the joint representatives because each one acts for the whole unit; and at the meeting on May 21, 1987, the IBEW representative stated that as to Glenn's announcement that day about the pool, Glenn did not speak for the Electrical Workers.

For the foregoing reasons, I conclude that Respondent has failed to meet its burden of preponderantly showing that Respondent would have maintained the lockout during the effective period of the unlawful subcontract even if Respondent had not entered into that subcontract. I do not agree with Respondent's contention that such a conclusion is inconsistent with the determination of the General Counsel's Office of Appeals that Respondent's unlawful failure to provide information in connection with Respondent's subcontracting proposal did not taint the lockout from the time Respondent failed to furnish such information until the time it was provided. This backpay Order is not issued to remedy Respondent's unlawful failure to provide information or any effect such failure may have had on the lockout. Rather, this backpay Order is based on Respondent's action in unlawfully executing the permanent subcontract. This action not only effected the unlawful termination of many of the locked-out employees, but also added to the purposes of the lockout the object of compelling the Unions to agree to such unlawful termination. Moreover, Respondent's action in unlawfully executing the subcontract not only created millions of dollars of perceived monetary savings in the cost of maintaining the lockout, thereby giving Respondent a new and substantial reason for continuing it, but also confronted the Unions with the reality (and not merely the prospect) of the loss of all (and not merely some) maintenance jobs, thereby causing the Unions to give top priority to the subcontracting issue rather than to the bargaining issues (including items 1, 2, and 3) which had previously caused Respondent to effect and maintain the lockout. In any event, even a failure by the General Counsel to request a backpay order would not affect the Board's power to issue such an order. *Sinclair Glass Co*., 188 NLRB 362, 363 (1971), enfd. 465 F.2d 209 (7th Cir. 1972). Accordingly, I shall recommend a backpay order with respect to all locked-out employees during the effective period of the unlawful subcontract. Respondent will be required to make such employees whole for any loss of pay they may have suffered by reason of the lockout, between August 11, 1987, and May 3, 1988, to be computed in the manner prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]