RBE Electronics of S.D., Inc. *and* District Lodge No. 5, International Association of Machinists and Aerospace Workers, AFL–CIO. Cases 18–CA–12266, 18–CA–12278, and 18–CA–12529

December 18, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING, COHEN, AND TRUESDALE

On September 30, 1993, Administrative Law Judge Jay R. Pollack issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed a response and an answering brief.[1]

The National Labor Relations Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order only to the extent consistent with this Decision.

1. The complaint alleged that the Respondent and RBE Electronics, Inc. constitute a single integrated business enterprise and a single employer within the meaning of the National Labor Relations Act. The judge found it unnecessary to resolve this issue. We find merit in the General Counsel's exception to the judge's failure to find single employer status.

The Board applies four factors in determining whether separate entities constitute a single employer: (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership or financial control. No one factor is controlling, nor do all need to be present to support a single employer finding. However, the Board has held that the first three factors are more critical than the last, and, further, that centralized control of labor relations is of particular importance because it tends to demonstrate ''operational integration.'' Single employer status is characterized by the absence of an arm's-length relationship found among unintegrated companies. See, e.g., *Hydrolines, Inc*., 305 NLRB 416, 417–419 (1991), and cases cited therein.

Both entities are solely owned by Roger Ernst and his wife Caroline. Thus, common ownership is clear. We further find that the Respondent and RBE Electronics, Inc. have interrelated operations. RBE Electronics, Inc. was originally set up to do manufacturing work for Thermo King Corporation, and the Respondent was established to go out and find assembly work for other companies, as well as to do assembly for RBE Electronics, Inc. At the time of the hearing, Thermo King was the primary customer of each. All parts and inventory for both entities were kept in a common area located at the Respondent's Aberdeen facility during the events at issue. In addition, during that period the Respondent performed much of the production work for RBE Electronics which the latter had subcontracted out prior to the formation of the Respondent. The licensing agreement and corresponding royalty fee schedule providing the Respondent with the right to use, manufacture, and sell certain products developed by RBE Electronics, Inc. was signed by Roger Ernst as president of each entity. This is evidence both of interrelated operations and, as the General Counsel asserts, the absence of an arm's-length relationship between the two nominally unintegrated companies.

We also find that the two entities share common management and centralized control of labor relations. Roger Ernst is the president of both entities. Ernst's wife, Caroline, is an officer of both, and Geoffrey Grassle is vice president of both. Although the two entities have separate onsite managers and Grassle stated that his role is to provide policy support, he conceded in his testimony that he has ultimate control over the day-to-day operations of both, including hiring, firing, layoff, and recall responsibility at both facilities. The events at issue here confirm Grassle's authority. He made the decisions to lay off and recall full-time employees,[3] determined the criteria used to effectuate these actions, and reduced hours by eliminating Friday work. Grassle took part in the negotiations at issue in this case during the latter part of 1992, and Ernst testified that Grassle's duties included negotiating on behalf of the Respondent. Thus, through Grassle, the two entities have centralized control over labor relations and the labor force.

Based on the above, we find, in agreement with the General Counsel, that the two entities constitute a sin-

[1] The General Counsel attached two appendices to his brief. The Respondent in effect moves to strike these documents because they were not introduced into evidence at the hearing. The Respondent, however, responding to the General Counsel's appendices, attached an exhibit to its brief which also was not part of the formal record. Both parties apparently seek to have these appended documents considered by the Board as essentially summaries of evidence submitted to the judge. Because these materials were not made part of the formal record, we strike them. *Northwest Community Nursing Service*, 306 NLRB 602 fn. 2 (1992); *Mademoiselle Knitwear*, 297 NLRB 272 fn. 1 (1989), and cases cited therein. In any event, the material sought to be considered would not require a different result. *New Jersey Bell Telephone Co*., 308 NLRB 277 fn. 2 (1992).

[2] The General Counsel 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. We also note that the first unfair labor practice charge against the Respondent filed by the Union was dated April 1, 1992, rather than April 6, as found by the judge. This factual error does not affect the outcome of this case.

[3] Grassle was not vice president at the time the layoff of part-time employees occurred in March 1992 and therefore had no part in that decision.

gle employer. As such, they are jointly and severally liable for any violations found in this proceeding.

2. The judge dismissed the complaint allegations that the Respondent violated Section 8(a)(5) and (1) by refusing to bargain over the Respondent's layoffs and recall of employees, and its reduction of work hours. In doing so, the judge essentially found, as to each alleged unilateral change, that the Union was given adequate notice and failed to act with due diligence in requesting bargaining. The General Counsel excepts to this finding, citing *Bottom Line Enterprises*, 302 NLRB 373 (1991), and contending, inter alia, that the judge applied the incorrect test in determining whether the Respondent violated its bargaining obligation. For the reasons set forth below, we find that the judge did not apply the appropriate Board precedent in considering these allegations, and we remand them for further proceedings.

The Board held in *Bottom Line Enterprises*, supra, that when, as here, parties are engaged in negotiations for a collective-bargaining agreement, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to provide notice and an opportunity to bargain about a particular subject matter; rather it encompasses a duty to refrain from implementation at all, absent overall impasse on bargaining for the agreement as a whole. The Board in *Bottom Line* recognized two limited exceptions to that general rule: when a union engages in tactics designed to delay bargaining and ''when economic exigencies compel prompt action.'' Id. at 374.

The ''economic exigency'' exception set forth in *Bottom Line* derives from the Supreme Court's decision in *NLRB v. Katz*, 369 U.S. 736, 748 (1962), as discussed in the Board's decision in *Winn-Dixie Stores*, 243 NLRB 972, 974 fn. 9 (1979). Although those decisions essentially condemn piecemeal bargaining, they provide support for the view that there might be some circumstances justifying or excusing an employer's taking action while bargaining is ongoing. These circumstances were described in *Winn-Dixie* as involving ''extenuating circumstances'' and a ''compelling business justification.'' In cases subsequent to *Bottom Line*, the Board has characterized the economic exigency exception as requiring a heavy burden,[4] and as involving the existence of circumstances which require implementation at the time the action is taken[5] or an economic business emergency that requires prompt action.[6]

Of course, there are certain compelling economic considerations that the Board has long recognized as excusing bargaining entirely about certain matters. The Board has limited its definition of these considerations to ''extraordinary events which are 'an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action.''' *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995), quoting *Angelica Healthcare Services*, 284 NLRB 844, 852–853 (1987). Absent a dire financial emergency, the Board has held that economic events such as loss of significant accounts or contracts,[7] operation at a competitive disadvantage,[8] or supply shortages[9] do not justify unilateral action.[10] Thus, even when parties are involved in contract negotiations, the existence of compelling economic considerations will allow an employer to act unilaterally, just as it may in other situations when negotiations are not in progress. The Board's exigency exception in *Bottom Line* recognizes that compelling economic considerations justify unilateral action. *Triple A Fire Protection*, supra.

We believe, however, that there are other economic exigencies, although not sufficiently compelling to excuse bargaining altogether, that should be encompassed within the *Bottom Line* exception. Thus, in *Dixon Distributing Co.*, 211 NLRB 241, 244 (1974), a case predating *Bottom Line*, the administrative law judge acknowledged that when negotiations for a contract are ongoing, matters may arise where the exigencies of a situation require prompt action for which bargaining is appropriate. The judge noted that in these and other related circumstances, ''management does need to run its business, and changes in operations toward that end often cannot await the ultimate full-fledged contract bargaining.'' *Dixon*, 211 NLRB at 244.[11] When these circumstances occur, we believe that the general *Bottom Line* rule foreclosing changes absent overall impasse in bargaining for an agreement as a whole

[4] *Our Lady of Lourdes Health Center*, 306 NLRB 337, 340 fn. 6 (1992).

[5] *Firefighters*, 304 NLRB 401 (1991).

[6] *Intermountain Rural Electric Assn.*, 305 NLRB 783 (1991), enfd. 984 F.2d 1562 (10th Cir. 1993).

[7] See *Farina Corp.*, 310 NLRB 318, 321 (1993), and *Angelica*, supra.

[8] *Triple A Fire Protection*, 315 NLRB 409, 414, 418 (1994).

[9] *Hankins*, supra.

[10] The Board has similarly held that under exigent circumstances an employer need not give notice and bargain concerning the effects of closing its operations, but has limited its definition of such exigent circumstances to situations such as where an employer lacked funds to continue operating and paying employees, or lost performance bonds required by law and had the bank end the employer's line of credit. See *Your Host, Inc.*, 315 NLRB 295, 297 (1994); *Compu-Net Communications, Inc.*, 315 NLRB 216, 223 (1994), and cases cited therein.

[11] In *Dixon*, Member Penello agreed with the judge that the employer did not violate the Act by making unilateral changes for the reasons stated by the judge; Member Kennedy found ''no violation . . . in accord with his dissent in the representation case on which the [union's] certification [was] predicated''; Member Jenkins disagreed with the judge's reasons and would have found that the employer violated the Act by making unilateral changes, but he expressed no disagreement with the above-quoted proposition of the judge. 211 NLRB at 241–242.

should not apply.[12] Instead, we will apply the traditional principles governing bargaining over changes in terms and conditions of employment referred to in *Bottom Line*. Thus, where we find that an employer is confronted with an economic exigency compelling prompt action short of the type relieving the employer of its obligation to bargain entirely, we will hold under the *Bottom Line Enterprises* exigency exception, as further explicated here, that the employer will satisfy its statutory obligation by providing the union with adequate notice and an opportunity to bargain. In that event, consistent with established Board law in situations where negotiations are not in progress, the employer can act unilaterally if either the union waives its right to bargain or the parties reach impasse on the matter proposed for change.

The foregoing analysis attempts to maintain the delicate balance between a union's right to bargain and an employer's need to run its business. We recognize that an analysis accommodating these interests of both the union and employer is not easily susceptible to bright line rules. In defining the type of economic exigency susceptible to bargaining, however, we start from the premise, derived from the cases discussed above, that not every change proposed for business reasons would meet our *Bottom Line* limited exception. Thus, because the exception is limited only to those exigencies in which time is of the essence and which demand prompt action, we will require an employer to show a need that the particular action proposed be implemented promptly.[13] Consistent with the requirement that an employer prove that its proposed changes were ''compelled,'' the employer must additionally demonstrate that the exigency was caused by external events, was beyond the employer's control,[14] or was not reasonably foreseeable.[15]

As discussed above, an employer which has demonstrated that a situation meets these requirements would satisfy its statutory obligations by providing adequate notice and an opportunity to bargain over the changes it proposes to respond to the exigency and by bargaining to impasse over the particular matter. In such time sensitive circumstances, however, bargaining, to be in good faith, need not be protracted. *Dixon*, supra. Thus, the Board has recognized in a number of analogous cases that the amount of time and discussion required to meet a bargaining obligation is dependent on the exigencies of a particular business situation. See, e.g., *Liquid Carbonic*, 277 NLRB 851, 865 (1985), and *American President Lines*, 229 NLRB 443, 454 (1977), citing *Shell Oil Co.*, 149 NLRB 305, 307 (1964).

In sum, we find that the proper analysis to be applied in the circumstances of this case is that set forth in *Bottom Line*, supra, as further explicated above. Accordingly, we shall remand to the judge the issue of whether the Respondent violated Section 8(a)(5) and (1) by refusing to bargain over the Respondent's layoffs and recall of employees, and its reduction of work hours, for analysis and disposition consistent with the principles articulated in this decision.[16]

3. The General Counsel alleged that the Respondent discharged its laid-off employees about December 4, 1992, by removing them from the Respondent's employee recall list in violation of Section 8(a)(3) and (1). The judge dismissed this allegation. He found that when the Respondent's general manager, Gerald Feickert, asked laid-off production employees if they wished to remain on the employee recall list, the employees responded that they wished to remain on the

[12] Chairman Gould would also require the Employer to show a compelling and substantial justification for individual bargaining in such circumstances.

[13] See *Firefighters*, supra. Cf., e.g., *Rain-Ware, Inc.*, 263 NLRB 50 (1982), in which the Board rejected an employer's argument that an economic exigency rather than a discriminatory motive compelled its action where the facts failed to demonstrate that economic conditions required action of a precipitous nature.

Chairman Gould would also require the Employer to show a compelling and substantial justification for individual bargaining in such circumstances.

[14] Cf. *P & C Food Markets*, 282 NLRB 894 (1987), in which the Board reversed a finding that an employer did not have a business justification for violating returning strikers' replacement rights but did not dispute the judge's reasoning that an exigency resulting from an employer's own action does not constitute a substantial and legitimate business justification.

[15] The Board in *Stone Container*, 313 NLRB 336 (1993), similarly declined to apply the *Bottom Line* analysis foreclosing changes absent overall impasse where a foreseeable, recurring event was scheduled to occur during contract negotiations. In such circumstances, the Board held that the established ''notice and opportunity to bargain'' analysis was appropriate. Chairman Gould and Member Browning did not participate in the decision in *Stone Container*, and express no views on its continuing validity.

[16] We conclude that the judge's factual findings that the Respondent here provided the Union with notice and an opportunity to bargain are supported in the record. In this regard, although the judge erroneously found that the Union was informed of the possibility of indefinite Friday shutdowns at the March 18, 1992 bargaining session, this factual error does not affect our decision. In so concluding, we note that the record reflects that the Respondent notified the Union of two discrete Friday shutdowns on that date and subsequently, on April 13, notified the Union of future Friday shutdowns until further notice beginning the following Friday. Similarly, although there is no support in the record for the judge's finding that employee Marie Haar was notified on March 31 that there would be a layoff of full-time employees, this error does not affect the outcome here because, as found by the judge, the Union was informed of the layoff, which ultimately occurred in mid-May, at a bargaining session at the end of April. Finally, we note that the judge's finding that the Respondent notified the Union at the November 4, 1992 bargaining session that a recall would occur is consistent with the record evidence. Specifically, the Respondent notified the Union at two bargaining sessions in November of a possible recall and undisputedly requested the Union to contact employees to determine if they desired recall if work permitted it, although, as the General Counsel contends, there is record evidence that a final decision was not made until early December.

list. Relying on the testimony of the Respondent's general manager and its vice president, Grassle, he further found that, contrary to the complaint, no employee was removed from the recall list. Based on these factual findings, the judge concluded there was insufficient evidence to establish that any of the laid-off employees were discharged or that their status was changed after December 1992. He therefore found it unnecessary to address whether these employees were removed from the recall list for antiunion reasons.

Contrary to the judges' findings, however, Gerald Feickert testified that when he asked laid-off full-time production employees whether they wished to remain on the recall list all answered in the negative. Of the three laid-off employees who testified, two essentially stated that they told Feickert they wished to be taken off the list, and one testified that she told Feickert she wished to remain on the list. Further, contrary to the judge, Grassle testified that none of the laid-off full-time employees contacted were on the recall list as of the hearing date. Moreover, an attachment to an exhibit entered into the record by the General Counsel, dated 2 months after the disputed events and purporting to be a then-current employee list, reflects that the laid-off production employees did not have employee status as of that time. Thus, the judge's findings do not comport with any version of the record evidence.

Accordingly, we also shall remand to the judge the issue of whether the Respondent violated Section 8(a)(3) and (1) by removing employees from the employee recall list.

4. The judge found, inter alia, that the Respondent, RBE Electronics of S.D., Inc., violated Section 8(a)(5) and (1) of the Act by refusing to meet and confer in good faith with the Union with respect to the negotiation of an agreement while an unfair labor practice charge was pending. He further found that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from the Union during the certification year and refusing to meet and confer with the Union as the exclusive bargaining representative of its production and maintenance employees. We adopt these findings.

To remedy the violations found, the judge's recommended Order and notice included provisions requiring the Respondent to cease and desist from refusing to bargain with the Union and to bargain, upon request, with the Union for at least an additional 5 months, that period representing an extension of the Union's original certification year of bargaining. While this case was pending before the Board, however, the Union advised the Board's Regional Director for Region 18 that it no longer had an interest in representing the unit employees involved here. On November 6, 1995, the Regional Director revoked the Union's original certification.

In light of the foregoing, we shall remand the 8(a)(5) issues discussed in this section so that the judge may consider the remedial ramifications of the revocation of the Union's certification. The judge shall likewise consider the revocation in fashioning a remedy for any violations that he may find with respect to the other 8(a)(5) allegations that we have remanded for analysis consistent with our discussion in section 2, above.

ORDER

It is ordered that the issue of what relief is appropriate to remedy the Respondent's Section 8(a)(5) refusal to bargain in good faith by refusing to meet and confer with the Union with respect to the negotiation of an agreement while an unfair labor practice charge is pending, and by withdrawing recognition from the Union during the certification year and refusing to meet and confer with the Union as the exclusive representative of its production and maintenance employees, is remanded to the administrative law judge for consideration of the effect of the revocation of the Union's certification on the recommended remedy.

IT IS FURTHER ORDERED that the complaint allegations that the Respondent refused to bargain over its layoff and recall of employees, and its reduction of work hours, in violation of Section 8(a)(5) and (1) of the Act and discharged employees about December 4, 1992, in violation of Section 8(a)(3) and (1) of the Act are remanded to the judge for the purpose of reopening the record for the taking of additional evidence, if he deems it necessary, and the making of credibility determinations, findings of fact, conclusions of law, and recommendations.

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and recommendations, including a recommended order consistent with this Order. Copies of such supplemental decision shall be served on all the parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

James L. Fox, Esq., for the General Counsel.
Dennis Maloney, Esq. (Maloney, Kolker, Fritz, Hogan & Johnson), of Aberdeen, South Dakota, for the Respondent.
Roger N. Nauyalis, Grand Lodge Representative, of Des Plaines, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Aberdeen, South Dakota, on June 8–10 and 22–24, 1993. On June 3, 1992, District Lodge No. 5, International Association of Machinists and Aerospace Workers, AFL–CIO (the Union) filed the charge in Case 18–CA–12266 alleging that RBE Electronics of S.D., Inc. (Respond-

ent) committed certain violations of Section 8(a)(5), (3), and (1) of the National Labor Relations Act (the Act). The charge was amended on June 19, 1993. On June 11, the Union filed a charge in Case 18–CA–12278, in which the charge was amended on July 22, 1992, and April 5, 1993. On August 27, 1992, the Regional Director for Region 18 of the National Labor Relations Board issued a ''dismissal letter'' refusing to issue complaint in Cases 18–CA–12266 and 18–CA–12278. On September 14, 1992, the Union filed a timely appeal with the General Counsel. The General Counsel remanded the case to the Regional Director for further investigation on January 26, 1992. The charge in 18–CA–12529 was filed by the Union on February 4, 1993, and amended on February 10 and April 6, 1993. Thereafter on April 19, 1993, the Regional Director issued a consolidated complaint and notice of hearing against Respondent, in all three cases, alleging that Respondent violated Section 8(a)(5), (3), and (1) of the Act. Respondent filed a timely answer to the consolidated complaint, denying all wrongdoing.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a South Dakota corporation with an office and principal place of business located in Aberdeen, South Dakota, where it is engaged in the manufacture and distribution of electronic devices. Respondent, in the course and conduct of its business operations, annually sells and ships goods and products valued in excess of $50,000 to customers located outside the State of South Dakota. Annually, Respondent purchases and receives goods and products valued in excess of $50,000 directly from sellers or suppliers located outside the State of South Dakota. Accordingly, Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Issues*

Respondent is a South Dakota corporation solely owned by Roger and Caroline Ernst. The Ernsts also own RBE Electronics, Inc., a Minnesota corporation located in Jordan, Minnesota. The Ernsts are the only officers of both corporations. In February 1992, the Union was certified as the exclusive collective-bargaining representative of the production and maintenance employees at Respondent's Aberdeen facility. In February 1992 the parties commenced negotiations for an initial collective-bargaining agreement. In April and May 1992, Respondent laid off its part-time workers, reduced the workweek of its full-time employees, and laid off eight full-time employees. Between February 1992 and January 23, 1993, the parties met in approximately 24 bargaining sessions in an unsuccessful attempt to negotiate an initial contract. The parties did not reach agreement and on January 23, 1993, Respondent ceased bargaining with the Union until the Union demonstrated majority status in the bargaining unit.

Within this factual framework, the General Counsel alleges that Respondent unlawfully: (1) assigned work to its Jordan, Minnesota facility; (2) laid off its part-time employees; (3) reduced its workweek and assigned work to nonunit employees; (4) laid off full-time workers; (5) laid off Linda Shuff, a union supporter; and (6) discharged its laid-off employees in violation of Section 8(a)(5), (3), and (1) of the Act. The General Counsel further alleges that Respondent failed to bargain in good faith with the Union by: (1) conditioning bargaining on the Union's withdrawal of an unfair labor practice charge; (2) engaging in surface bargaining with no intent on reaching an agreement; (3) delaying meetings, canceling meetings and wasting time at negotiations discussing irrelevant matters; (4) proposing to change the certified bargaining unit; (5) bypassing the Union and dealing directly with its laid-off employees; and (6) withdrawing recognition from the Union as exclusive bargaining representative.

Respondent admits that it refused to bargain with the Union after January 1993 unless the Union established its majority status. Respondent alleges that its current employees do not want representation by the Union. Respondent denies any wrongdoing and contends that it bargained in good faith with the Union about all the layoffs. Respondent affirmatively alleges that the Union refused to bargain about the layoffs and other personnel actions. Finally, Respondent denies that any of its actions were motivated by union animus and asserts that such actions were necessitated by legitimate business reasons.

B. *Facts*

As indicated above, the Union was certified on February 5, 1992. At the first meeting, on January 28, 1992, the parties exchanged written proposals. On March 5 the parties discussed the number of employees that would be present at the bargaining table. Respondent raised the subject of employee tardiness and absenteeism. Thereafter, the parties reviewed and discussed the Union's proposals. Tentative agreement was reached on one article of the Union's proposal. On March 6, the parties discussed the schedule for further negotiation sessions. The Union questioned whether Respondent was transferring work to its Jordan, Minnesota facility. Respondent explained that the Jordan facility was a sister facility and agreed to get the Union more information concerning the relationship between the two companies. The parties discussed three of the Union's proposals at length.

On March 18, the parties discussed the transfer of work and subcontracting. During this meeting Respondent informed the Union that due to a downturn in business, it was going to eliminate its second shift and lay off its part-time employees. Dennis Maloney, Respondent's attorney and chief negotiator, told the Union that if Respondent's financial condition did not improve it would also have to reduce the workweek to a 4-day week. Maloney told the Union that the part-timers would be laid off during the week of March 20 and that if that did not resolve the problem, Respondent would shorten the workweek to 32 hours. The Union made no request to bargain over these changes. Dennis Wallworth, business representative and the Union's chief negotiator, testified that he was presented with a fait accompli. Linda

Shuff, an employee-member of the Union's negotiating committee, testified that there were no negotiations over the layoff of the part-timers or the reduction of the workweek. Marie Harr, another employee-member of the negotiating team, testified that at the March 31 meeting, Respondent notified the Union that there would be a layoff. No one from the Respondent's side testified as to what occurred at the March meetings. The parties did discuss several subjects concerning employees at the facility and bargained over eight or nine union proposals.

On April 6, the Union filed a charge against Respondent in Case 18–CA–12166 concerning the layoff of the part-time employees and the reduction of the workweek. At the negotiation meeting that day, Maloney announced that he would not bargain with the Union while the charge was pending but would recommence bargaining when the charge was withdrawn. Shortly thereafter, Respondent filed an unfair labor practice charge against the Union. At the April 13 session the Respondent raised two subjects outside the area of a contract but concerning working conditions and the adjustment of grievances. Maloney stated that orders were down and that Respondent's inventory was too high. Thus, Respondent's employees would be working only a 4-day workweek (no Fridays) until further notice. The parties discussed whether part-time employees would be on a list for recall. Respondent stated it did not want part-time employees but would place the employees that were willing to work full time on such a list. The Union argued that the employees should be recalled when work permitted it. At the April 16 meeting, the parties negotiated two articles. On April 18, both the Union's and the Respondent's charges were withdrawn. On April 27, the Union claimed that management and nonunion employees were working Fridays and that supervisors were intimidating union members. The parties discussed economic conditions, seniority, and on-the-job injuries. Maloney again stated that the Respondent did not want part-time employees but only full-time employees. The parties reached tentative agreement on two articles at this meeting. On April 28, the parties discussed the schedule for further meetings. They negotiated over five articles in the Union's proposal. Maloney told the union committee that Thermo King, Respondent's largest customer, was going to require that product testing be done by certified technicians. Linda Shuff was presently working in the testing department but was not a certified technician. Maloney said that the change would take place in 10 days to 2 weeks. The Union asked what would be the effect on Shuff. Maloney said that she would no longer be able to work in the testing department. According to Shuff and Wallworth, nothing was said about a layoff of Shuff or any other employee. The Union made no demand to bargain about the elimination of Shuff's job or the layoffs. The parties discussed approximately 12 articles in the Union's proposal.

Russell Ernst, son of Roger and Caroline Ernst, testified that at the April 28 meeting, Maloney told the union negotiators that due to economic conditions, Respondent would have to lay off some full-time employees and asked for the Union's help in choosing the employees for layoff. According to Ernst, Wallworth said that if the layoffs were not based on strict seniority, the Union was not interested. Both Shuff and Wallworth deny Ernst's testimony. Shuff admitted that layoffs were mentioned but denied that any negotiations over layoffs took place. Wallworth admitted stating that the Union's position was that layoffs should be based on strict seniority but claimed that his remarks pertained to the proposed contract and not the actual layoff of the full-time employees. I credit Ernst's testimony over that of Wallworth and Shuff.

On May 11, Maloney notified Wallworth that Respondent would lay off eight employees at the end of that week. Maloney told Wallworth that he would not give the names of the employees until after the employees were notified. Maloney told Wallworth that Wallworth could come to his office to see the criteria used for the selection of employees to be laid off. There was no demand by the Union to bargain over the decision or manner of the layoff. Wallworth testified that the Union was presented with a fait accompli and that there was, therefore, nothing to bargain about. On Thursday, May 14, eight employees were laid off. Wallworth learned the identity of the eight employees that day from the employees. On Friday, May 15, Maloney gave Wallworth a list of the laid-off employees and a sheet showing rankings for seniority, attendance, and productivity.

At the May 20 negotiation meeting, Respondent raised the problem that it was having with vandalism and the use of its computer. Thereafter the parties discussed several contract proposals including attendance, sick leave, and health and accident insurance. They reached tentative agreement on four provisions. On May 21, the parties discussed paid leaves, hours of work, administration, wage payment, paid time off, holidays, and jury duty. The Union asked for a document showing that Thermo King had required certified testers and Maloney agreed to get such information. On May 27, Maloney said he would obtain information concerning the change in testing and the computer problem. He stated that business was still down and that there might be further layoffs. The parties discussed some concerns involving individual employees. On May 28, the parties discussed scheduling of employees, absenteeism, hours of work, and related proposals. They reached tentative agreement on contract language concerning holidays and other proposals.

On June 3, the Union filed another unfair labor practice against Respondent. At the June 5 meeting, Caroline Ernst and the employee members of the union committee engaged in a long discussion of the company picnic. Both Maloney and Wallworth stayed out of this discussion. After the discussion of the picnic, Maloney said he would not negotiate while a charge was pending, that he would not negotiate with a gun to his head and that he would file a charge against the Union. Maloney stated that he would not bargain until the charges were withdrawn and the Union agreed to bargain in good faith.[1] Maloney said he would arrange a meeting so that Geoffrey Grassle, Respondent's vice president, could explain the layoff criteria and the method used to select the employees laid off on May 14. On June 8, Maloney filed a charge against the Union.

On June 10, a meeting was held with Grassle in Maloney's office for Grassle to explain the layoff criteria. Grassle said that the layoffs were based on productivity, attendance, and seniority. The Union questioned the time pe-

[1] In his posthearing brief, Maloney asserted ''Any negotiations which would have continued in that atmosphere would have been based only on bad faith and blackmail.''

riod used for calculating absences. The Union contended that the method used was unfair to long-term employees. Linda Shuff questioned why she was included in the layoff. Grassle answered that Shuff was laid off because of the change in testing, i.e., that certified technicians were being used for testing. The layoff criteria of absenteeism, productivity, and seniority were not used in selecting Shuff. Rather she was laid off because her job was eliminated. Shuff questioned why she wasn't transferred to another job. Grassle said Shuff had not been cross-trained. Shuff stated that she had worked in many jobs at the facility and was cross-trained. Grassle answered that Shuff was probably cross-trained but there were no documents showing that. At the hearing Respondent contended that Shuff's experience in other positions was outdated and that Shuff could not read blueprints which were required on the assembly line jobs.[2] No negotiations were held until October 1992.

On October 8, the parties resumed negotiations. Maloney announced that he would ''talk but not spend any money or make any agreements.'' However, the parties did negotiate and discuss several proposals. Tentative agreement was reached on three articles in the Union's proposed contract. The meeting scheduled for October 9 was rescheduled to November 4 at Maloney's request.

Grassle attended the November 4 meeting and discussed an alleged slowdown at the facility. The Union attempted to get an employee who had recently quit reinstated. At this meeting Maloney requested that the Union contact laid-off employees to determine whether they desired recall if work permitted it. Respondent also wanted to know whether the laid-off part-timers were available to return as full-time employees. The Union said it would attempt to locate the employees and determine their status. The Company explained that eight employees had resigned since the May layoffs and that a recall of employees would take place. On November 5, the Union made counterproposals to those offered by Respondent the previous day. The Union requested a response prior to the next meeting on November 25. Respondent sent a written response on November 25. The Union made no request to bargain about recall or recall procedure.

At the November 25 meeting, Maloney gave the Union requested information concerning jury duty. Respondent again explained a problem with its computer software. With regard to the term of the contract, Respondent proposed a 3-year agreement. According to Wallworth, the Company stated that there were no leadpersons. Leadpersons had been stipulated as part of the appropriate bargaining unit in the representation case. Wallworth responded that the leadpersons were covered by the Board certification. Grassle testified that Respondent stated that the leadpersons were reluctant to exercise supervisory authority but that Respondent did not propose that they be omitted from the unit.

On November 25, Respondent asked the Union to find out if any of the laid-off employees were available for recall on a full-time basis. According to Wallworth the Union contacted employees but none were willing to put anything in writing. Wallworth testified that he was not given notice of a recall.

[2] During cross-examination, Shuff was presented with a blueprint used in Respondent's assembly process and was unable to adequately read the blueprint.

On December 2 or 3, Respondent contacted the eight employees laid off on May 14 to fill one position. The employees were asked if they could come to work the following Monday and when they answered no, they were asked whether they wanted to remain on the recall list. According to Wallworth he did not learn of the recall until December 3 when he was called by employee Mary Casanova. The next meeting was held on December 15 because Grassle was unable to attend the December 14 meeting. The parties updated their areas of agreement and disagreement. Maloney said that a majority of the employees contacted for recall had quit and that employee Olivia McDonald was again working. The parties argued again over whether Linda Shuff had been cross-trained. According to Wallworth, Respondent declared that it had no leadpersons. On December 16, the parties had discussed accident and health insurance, wages, paid leave, and work rules. Five tentative agreements were reached that day.

On January 26, 1993, Maloney announced that Respondent would no longer bargain with the Union. Maloney said the Union did not represent a majority of the employees and that Respondent was going to file a decertification petition. Shortly thereafter, Respondent filed a decertification petition. After that petition was dismissed, Respondent filed a petition with the Board seeking a representation election. That petition was dismissed pending resolution of the instant case.

C. *The Layoffs and Reduced Workweek*

As shown above, the General Counsel contends that Respondent laid off the part-time employees, reduced the work and laid off eight employees, and took employees off its recall list without notice to and bargaining with the Union. Further, the General Counsel contends that these actions were motivated by union animus and a desire to dissipate the bargaining unit. The General Counsel contends that work which would have been performed at the Aberdeen facility was transferred and performed at Jordan in order to accomplish these antiunion objectives. Respondent argues that its personnel actions were based on legitimate business reasons, i.e., that orders were down and finances required that the payroll be reduced. Respondent contends that it sought the Union's help with regard to layoffs and recall but that the Union was not interested unless layoff and recall were based strictly on seniority. Respondent contends that the work performed at Jordan was not work transferred from Aberdeen but rather a shipment of inventory necessitated by the development of a new product at Jordan and because of other legitimate business reasons.

Helen Alden, one of the eight laid-off employees, testified that her supervisor, Lena Cox, attended two union meetings. On several occasions between July and October 1991, Cox asked Alden why the employee wanted union representation. According to Alden, in September 1991, Cox told her that Respondent would lay off employees ''until all the Union people were gone.'' Shirley Habeck, another laid-off employee, testified that Cox told her that Respondent would lay off all the employees in the next 6 months and later reopen with all new employees. Shuff testified that Cox told her that products were being produced in Jordan because the employees in Aberdeen had chosen the Union. I credit the testimony of the three employees over Cox's denials.

Former employee Donna Webber testified that the shipment of parts from Aberdeen to Jordan began to increase in

March 1992.[3] At that time, parts and inventory for both facilities were stocked in Aberdeen. Respondent's records show a significant increase in the number of parts and kits shipped to the Jordan facility in the summer and fall of 1992. Further, in July 1992, assembly line equipment was sent from Aberdeen to Jordan. Roger Ernst and Grassle credibly testified that this equipment was owned by the Jordan company and was underutilized in Aberdeen.

Respondent established that the Company's financial position was poor in April 1992. Roger Ernst had to use his personal funds to meet the payroll. Respondent decided to eliminate the second shift causing the layoff of the part-time employees. Respondent believed that these employees had other jobs and would not be affected by a layoff as much as full-time employees. The savings resulting from the layoff of the part-time employees were not sufficient to bring Respondent's costs into line and, therefore, Respondent decided to go to a 4-day workweek. The employees did not return to a 5-day workweek until the winter of 1992. By the end of November, Respondent's work force had been decreased by eight voluntary terminations. Consequently, Respondent decided to recall one employee. Grassle chose to recall the employees in reverse order from the layoffs and directed Gerald Feickert to recall the employees in reverse order until the position was filled.

Grassle testified that he was assigned to lay off eight employees by Roger Ernst. To avoid charges of discrimination by the Union, Grassle devised a plan to choose the employees by objective means. Grassle directed that a chart of employees, by employee number, not name, be created. By work center, the seniority, productivity, and attendance of each employee was shown and compared to other employees in the department and the overall facility. Based on this chart Grassle ranked employees for layoff. He chose Linda Shuff for layoff based on the change in the testing process. Grassle had Terry Anderson, general manager of the Jordan facility, select employees, by employee number, for layoff using a similar chart. Employees selected by Anderson that matched those chosen by Grassle were laid off. On May 14, the employees were laid off and told that they would be recalled when work increased. Grassle told the employees that their union business agent would explain the criteria used in selecting employees for layoff.

In the spring of 1992, Respondent's Jordan facility was unable to assemble any products which involved the discharge of waste water. That restriction was lifted and the facility again began production. This increase in production required increased shipments from the shared inventory located in Aberdeen. Further, Respondent's chief customer, Thermo King, developed a new product which required production in Jordan. Several other new products were in the process of development. Thermo King's engineers needed to monitor the production process for the new product, named the kit and panel. Thus, the Jordan facility was chosen to assemble the product because it was more convenient for the customer. When Ernst and Grassle decided to recall an employee at the end of November, Grassle instructed Gerald Feickert, general manager, to call employees in opposite order of the layoff. According to Feickert the employees turned him down until he reached employee Olivia McDonald. After an employee turned Feickert down, he asked if she wished to remain on the recall list. The employees wished to remain on the list. Contrary to the complaint, Feickert and Grassle testified that no employee was fired or removed from the employee list. According to Respondent the employees are still in layoff status except for McDonald, who is currently working full time for Respondent.

Grassle testified that during late 1992 and early 1993, four employees separately told him that a majority of the employees did not want union representation. In considering whether the Union represented a majority the employees, Grassle gave no consideration to the fact that the laid-off employees were still part of the bargaining unit. Grassle testified that the four employees told him that a majority of the then current employees did not want union representation.

III. ANALYSIS AND CONCLUSIONS

A. *The Alleged 8(a)(3) Violations*

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a ''motivating factor'' in the employer's decision. Upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Corp*., 462 U.S. 393, 399–403 (1983).

Here, I find that the General Counsel has made a prima facie case that the elimination of the second shift and the layoff of the part-time employees was motivated by a desire to eliminate union supporters from the bargaining unit. Supervisor Lena Cox told employees that Respondent would lay off employees until all the union people were gone. She further stated that Respondent would reopen with all new employees and that work was being shipped to the Jordan facility because employees had chosen union representation. Such threats provide ample evidence to support the General Counsel's prima facie case of unlawful motivation.

However, I find that Respondent has shown that the layoffs were economically motivated and would have taken place even in the absence of the union activities. The record evidence establishes that Respondent was faced with a serious cash-flow problem. Roger Ernst withdrew funds from his personal savings in order to meet Respondent's payroll. It is clear that a reduction of payroll costs was necessary. Sales were down and there were no indications that an increase in orders was imminent. In fact, additional cost-cutting measures were necessary and Respondent reduced the workweek for production employees from 40 to 32 hours per week. Again, further measures were necessary. Respondent laid off eight employees 2 weeks later. The work allegedly transferred to the Jordan facility did not materialize until at least 3 months later. As shown above the threats by Cox support the prima facie case. However, balanced against those threats are the fact that Cox was a low level supervisor who was in no way involved in the decision-making which led to the

[3] Respondent's records show that the shipment of inventory from Aberdeen to Jordan did not increase until August 1992.

personnel actions at issue herein. Thus, I find that the elimination of the second shift and the layoff of the part-time employees, the reduction of the workweek, and the May layoff of employees were economically motivated and would have taken place absent any union activities. The issues concerning the alleged refusal to bargain over these economic decisions and their effects will be addressed separately, infra at pages 11–12.

The General Counsel alleges that Respondent unlawfully transferred work to its Jordan facility for antiunion reasons. To make a prima facie case, General Counsel must establish that a transfer of work did occur. For the reasons expressed below I find that General Counsel has failed to establish that any work was transferred to the Jordan facility or that the shipment of parts and inventory to the Jordan facility was not in the normal course of business operations.

In the spring of 1992, Respondent's Jordan facility was unable to assemble any products which involved the discharge of waste water. That restriction was lifted and the facility again began production. This increase in production required increased shipments from the shared inventory located in Aberdeen. Further, Thermo King developed a new product which required production in Jordan. The customer's engineers needed to monitor the production process. Thus, the Jordan facility was chosen to assemble the product because it was more convenient for the customer. I find that these two factors explain the increase in production at the Jordan facility and the consequent increase in the shipment of parts and inventory from the Aberdeen to the Jordan facility.

As noted above, the General Counsel alleges that Linda Shuff was discharged because of her union activities. The evidence establishes that Shuff was laid off in May 1992 along with seven other employees. Shuff's position as product tester was eliminated because the customer required testing to be done by certified technicians. Testing at the Jordan facility was also done by certified technicians. I am persuaded by the evidence that the elimination of the product tester job was done for legitimate business reasons. The question remains as to whether Respondent laid off Shuff rather than transferring her because of her union activities.

Shuff was active in the Union and her activities were known to Respondent. There is no specific evidence of animus towards Shuff but the threats uttered by Supervisor Lena Cox establish general union animus. However, Shuff's ability to perform production work is at issue. Respondent's records showed very little in the way of cross-training. Further, while Shuff had worked in various jobs in the facility, her experience in production was outdated. Shuff worked on the assembly line prior to the current practice of using blueprints. At trial, it was apparent that Shuff could not adequately read a blueprint used on Respondent's assembly line. Respondent made a business decision to retain a cross-trained employee over Shuff who would have required training. Cross-training appears to be a valid consideration when an employer is downsizing to cut labor costs. I will not substitute my judgment for that of Respondent. Accordingly, I find that Respondent did not discharge or lay off Shuff in violation of the Act.

The complaint alleges that Respondent discharged its laid-off employees in December 1992. The evidence shows that Respondent through Gerald Feickert questioned the employees as to whether they wished to remain on the recall list. However, no employee was removed from the list. All of the laid-off employees are still considered to be laid off by the Respondent. I find insufficient evidence to establish that any of the laid-off employees were discharged or that their status changed in any way after December 1992.

B. *The Table Bargaining Allegations*

Section 8(d) of the Act requires the parties ''to meet at reasonable times and confer in good faith with respect to . . . the negotiation of an agreement.'' Mere willingness to talk does not constitute a willingness to bargain collectively. In such a case the question is whether it is to be inferred from the totality of the employer's conduct that it went through the motions of negotiations as an elaborate pretense with no sincere desire to reach an agreement if possible, or that it bargained in good faith but was unable to arrive at an acceptable agreement with the union. *NLRB v. Reed & Prince Mfg. Co*., 205 F.2d 131, 134 (1st Cir. 1953), cert. denied 346 U.S. 887 (1953). Bad faith is prohibited though done with sophistication and finesse. Consequently, to sit at a bargaining table, or to sit almost forever, or to make concessions here and there, could be the very means by which to conceal a purposeful strategy to make bargaining futile or fail. *NLRB v. Herman Sausage Co*., 275 F.2d 229, 232 (5th Cir. 1960).

In *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984), the Board set forth the following criteria for determining whether an employer was engaged in mere surface bargaining:

> Such conduct includes delaying tactics, unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already agreed-upon provisions and arbitrary scheduling of meetings. [Footnotes omitted.]

The evidence shows that after the Union filed its first charge on April 6, 1992, Maloney refused to bargain until the charge was withdrawn. That charge was withdrawn and bargaining began again. On June 5, Maloney again refused to bargain while a charge was pending. This time bargaining was suspended until October. Thereafter on October 8, 1992, Maloney stated that he would talk but make no agreements or spend any money. In spite of this statement, Respondent continued to negotiate and reached tentative agreements with the Union. As noted above, Section 8(d) requires both parties to meet at reasonable times and confer in good faith with respect to wages hours, and terms of employment. That obligation is independent of any pending unfair labor practice charge. Thus, I find that Maloney's refusal to bargain while a charge was pending was a per se violation of Section 8(a)(5).

The parties met on 22 occasions in bargaining for an initial agreement for a business which had no previous labor organization or labor agreement. Experience tells us that it generally takes longer to negotiate an initial agreement. The General Counsel has not established that Respondent engaged in bargaining with no intent on reaching agreement. In the instant case, the record clearly does not support a finding that Respondent engaged in delaying tactics or failed to dis-

play the degree of diligence that performance of its bargaining obligations required. Rather, Respondent bargained and negotiated with the Union and reached tentative agreement on 27 of the Union's proposals. In my view, Respondent's refusal to negotiate in the face of a pending charge does not establish a bad-faith motive. That refusal to bargain appeared to be based on a mistake of law rather than an intent to violate the Act. While a per se violation of the law, I do not find the refusal to bargain between June and October establishes that Maloney's purpose was to delay and frustrate the collective-bargaining process or to evade reaching an agreement.

The evidence does not support the General Counsel's contention that Respondent unduly delayed meetings, canceled meetings, and wasted time discussing irrelevant matters. Except for the period when Respondent unlawfully refused to meet while charges were pending, Respondent was willing to meet at reasonable times and places. Over a period of a year a few cancellations or delays were necessary. Respondent always arranged for a mutually agreeable postponement. The evidence only revealed one occasion when negotiation time was wasted discussing the company picnic. The lead negotiators for both sides avoided this controversy and commenced negotiations as soon as the discussion was over. This brief interlude, engaged in by participants from both sides, does not taint the approximately 8 months of good-faith negotiations.

The credible evidence establishes that while arguing against a second wage tier for leadpersons, Respondent argued that its leadpersons were not actually performing lead functions. There was no evidence that Respondent sought to exclude any employees from the certified bargaining unit.

Accordingly, I find that Respondent violated Section 8(a)(5) of the Act when it failed and refused to bargain with the Union while unfair labor practices were pending before the Board. I find insufficient evidence to support the allegations that Respondent's 8 months of bargaining at the table were engaged in with the intent of frustrating agreement.

C. *The Layoffs and Reduction in the Workweek*

As discussed above, for economic reasons Respondent eliminated its second shift and laid off its part-time workers, reduced its workweek, and laid off eight full-time employees. The General Counsel contends that Respondent violated Section 8(a)(5) by failing to give the Union notice and an opportunity to bargain over such changes.

Section 8(a)(5) requires an employer, after reaching a decision concerning a mandatory subject, to delay implementation until after it has consulted with the bargaining representative, but does not require that the employer delay the decision-making process itself. *Mercy Hospital of Buffalo*, 311 NLRB 869 (1993); *Haddon Craftsmen*, 300 NLRB 789 (1990); *Lange Co.*, 222 NLRB 558 (1976). When an employer notifies a union of proposed changes in terms and conditions of employment, it is incumbent upon the union to act with due diligence in requesting bargaining. *Haddon Craftsmen*, supra; *Jim Walter Resources*, 289 NLRB 1441 (1988).

In the instant case, Respondent notified the Union on March 18 that it intended to cut labor costs by eliminating its second shift and laying off its part-time employees. However, the Union made no request to bargain over this decision or the effects of this decision. The General Counsel and the Union argue that the decision had been made and that a request for bargaining would have been futile. However, there is no objective evidence to support that contention. At the time of Respondent's announcement, the decision was still executory. It appears bargaining would have been possible regarding the number of employees to be laid off and the selection of such employees. Further the timing and implementation of the decision could have been the subject of bargaining. Finally, the effects of the decision were open to bargaining. I can find no violation because the Union made no attempt to bargain and, therefore, there was no test of Respondent's willingness or reluctance to bargain. Similarly, I find that there was no demand to bargain about the reduced workweek. Respondent through Maloney gave notice that if the savings generated by the layoffs of the part-timers were insufficient, Respondent would reduce the workweek. The Union made no request to bargain and offered no alternatives. Nor did the Union seek to bargain about the effects of the shortened workweek. It was incumbent on the Union to request bargaining over these changes.

On April 28, Respondent gave notice to the Union of its intended layoff of some full-time employees. Wallworth stated that unless layoffs were based on strict seniority the Union was not interested in discussing layoff criteria. Here, Respondent not only gave notice of the intended layoffs but sought union bargaining over the procedure to be utilized. Again, the Union took no action. Finally, in November, Respondent notified the Union of an intended recall of laid-off employees. The Union made no request to bargain over the recall, the number of employees or the order of recall. Thus, there is insufficient evidence to support a finding that Respondent acted in bad faith.

In sum, I find that the General Counsel has failed to establish that Respondent eliminated its second shift, shortened its workweek, laid off employees, and recalled employees without affording the Union notice and an opportunity to bargain over such changes in terms and conditions of employment.

D. *Withdrawal of Recognition*

A newly certified union enjoys a presumption of majority status for a period of 1 year following the certification. *Brooks v. NLRB*, 348 U.S. 96 (1945). ''The underlying purpose of this statute is industrial peace. To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end; it is inimical to it.'' Id. at 103.

Grassle testified that during late 1992 and early 1993, four employees separately told him that a majority of the employees did not want union representation. One defect in this defense is that Respondent questioned the Union's majority and refused to bargain during the certification year. Second, the fact that 4 employees out of approximately 30 employees state that the Union does not represent a majority does not amount to objective considerations of a reasonable doubt of majority status. The comments of employees about the union sentiments of other employees are not persuasive. Otherwise, ''a few antiunion employees could provide the basis for withdrawal of recognition when, in fact, there is actually an insufficient basis for doubting the Union's continued majority.'' *Golden State Habilitation Convalescent Center*, 224 NLRB 1618, 1619–1620 (1976). Third, in considering wheth-

er the Union represented a majority the employees, Grassle and the complaining employees spoke in terms of the current employees and gave no consideration to the fact that the laid-off employees were still part of the bargaining unit. Thus, Respondent has not established that the allegedly dissatisfied employees would have constituted a majority of the unit employees. Finally as shown above, the question of representative status was not raised in a context free from unfair labor practices. The question of majority status was raised after Respondent had unlawfully refused to bargain with the Union for a 4-month period while charges were pending before the Board.

CONCLUSIONS OF LAW

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

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

3. By refusing to meet and confer in good faith with respect to the negotiation of an agreement with the Union while an unfair labor practice charge was pending, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

4. By withdrawing recognition from the Union during the certification year and by refusing to meet and confer with the Union as the exclusive collective-bargaining agent of its production and maintenance employees, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1).

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

6. Except as found above, Respondent has not violated the Act as alleged in the complaint.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that Respondent be ordered to cease and desist therefrom and take certain affirmative action necessary to effectuate the purposes of the Act.

Because the evidence shows that Respondent refused to bargain on two occasions because the Union had filed unfair labor practice charges and had unlawfully questioned the Union's majority status, I shall recommend that the certification year be extended through 5 months after Respondent commences to bargain. See generally *Mar-Jac Poultry Co*., 136 NLRB 785 (1962). Contrary to the argument of the General Counsel, I find no reason to extend the remedy to RBE Electronics, Inc. (the Minnesota corporation).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

[4] All motions inconsistent with this recommended Order are hereby denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, RBE Electronics of S.D., Inc., Aberdeen, South Dakota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with District Lodge No. 5, International Association of Machinists and Aerospace Workers, AFL–CIO.

(b) In any like or related manner violating Section 8(a)(5) and (1) of the Act.

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

(a) Bargain in good faith, on request, with the Union as the exclusive bargaining representative of all the employees in the appropriate unit.

(b) Regard the Union as exclusive agent as if the initial certification year has been extended for an additional 5 months from the commencement of bargaining pursuant to this Order.

(c) Post at its offices and facilities in Aberdeen, South Dakota, copies of the attached notice marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

[5] 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.

WE WILL NOT refuse to bargain in good faith with District Lodge No. 5, International Association of Machinists and Aerospace Workers, AFL–CIO.

WE WILL NOT in any like or related manner violate Section 8(a)(5) and (1) of the Act.

WE WILL bargain, on request, with the Union as the exclusive bargaining representative of our employees in the appropriate unit shown below.

WE WILL bargain with the Union as if the certification year has been extended for an additional 5 months from the commencement of bargaining.

The appropriate bargaining unit is:

All full-time and regular part-time production and maintenance employees employed by Respondent at its Aberdeen, South Dakota, facility; but excluding all office clerical and professional employees, casual and on-call employees, guards and supervisors as defined in the Act, as amended.

RBE ELECTRONICS OF S.D., INC.