Greensburg Coca-Cola Bottling Company, Inc. *and* Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 30, affiliated with International Brotherhood of Teamsters, AFL–CIO.[1] Cases 6–CA–22872 and 6–CA–23022

May 28, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On July 5, 1991, Administrative Law Judge Philip P. McLeod issued the attached decision. The Respondent filed exceptions and a supporting brief; the General Counsel filed limited exceptions and a supporting brief and an answering brief to the Respondent's exceptions; and the Respondent filed an answering brief to the General Counsel's limited exceptions.

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

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

1. We adopt the judge's findings, supported by the facts summarized below, that the Respondent unlawfully bargained to impasse over its proposal altering unit scope. Since 1974, the Union has represented the warehouse employees at the Greensburg distribution facility. The Union's 1974 Board certification described the unit, which consists of approximately 8 to 10 employees, as:

> All plant employees, truck loaders, service repairmen and the general laborer; excluding all other employees, drivers, hostesses, cafeteria employees, salemen, the production foreman, office clerical employees, and other supervisors as defined in the Act.

Subsequent collective-bargaining agreements for the above-unit employees, including the most recent 1986–1989 contract, changed the opening phrase of the certification from ''[a]ll plant employees'' to ''only full-time employees.''[3] These contracts contain a provision that employees covered by the agreement are not guaranteed 40 hours of work per week.

In April 1989, the Respondent purchased the Greensburg facility from the predecessor employer. Shortly thereafter, the Respondent began negotiations for a new agreement with the Union to replace the expiring 1986–1989 contract which the parties had agreed to extend while negotiations were ongoing. Before negotiations commenced, the Union submitted a proposal that read:

> The two (2) part-time employees that are currently employed by [the Respondent] shall be made full-time employees upon ratification. Two (2) part-time employees are: Bob Walter and James Hamerski.

Walter and Hamerski were night loaders hired on May 28 and June 31, 1988, respectively. They were employed on a regular basis and sometimes worked less than 40 hours per week like unit employees Carl Armitage and Scott Morrison.[4] Although the contract was never applied to Walter and Hamerski, the Union first became aware of this oversight when Shumar became responsible for the warehouse employees unit in the spring of 1989.

At the first bargaining session on June 19, 1989, the Respondent submitted numerous proposals, including a proposal to change the recognition clause of the contract to specifically exclude ''all part-time employees'' from the unit. The Respondent stated that the purpose of this proposal was to ''clarify'' existing contract language which it interpreted as excluding part-time employees. This proposal was rejected because the Union had historically represented all individuals regularly employed who performed unit work regardless of the number of hours per week that they worked with the exception of employees who did not work on a regular basis, such as summer help or probationary employees.

[1] The name of the Charging Party has been changed to reflect the new official name of the International Union.

[2] 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 up 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 correct the following inadvertent errors of the judge, which do not affect our overall agreement with his findings and conclusions. In sec. III,A, of his decision, the judge incorrectly stated that ''the recognition/coverage clause [beginning with the parties' 1974 contact] was changed from 'all plant employees' as used in the Board certification to read 'all full-time plant employees.''' The record reveals that the contracts not only added the word ''full-time'' but also changed the modifier from ''all'' to ''only.'' In the last paragraph of sec. III,B, of his decision, the judge stated: ''union steward Pallow testified credibly that [Robert Walter and Jim Hamerski] were simply overlooked because employees hired as night loaders rarely stayed beyond their probationary period.'' The record, however, reveals that Pallow merely testified that there is a high turnover among night loaders, while Union Business Agent Shumar testified that Walter and Hamerski had not become union members after their probationary periods expired because of ''an oversight that nobody knew that they were there for that long.''

In the analysis section of his decision, the judge referred to the Union as possessing ''unsophisticated confusion'' or as being ''unsophisticated.'' In adopting the judge's findings that the Respondent violated the Act, we find it unnecessary to rely on this reference.

[3] The Respondent and the Union could not explain the reason for the language differences between the certification and the contracts.

[4] This comparison is supported by the uncontroverted testimony of Union Business Agent Shumar.

At the second bargaining session held the next day, the Respondent withdrew its proposal to specifically exclude part-time employees. The Respondent instead proposed to maintain the language of the existing recognition clause and simultaneously took the position that the term ''full-time plant employee'' as used in the contract and past contracts meant an employee working 40 hours per week. The Union rejected the Respondent's new proposal because it was a change in form only from its previous proposal and not in substance and because there was concern that full-time employees would be replaced by part-time employees.

At almost every negotiation session thereafter, the parties discussed the Respondent's recognition clause proposal meant to exclude part-time employees. The Union repeatedly rejected this proposal for the reason given on June 19.

At their July 24, 1990 meeting, the Union requested language regarding the Respondent's intended utilization of part-time employees. In response, the Respondent submitted a handwritten proposal specifying that part-time employees would not be utilized if full-time employees were on layoff. This proposal also included the following statements:

> [Part-time] employees shall be considered probationary employees and shall receive no continuous service credit while so classified. Regular part-time employees may be terminated at any time and shall have no recourse under this Agreement. Regular part-time employees shall not be entitled to any fringe benefits. Regular part-time employees re-classified to regular full-time status shall accrue seniority from the date of re-classification to full time status . . . . Regular part-time employees shall be paid as determined by the Employer.

The Respondent then added this handwritten proposal to its typed ''final offer'' which included Respondent's June 20 recognition clause proposal. The Respondent also notified the Union that it intended to terminate the contract effective July 27, 1990.

The judge found that the Respondent was trying to construct contract language which would allow it complete freedom in determining who was included or excluded from the unit. Considering the contract as a whole, the judge indicated that a literal reading of the recognition clause as urged by the Respondent defied logic because the contract specifically provided that employees are not guaranteed a full 40-hour work schedule. The judge explained that, by specifically including only full-time employees, as defined by the Respondent, in the unit and excluding part-time employees, and by further having the contractual right to unilaterally establish and alter work schedules, the Respondent was attempting to relegate to itself the right to remove employees from the unit at will. The judge found that by insisting on the right to unilaterally alter the scope and composition of the unit at will the Respondent violated Section 8(a)(5) and (1) of the Act.

Our dissenting colleague's position is premised on a faulty argument that the Respondent never conditioned agreement on the Union's acceptance of its interpretation of ''full-time employees'' (i.e., that part-time employees were excluded from the unit). We find this argument untenable because it disturbs the judge's factual findings and does not reflect the true flavor of the parties' contract negotiations.[5] According to well-established Board practice, an administrative law judge's factual findings based on reasonable inferences drawn from the record are not to be lightly disturbed. Here, after thoroughly reviewing the history of the parties' negotiations, the judge found that the Respondent's proposals taken in this context sought to alter the scope of the bargaining unit historically represented by the Union by excluding the part-time employees. We agree that the record sufficiently supports the judge's conclusion that the June 20 proposal was not a proposal to maintain the status quo. As the newly arrived successor, the Respondent admittedly had no idea what past meaning had attached to the term ''full-time employees.''[6] There is also no indication, contrary to the dissent's desire, that the Respondent ever qualified its insistence on the exclusion of part-time employees by reserving the option that any lingering dispute over the interpretation of the contested phrase could be later resolved in future arbitration. In addition, we find that the Respondent's handwritten proposal which was incorporated into its July 24 final offer package for all practical purposes excluded part-time employees from contract coverage. This action reinforces our view that the Respondent all along was tying its June 20 proposal to its interpretation of ''full-time employees.'' Thus, we are unwilling to split fine hairs and find no violation here based on an overly technical distinction made without reference to the context of events as found by the judge.

2. We also adopt the judge's findings that the Respondent unlawfully locked out unit employees in support of its proposal altering unit scope. The Respondent, citing *Delhi-Taylor Refining Division*, 167 NLRB 115 (1967), enfd. 415 F.2d 440 (5th Cir. 1969), contends that the judge erred in finding that it unlawfully locked out employees. We find *Delhi-Taylor* distinguishable from the present case.

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[5] We also observe that in its brief the Respondent repeatedly characterized its June 20 proposal as a proposal ''to exclude part-time employees.''

[6] For this reason, we think that the dissent's contention that the Respondent's interpretation was not made contemporaneously with the initial adoption of the recognition clause carries little weight.

In *Delhi-Taylor*, the employer submitted a contract proposal excluding certain classifications from the established unit. The Board found, inter alia, that the employer had insisted on the union's acceptance of this proposal, but later joined the union in deferring resolution of this issue until after other contract matters were settled. When the subsequent lockout occurred, the unit scope issue was then no longer under active consideration. In this context, the Board found that the employer had not conditioned the execution of a contract on the union's agreement on the unit scope issue and that the lockout in *Delhi-Taylor* was not unlawful.[7]

In contrast, here the record reveals that throughout negotiations the Respondent actively pursued the exclusion of the regular part-time employees from the unit and maintained that position 3 months after the lockout began. In fact, at the July 24 bargaining session, the unit scope issue was still a particular concern to the Union and the Respondent responded by adhering to its demand for the part-time employees' exclusion but adding to its ''final offer'' a handwritten proposal modifying its position on the utilization of part-time employees. In these circumstances, we agree with the judge's finding that the Respondent conditioned an agreement on a change in unit scope and that the subsequent lockout was unlawful.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Greensburg Coca-Cola Bottling Company, Inc., Greensburg, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER OVIATT, dissenting.

I do not agree that the Respondent violated Section 8(a)(5) of the Act.

In the recognition clause of their 1986–1989 contract, the parties had mutually agreed to modify the ''All plant employees'' language of the certification to cover ''only full-time employees.'' Thereafter, as is exemplified by the Union's prenegotiations proposal to include Walter and Hamerski, ''[t]he two part-time employees'' who sometimes worked less than 40 hours a week, a dispute developed over the meaning of the words ''full-time employees.'' In proposing and insisting to impasse during the subject negotiations on a continuation of the previous contract's recognition clause, the Respondent stated its interpretation of that language. That is, it understood the clause to exclude ''part-time employees'' who it defined as those employees working less than 40 hours a week. This is a far cry from an employer demanding a change in a contract clause which changes the unit description. The Union disagreed with this interpretation, contending that the recognition clause included all employees who worked regularly, both full time and part time. Significantly, although throughout bargaining the Respondent insisted on the recognition clause language, it never insisted on—or, indeed, proposed after the first bargaining session—*language* expressing its interpretation of the recognition clause, i.e., language excluding part-timers. Neither does the judge explicitly find that the Respondent conditioned agreement on the Union's acceptance of its *interpretation* of the proposed recognition clause language.[1]

Insisting on the language of a particular clause that the parties had previously agreed to and insisting that the other side accept an *interpretation* of that clause as a condition of agreement is an important distinction that the judge failed to make. In my experience, parties are often able to agree in bargaining on a contract's language, even when they disagree about its interpretation in particular circumstances. If a dispute arises over the clause's interpretation with respect to particular facts, they may resort to arbitration. But an arbitrator would not necessarily accept the interpretation placed upon the clause by its proponent; nor would we. Particularly would this be so where, as here, one side's interpretation was not made contemporaneously with the initial adoption of the clause, but only where a second contract was being negotiated. Thus, I would not find in this case that the Respondent bargained to impasse over a ''proposal'' to exclude part-timers, but only insisted on previous contract language defining the unit to include only full-time employees. This was a perfectly valid bargaining stance and one that cannot offend Section 8(a)(5).

[7] Cf. *National Fresh Fruit & Vegetable Co. v. NLRB*, 565 F.2d 1331 (5th Cir. 1978) (the union's acceptance of an employer's proposal altering the unit was not a condition precedent to a contract with the union).

[1] Although the judge, in connection with his discussion of the June 21, 1990 bargaining session, states that the ''Respondent stood by its proposal to exclude regular part-time employees,'' in fact the Respondent made no such proposal after the first bargaining session. The judge has transmuted—I think, improperly—the Respondent's interpretation of a previously agreed-to contract clause into a new ''proposal.'' This sleight-of-hand then permits the judge in the ''Analysis'' section of his decision to characterize the Respondent by ''specifically excluding part-time employees'' as ''insisting on the right to unilaterally alter the scope'' of the unit. The Respondent did no such thing.

Julie R. Stern, Esq., for the General Counsel.
William R. Sullivan Jr., Esq. and *Lisa A. Lopatka, Esq. (Seyfarth, Shaw, Fairweather, and Geraldson)*, of Chicago, Illinois, for the Respondent.

DECISION

STATEMENT OF THE CASE

PHILIP P. MCLEOD, Administrative Law Judge. I heard this case in Pittsburgh, Pennsylvania, on March 22, 1991. The

charges which gave rise to this case were filed by Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 30, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (the Union), against Greensburg Coca-Cola Bottling Company, Inc. (Respondent), on July 27 and September 21, 1990. On December 21, 1990, an order consolidating cases, consolidated complaint, and notice of hearing issued which alleges inter alia that Respondent violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act), by demanding, as a condition of consummating any collective-bargaining agreement, that the Union agree to a provision which would exclude regular part-time employees from the bargaining unit represented by the Union; and by locking out its bargaining unit employees in support of this demand.

In its answer to the consolidated complaint, Respondent admitted certain allegations including the filing and serving of the charges, its status as an employer within the meaning of the Act; the status of the Union as a labor organization within the meaning of the Act; and the status of certain individuals as supervisors and agents of Respondent within the meaning of the Act. Respondent denied having engaged in any conduct which would constitute an unfair labor practice within the meaning of the Act.[1]

At the trial herein, all parties were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Following the close of the trial, counsel for General Counsel and Respondent both filed timely briefs with me which have been duly considered.[2]

On the entire record in this case and from my observation of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Greensburg Coca-Cola Bottling Company, Inc. is, and has been at all times material herein, a corporation operating as a distribution facility in Greensburg, Pennsylvania. In the course and conduct of its business operations, Respondent annually purchases and receives at its Greensburg facility goods and products valued in excess of $50,000 directly from points located outside the State of Pennsylvania.

Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 30, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

The Union represents employees at Respondent's Greensburg distribution center in two separate bargaining units, one unit of drivers and salesmen and one unit of warehouse employees. Each bargaining unit is covered by a separate collective-bargaining agreement, which have different effective dates. Only the unit of warehouse employees, which consists of approximately 8 to 10 employees, is involved in this case.

On June 4, 1974, the Union was certified by the Board to represent the warehouse employees. The unit is described in that certification as:

> All plant employees, truck loaders, service repairmen and the general laborer; excluding all other employees, drivers, hostesses, cafeteria employees, salesmen, the production foreman, office clerical employees, and other supervisors as defined in the Act.

Beginning with the first collective-bargaining agreement between the parties in 1974, the recognition/coverage clause was changed from ''all plant employees'' as used in the Board certification to read ''all full-time plant employees.'' The exclusionary language ''all other employees'' as contained in the Board certification, however, was retained in the contract verbatim. At the same time, there was nothing which specifically excluded part-time employees from the bargaining unit. The contracts do specifically refer to the Board certification of this unit. The language used in the first collective-bargaining agreement was repeated throughout each of the successive agreements, including the most recent agreement which was effective from May 1986 through May l989. Past collective-bargaining agreements also included a union-security clause which tracks the language of the recognition clause, providing that ''full-time employees'' shall join the Union upon the completion of their 60-day probationary period. Past agreements, including the most recent agreement, also contained a provision that employees covered by the agreement are not guaranteed 40 hours of work per week.

B. *Past Practice Regarding Part-Time Employees*

Respondent acquired the Greensburg facility in April 1989, just 1 month prior to the expiration of the previous collective-bargaining agreement. The Union's business agent was also a newcomer to Greensburg. In their posthearing briefs, both parties acknowledged that neither was able to proffer a witness who could explain why there were differences in language between the Board certification and the parties' collective-bargaining agreements. Nor was any party able to proffer a witness who could testify with certainty whether regular part-time employees were ever used by the Employer during the parties' collective-bargaining relationship.

Employee John Pallow, a long-time employee and union steward, testified that he was on the Union's negotiating committee in 1974 and that he understood the term ''full-time employee'' to mean all employees working on a regular basis who had completed their probationary period, regard-

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[1] One of the affirmative defenses contained in Respondent's answer to the consolidated complaint contends that the two charges in this case should be severed since ''Case 6–CA–22872 does not have anything to do with the substantive allegation of the [consolidated] complaint.'' The two charges in this case are clearly related, however, and the Regional Director properly exercised his discretion in issuing the order consolidating cases. Accordingly, this affirmative defense is dismissed.

[2] Counsel for General Counsel's unopposed motion to correct the transcript is granted.

less of the number of hours worked per week. Pallow testified he was not aware of any employee working less than 40 hours per week on a regular basis who had been excluded from the bargaining unit. Pallow testified in essence that employees were historically considered ''part-time'' until they completed the probationary period, at which time they joined the Union pursuant to the union-security clause and were thereafter considered ''full-time.'' The single exception which Pallow was aware of during his long tenure with the Company applied to students hired as summer help. They were apparently not considered part of the bargaining unit nor accorded contract benefits even if they worked more than 60 days. Neither were they required to join the Union pursuant to the union-security clause.

On May 28, 1988, Robert Walter was hired to work as a night loader. On June 31, 1988, Jim Hamerski was also hired as a night loader. Both remained employed at the time of the hearing herein. The testimony indicated that these two individuals, while employed on a regular basis, sometimes worked less than 40 hours per week. From the time they were hired, the collective-bargaining agreement was not applied to them. At the end of 60 days, the probationary period provided for in the collective-bargaining agreement, contract terms were still not applied to them, and they were not asked or required to join the Union. Respondent correctly notes that the Union never filed a grievance or otherwise complained about the fact that these men had not joined the Union nor that the substantive terms of the contract were not being applied to them. On the other hand, Union Steward Pallow testified credibly that they were simply overlooked because employees hired as night loaders rarely stayed beyond their probationary period. Union Business Agent Mark Shumar testified that he became responsible for administering this bargaining unit in the spring of 1989. Shortly thereafter, he became aware that Walter and Hamerski were not having the contract applied to them, nor were they members of the Union.

C. *Negotiating for a New Collective-Bargaining Agreement*

The Union gave timely notice to Respondent of its intent to terminate the collective-bargaining agreement pursuant to its terms. At the time, Respondent had just purchased the Company and requested that negotiations be postponed in order to give Respondent an opportunity to prepare for bargaining. The parties agreed to extend the past collective-bargaining agreement beyond the expiration date of May 14, 1989, on an indefinite basis during negotiations.

Before negotiations began in June 1989, the Union sent Respondent its proposals for a new agreement. Along with its other proposals was one that read, ''The two (2) part-time employees that are currently employed by Greensburg Coca Cola Bottling Co., Inc., (plant) shall be made full-time employees upon ratification. Two (2) part-time employees are: Bob Walter and James Hamerski.''

The first negotiating session was held on June 19, 1989. Throughout negotiations, which still have not resulted in agreement between the parties, Respondent was represented by Vice President of Human Resources and Industrial Relations Robert Palo and Director of Human Resources Ralph LeMoyne. The Union has been represented by Business Agent Mark Shumar and various employee representatives, including Union Steward Pallow. At the first bargaining session on June 19, Respondent submitted numerous proposals to the Union, including a proposal to change the recognition clause of the contract to specifically exclude ''all part-time employees'' from the bargaining unit. Respondent stated that the purpose of this proposal was to ''clarify'' existing contract language which it interpreted as excluding part-time employees. After consulting with one another, Business Agent Shumar and Union Steward Pallow rejected Respondent's proposal. At that meeting, and at subsequent meetings, the Union took the position that it had historically represented all individuals regularly employed who performed bargain unit work, regardless of the number of hours per week that they worked. The Union stated that it did not wish to waive its right to represent employees who regularly work less than 40 hours per week.

The second negotiating meeting occurred the following day, June 20. At that meeting, Respondent withdrew its proposal to specifically exclude regular part-time employees from the bargaining unit. Instead, Respondent proposed to maintain the language of the recognition clause as it had existed in collective-bargaining agreements since 1974. A discussion then ensued between the Union and Respondent about the meaning of the language used in those past collective-bargaining agreements. Respondent took the position that the term ''full-time plant employee'' as used in those agreements, and therefore in its proposal, meant an employee working 40 hours per week. The Union argued that Respondent's withdrawal of its proposed language regarding part-time employees was a change in form, but not in substance. The Union refused to agree to Respondent's definition of the contractual term. The Union reiterated the position stated on June 19, described above, and expressed concern that if part-time employees were excluded from the unit, Respondent would utilize part-time employees to replace full-time employees.

The third negotiating session was held on August 1, 1989. At that meeting, Respondent presented a typed proposal. This proposal included recognition language stating that the Union represented ''all full-time employees.'' In fact, the language did not differ from that used in previous contracts. At this meeting, and throughout negotiations, the parties presented various proposals and counter-proposals regarding numerous contract provisions. As is typical, these proposals related to numerous subjects including wages, health and welfare, pensions, holidays, vacations, grievance and arbitration, management rights, and employee work rules. The parties obviously explored and discussed many of these proposals at any given meeting. At almost every meeting, however, they also discussed the recognition clause and its interpretation relating to the unit placement of part-time employees. Respondent does not dispute the fact that at the August meeting, it intended by its proposal that ''full-time employees'' be individuals who worked 40 hours per week and that part-time employees were excluded from the bargaining unit. The Union reiterated its position that ''full-time employees'' included any regular employee who had completed his probationary period, regardless of the number of hours worked on a weekly basis. The Union stated that ''part-time employee'' meant someone who did not work on a regular basis, such as individuals hired for summer work, or an individual who has not com-

pleted his probationary period. No agreement was reached at the August 1 meeting.

Another bargaining meeting was not held until January 15, 1990. Along with other subjects which may have been discussed, the parties once again discussed the unit placement of part-time employees. Respondent once again stated that it wished to exclude regular part-time employees from the bargaining unit. The Union reiterated its earlier position, responding that it had no intention of forfeiting the right to represent employees it had represented in the past. The Union stated that it did not make sense to exclude employees regularly working less than 40 hours per week and allow Respondent to replace bargaining unit employees through attrition. No agreement was reached.

Bargaining sessions were held on April 16 and May 23, 1990. There is no indication the parties specifically discussed part-time employees at those meetings. The seventh bargaining session was held on June 21, 1990, and the issue was discussed at that meeting. Respondent stood by its proposal to exclude regular part-time employees from the bargaining unit. The Union continued to reject Respondent's proposal, arguing that it had historically represented employees who regularly worked less than 40 hours per week. No agreement was reached on that issue at this meeting.

The next bargaining session was held on July 24, 1990. At that meeting, the Union presented a specific proposal to Respondent on the issue of part-time employees. The Union stated that it was not willing to waive its right to represent employees who regularly worked less than 40 hours per week. The Union therefore proposed that such regular part-time employees be included in the bargaining unit but that Respondent have the right to hire casual ''part-time employees'' on an occasional basis such as summer vacations. Respondent rejected the Union's proposal. The Union asked Respondent for language regarding its intended utilization of part-time employees. A caucus was held.

During the caucus, Respondent prepared a handwritten proposal concerning part-time employees which specified that Respondent would not utilize part-time employees if full-time employees were on layoff. The proposal did not address the possibility of Respondent altering the work schedules of full-time employees to become part-time employees, thereby removing them from the bargaining unit. When Respondent returned from the caucus, it presented the Union with what Respondent itself termed its ''final offer.'' This final offer contained the recognition clause language which had been in Respondent's proposals since June 20, and which tracked past collective-bargaining agreements. Respondent's modified proposal not to utilize part-time employees if full-time employees are on layoff was included as a part of this final offer. I do not credit Respondent's selfserving testimony that by this counterproposal, Respondent believed that it had met the Union's concern with respect to part-time employees. Respondent served the Union with notice of its intent to terminate the collective-bargaining agreement effective July 27, 1990.

Bargaining meetings were held on August 7 and September 10, 1990, with little, if any, progress. On September 19, 1990, Respondent locked out its employees in the warehouse unit in order to apply economic pressure on them to accept Respondent's final offer. Temporary replacements were hired by Respondent to take the place of locked-out employees. The lockout was still in effect as of the hearing in this case.

After the lockout began, the next bargaining meeting was held on October 4, 1990. Although many issues were undoubtedly discussed, the parties also discussed the issue of part-time employees again. I credit Union Business Agent Shumar that during the discussion, Respondent insisted as it had previously that by its proposal, it intended to exclude from the bargaining unit those employees who regularly worked less than 40 hours per week. The Union continued to insist that ''full-time plant employees'' referred to any employee who had completed his probationary period and worked on a regular basis, regardless of the number of hours per week. I also credit Shumar that Respondent made it clear the lockout would end only if the Union ratified Respondent's final offer.

Another bargaining session was held on November 5, 1990, with little, if any, progress. The positions of the parties remained firm on the issue of part-time employees.

After the Union filed its charge herein, the parties met again on December 12, 1990. I credit Shumar that at that meeting, Respondent altered its final offer with respect to the recognition clause, proposing for the first time that regular part-time employees be specifically included in the bargaining unit. This particular issue was then put to rest, although the Union did not accept Respondent's ''final offer'' as a whole. The lockout continued.

Analysis and Conclusions

Alteration of the scope of a bargaining unit is a nonmandatory subject of bargaining, over which the parties may not bargain to impasse *Syncor International Corp*., 282 NLRB 408, 409 (1986); *Newport News Shipbuilding Co*., 236 NLRB 1637, 1643 (1978); *White-Westinghouse Corp*., 229 NLRB 667 (1977).

Counsel for General Counsel argues that throughout negotiations, Respondent's proposals sought to alter the scope of the bargaining unit historically represented by the Union. Counsel for General Counsel argues that by bargaining to impasse on this position, Respondent violated Section 8(a)(1) and (5) of the Act, and by locking out employees in support of this position, Respondent violated Section 8(a)(1), (3), and (5) of the Act.

Respondent argues that it was simply trying to clarify prior collective-bargaining agreements. Respondent next argues that after it dropped its proposal to specifically exclude part-time employees from the bargaining unit and reverted to language used in past collective-bargaining agreements, the parties' only dispute was over the meaning of the term ''full-time'' as used in past collective-bargaining agreements. According to this argument, from that point on the parties simply had an argument about contract interpretation which did not involve either party attempting to alter the historical bargaining unit. Both of Respondent's arguments have a certain amount of surface appeal. There is no question that for reasons unknown, past collective-bargaining agreements altered just slightly the language of the Board certification issued to the Union. One can certainly argue by sheer logic that contractual reference to ''full-time employees'' implies exclusion of part-time employees. Such a literal reading, however, also defies logic if those past collective-bargaining agreements are looked at as a whole, particularly when consider-

ing the specific contract provision that employees are not guaranteed a full 40-hour work schedule.

Respondent also points to the Union's first proposal that on ratification of a new contract, night loaders Walter and Hamerski be put into the bargaining unit. Respondent argues that if the Union firmly believed these men belonged in the bargaining unit based on the fact that they had completed their probationary periods, the Union would have insisted that they be put into the unit immediately. Again, Respondent's argument contains some surface appeal. Respondent's argument, however, overlooks reality. This case is a poignant example of how parties to a collective-bargaining relationship often tend to confuse the concepts of bargaining unit, union membership, and contractual coverage. In reality, the Union was simply proposing that once a new contract was negotiated, all parties recognize that Hamerski and Walter were covered by it, enjoyed its benefits, and needed to join the Union pursuant to the union-security clause. In expressing this, however, the Union was willing to label Hamerski and Walter as ''part-time employees'' because they were not yet members of the Union. So it was that the Union proposed that these ''part-time employees'' be made ''full-time employees'' on contract ratification. It is because of the Union's unsophisticated confusion of these terms that Respondent's arguments have some surface appeal.

Respondent's arguments are exposed as groundless, however, if one analyzes with any degree of care what it was Respondent was really trying to accomplish. As unsophisticated as the Union was, even it understood that Respondent was trying to construct contract language which would allow it complete freedom in determining for itself who was in and who was out of the bargaining unit represented by the Union. By specifically including only full-time employees in the bargaining unit and specifically excluding part-time employees, and by further giving Respondent the contractual right to unilaterally establish and alter work schedules, Respondent was attempting to relegate unto itself the right to remove people from the bargaining unit at will. I find that by insisting on the right to unilaterally alter the scope and composition of the bargaining unit at will, Respondent violated Section 8(a)(1) and (5) of the Act.

There is simply no concrete evidence on which to base a conclusion that the Union ever waived its right to represent regular part-time employees. A union may waive its right to represent certain employees, but it has long been held that such a waiver must be ''clear and unmistakable.'' *Park-Ohio Industries*, 257 NLRB 413 (1981), enfd. 702 F.2d 62 (6th Cir. 1983). Waiver will not be lightly inferred. The fact that past collective-bargaining agreements were phased so as to appear to cover only full-time employees is not sufficient by itself to support a conclusion that the Union waived the right to represent the regular part-time employees, in particular because of the provision that bargaining unit employees were not guaranteed full-time work schedules. I credit Union Steward Pallow's testimony that historically the only employees who were regularly recognized as being outside of the collective-bargaining unit were students hired during summer vacation periods. I find that Respondent's proposals sought to alter the scope of the bargaining unit historically represented by the Union. The Union repeatedly expressed its opposition to these proposals. Respondent refused to back down, and continued to maintain the position even in it ''final offer'' that regular part-time employees would not be included in the bargaining unit represented by the Union. I find that by continuing to insist on this position, Respondent bargain to impasse over this issue. By bargaining to impasse on its demand that the Union alter the scope of the collective-bargaining unit, Respondent violated Section 8(a)(1) and (5) of the Act. *E. I. du Pont Co*., 268 NLRB 1075 (1984); *Taft Broadcasting Co*., 163 NLRB 475 (1967). *White-Westinghouse*, supra.

There is really no dispute about the fact, and the record clearly supports a conclusion that Respondent locked out its employees on September 17, 1990, to pressure them to accept Respondent's ''final offer.'' This ''final offer'' included Respondent's insistence that the bargaining unit not include regular part-time employees. Contrary to Respondent's argument, I find it is simply not relevant whether an impasse had occurred at the time of the lockout. A lockout which is used to support bad-faith bargaining is unlawful regardless of whether an impasse was reached. *Union Terminal Warehouse*, 286 NLRB 851 (1987). In locking out its employees to support its unlawful bargaining position, Respondent violated Section 8(a)(1), (3), and (5) of the Act. *Vore Cinema Corp*., 254 NLRB 1288, 1293 (1981).

CONCLUSIONS OF LAW

1. Respondent Greensburg Coca-Cola Bottling Company, Inc. is, and has been at all time material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 30, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent demanded and insisted to impasse, as a condition of reaching any collective-bargaining agreement with the Union, that the Union agree to a provision excluding regular part-time employees from the bargaining unit, and Respondent thereby violated Section 8(a)(1) and (5) of the Act.

4. Respondent locked out bargaining unit employees in support of its demand that the Union agree to a provision excluding regular part-time employees from the bargaining unit, and Respondent thereby violated Section 8(a)(1), (3), and (5) of the Act.

5. The unfair labor practices which Respondent has been found to have engaged in, as described above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Counsel for General Counsel seeks an order requiring Respondent to end the lockout, to offer reinstatement to all affected employees, and to make whole employees for any loss

of wages or other benefits they may have suffered. It also requests and order directing Respondent to recognize and bargaining in good faith with the Union as the exclusive representative of all Respondent's bargaining unit employees. Respondent argues that even if its earlier conduct is found to be unlawful, Respondent repudiated such conduct on December 12, 1990, and therefore cured any violation of the Act as of that date. The Board addressed a similar situation in *Movers & Warehousemen's Assn*., 224 NLRB 356 (1976), enfd. 550 F.2d 962 (4th Cir. 1977), cert. denied 434 U.S. 826 (1977). In that case, the judge found that when the unlawful bargaining position was retracted, the lockout was cured, and thereafter became lawful. The Board disagreed, stating that ''a lockout unlawful at its inception retains its initial taint of illegality until it is terminated and the effected employees are made whole.'' In other words, the Board held that to cure the lockout, the employer must restore the status quo ante as well as end the lockout. The Board further held, however, that an employer can avoid further liability if it is able to show affirmatively that a failure to restore the status quo ante did not adversely affect subsequent bargaining. I shall reserve for the compliance stage of this proceeding the possibility that Respondent might show that after December 12, 1990, failure to restore the status quo ante did not adversely affect subsequent bargaining. Accordingly, I shall order that employees be made whole but recognize that the date for being made whole may terminate on December 12, 1990, or may continue thereafter, depending on evidence adduced at the compliance stage of this proceeding.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Greensburg Coca-Cola Bottling Company, Inc., Greensburg, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Demanding as a condition of reaching a collective-bargaining agreement with the Union, and/or insisting to impasse, that the Union agree to a contract provision excluding regular part-time employees from the bargaining unit represented by the Union.

(b) Locking out bargaining unit employees in support of a demand that the Union agree to a contract provision excluding regular part-time employees from the bargaining unit represented by the Union.

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

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

(a) Offer immediate and full reinstatement to locked-out bargaining unit employees to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges.

(b) Make whole locked-out bargaining unit employees for any loss of earnings or other benefits they may have suffered by reason of the discrimination against them by paying them a sum of money equal to the amount they normally would have earned from the date of the discrimination against them to such time as Respondent has remedied its discrimination as set forth in the remedy section of this decision, less net interim earnings, with backpay to be computed in the manner prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[4]

(c) Recognize and, on request, bargain in good faith with the Union as the exclusive collective-bargaining representative of its employees in the following appropriate bargaining unit:

> All plant employees, truck loaders, service repairmen and the general laborer; excluding all other employees, drivers, hostesses, cafeteria employees, salesmen, the production foreman, office clerical employees, and other supervisors as defined in the Act.

(d) 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.

(e) Post at its Greensburg, Pennsylvania facility copies of the attached notice marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 6, 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 Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

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

[4] Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendments to 26 U.S.C. § 6621. Interest accrued before January 1, 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp*., 231 NLRB 651 (1977).

[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.

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 demand as a condition of reaching a collective-bargaining agreement with the Union, and/or insist to impasse, that the Union agree to a contract provision excluding regular part-time employees from the bargaining unit represented by it.

WE WILL NOT lock out bargaining unit employees in support of a demand that the Union agree to a provision excluding regular part-time employees from the bargaining unit represented by the Union.

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

WE WILL offer immediate and full reinstatement to locked-out employees to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges.

WE WILL make whole locked-out employees for any loss of earnings or other benefits they may have suffered by reason of the discrimination against them by paying them a sum of money equal to the amount they normally would have earned from the date of the discrimination against them to such date that the discrimination ceases, less net interim earnings, with appropriate interest.

WE WILL recognize and, on request, bargain with Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 20, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All plant employees, truck loaders, service repairmen and the general laborer; excluding all other employees, drivers, hostesses, cafeteria employees, salesmen, the production foreman, office clerical employees, and other supervisors as defined in the Act.

GREENSBURG COCA-COLA BOTTLING COMPANY, INC.