Grinnell Fire Protection Systems Company *and* Road Sprinkler Fitters Local Union No. 669, U.A., United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO *and* United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO. Cases 5–CA–24521, 5–CA–25227, and 5–CA–25406

May 28, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On January 16, 1997, Administrative Law Judge Richard A. Scully issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions, a supporting brief, and an answering brief, as did each Charging Party. The Respondent filed an answering brief. Each Charging Party filed a reply.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] except as modified below and to adopt the recommended Order[3] as modified and set forth in full below.

1. The judge found, and we agree, that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing terms and conditions of employment through the implementation of its final contract offer when there was no impasse in bargaining. We disagree with our dissenting colleague's view that impasse had been reached on April 12, 1994, and therefore the changes were lawful. Although impasse issues are necessarily decided on the basis of the totality of the record evidence, and thus it is virtually impossible to find cases exactly on point, we find support for our position in the analytical approach taken by the Board and upheld by courts in past decisions that have found no impasse despite the fact that one party had asserted that it had reached its final position and the other had not yet offered specific concessions. See, e.g., *PRC Recording Co*., 280 NLRB 615, 640 (1986), enfd. 836 F.2d 289 (7th Cir. 1987) (for impasse to occur, both parties must be unwilling to compromise); *Powell Electrical Mfg. Co.*, 287 NLRB 969, 973, 974, enfd. as modified 906 F.2d 1007 (5th Cir. 1990) (futility, not some lesser level of frustration, discouragement, or apparent gamesmanship, is necessary to establish impasse); *D.C. Liquor Wholesalers*, 292 NLRB 1234, 1235 (1989), enfd. 924 F.2d 1078 (D.C. Cir. 1991) (exhaustion of the collective-bargaining process is required for impasse to exist).

During the final negotiating session on April 12, the Union not only continued to declare its intention to be flexible, but demonstrated this throughout its dealings with the Respondent that day. When the Respondent's negotiator Chatilovicz said that the Respondent would assume that a proposal offered by union negotiator Preuett was the Union's last offer, Preuett explicitly denied that it was, and said that he wanted an agreement and was flexible. After Chatilovicz rejected this offer, he told Preuett that he would be in his office until 6 p.m., and gave Preuett the telephone number. Preuett, in our view correctly, said that the Respondent was trying to push him to an impasse. Preuett said that he did not want an impasse and that he did not give up easily. He asked how far apart the parties were, and—in reference to past agreements to target certain jobs for lower than standard wage rates in order to allow the employer to meet nonunion competition—he asked in which states the Respondent needed movement on wage rates. Before the meeting ended, the parties discussed rate differences in some States. These statements by Preuett, in conjunction with Chatilovicz' acknowledgement that Preuett's proposal provided some savings and that both parties had worked hard to reach an agreement, indicate that Preuett remained flexible.

Further, Preuett took Chatilovicz up on his offer. He telephoned Chatilovicz at about 6 p.m. and asked to meet on the following day. When Chatilovicz asked what the Union would propose, Preuett said that he would try to get the Respondent to raise its rates. Even after Chatilovicz replied that the Respondent's offer was final and that it would not change wages and benefits, Preuett showed his continued willingness to bargain by raising the possibility of Federal mediation. In a crucial credibility resolution, the judge found that, during this conver-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 363 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We note that there are no exceptions to the judge's dismissal of complaint allegations concerning the Respondent's use of an employment questionnaire and its failure to recall employees from layoff.

[3] The complaint was amended during the hearing to allege that the Respondent violated Sec. 8(a)(5), (3), and (1) of the Act when, following implementation of its final contract offer, it paid certain employees higher wages than provided in the offer. The judge found that the Respondent violated Sec. 8(a)(5) and (1) by offering the employees in question higher wages than those offered in its last contract proposal. He also found that the Respondent violated Sec. 8(a)(3) and (1) by paying higher wages to employees who abandoned the Union and worked during the strike that followed the failure of the parties to agree on a new contract. As to the offer, we find that, in accordance with the judge's citation of *Central Management Co*., 314 NLRB 763, 767 (1994), the Respondent's conduct constituted unlawful direct dealing, and that the Respondent thereby unlawfully sought to bypass the Union in violation of Sec. 8(a)(5). We will modify the judge's recommended Order and notice accordingly.

We shall also modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

sation, Preuett did *not* say that he would not lower his proposed wage rates and benefits. Rather, he said that he was not willing to agree to the rates in the Respondent's final offer.

As the judge noted, for an impasse to occur, neither party must be willing to compromise. *PCR Recording Co.*, 280 NLRB at 640. This was not the case on April 12. The Respondent chose to assume that the Union was wedded to the agreement it had signed with the National Fire Sprinkler Association (NFSA) and refused to listen to the Union's repeated assurances that such was not the case. For example, Chatilovicz asked Preuett if the Union was saying no to the Respondent's benefit plan, and Preuett said he was not. In fact, Preuett had brought to the April 12 negotiations an expert in employee benefits so that it could explore the feasibility of the Respondent's proposed benefits plan. At another point, Chatilovicz asserted that the Union's counterproposal to the Respondent's final offer was in fact the Union's final offer, despite Preuett's statement that it was not. Further, although Chatilovicz conceded that the Union's April 12 proposal (which moved beyond the NFSA agreement wage rates in some States) did provide savings for the Respondent, he claimed it was not enough, and effectively terminated the bargaining session, despite Preuett's statements that the Union wanted to reach an agreement, and that he was flexible.

Thus, despite the Respondent's insistence that the Union would inevitably offer to the Respondent the same proposal contained in the agreement the Union had signed with NFSA, and its assertion that it knew that was the agreement the Union wanted, the Union continued to demonstrate its willingness to compromise by giving the Respondent proposals which differed from those in the NFSA agreement. Where, as here, a party who has already made significant concessions indicates a willingness to compromise further, it would be both erroneous as a matter of law and unwise as a matter of policy for the Board to find impasse merely because the party is unwilling to capitulate immediately and settle on the other party's unchanged terms. Such a doctrine would encourage rigid, inflexible posturing in place of the give-and-take of true bargaining. Further, even assuming arguendo that the Respondent has demonstrated it was unwilling to compromise any further, we find that it has fallen short of demonstrating that the Union was unwilling to do so.[4] Accordingly, we find that the judge correctly concluded that impasse had not been reached and that the Respondent therefore violated Section 8(a)(5) and (1) of the Act when it unilaterally implemented its last contract offer.

Accordingly, we also find that the judge correctly concluded that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to meet and bargain in good faith with the Union on and after April 13, 1994, and that the strike that began about April 12, 1994, was an unfair labor practice strike. With respect to the strike, we note that the Union's strike notice stated, inter alia, that the Respondent refused to negotiate further and that the Respondent refused Federal mediation.

2. The judge found that the Respondent did not violate Section 8(a)(1) of the Act by virtue of remarks made by Supervisor William Frederick to employee James Remy. The General Counsel excepts to this finding.[5] We find merit in the General Counsel's exception, and we find, for the reasons set forth below, that Frederick's remarks violated Section 8(a)(1).

On March 21, 1994, Frederick asked Remy to stop in Frederick's office. While speaking with Frederick, Remy asked if he had heard how the contract negotiations between the Respondent and the Union were going. Frederick asked what Remy had heard. Remy said that he had not heard much except that negotiations were continuing. During the conversation, Frederick told Remy, "we just need to get rid of this f— Union." Frederick also said that the Union was not representing the men fairly and that the Respondent's benefit and wage packages were better than those offered by the Union. He gave Remy a packet of documents, which Remy took into Supervisor Wayne Gordon's office to review. The documents included descriptions of the health plan proposed by the Respondent and instructions for hiring replacement workers and for resigning from the Union. Remy found the documents "scary" and spoke to Gordon about them. Gordon said that he had been to a meeting in Texas and was told that he had to resign from the Union to keep his job as a construction manager and that during a strike anyone who wanted to work for the Respondent would have to resign from the Union. After returning the documents to Frederick, Remy went back

[4] Our dissenting colleague contends that the disagreement about targeting was a fundamental disagreement about principle, and not merely a matter of one wage rate or percentage versus another. This contention is undermined by the Respondent's own movement on this issue during the course of bargaining. The 80-percent rate in its final offer was considerably higher than the targeting rates it had earlier proposed. Moreover, even if the dichotomy stated by our colleague is genuine, we know of no reason why fundamental issues of principle should be exempt from normal bargaining obligations. Nor do we know of any reason why such normal obligations should be confined to "mere" matters of dollars and cents.

Contrary to our colleague's view, there was no prolonged stalemate in this case. Rather, the Respondent broke off bargaining after only four negotiating sessions with Preuett, without testing his stated willingness to make even more concessions than he had already made. Further, it is hard to square our colleague's view that Preuett was, in effect, a prisoner of his alleged need for "uniformity" with the fact that he would not accede to a "most favored nation" clause in the agreement he negotiated with the NFSA. By not agreeing to such a clause in the NFSA contract, Preuett would be able to give concessions to the Respondent without eroding the employees' terms and conditions of employment with NFSA employers.

[5] Although the Charging Parties did not brief this issue, they adopted and incorporated by reference the General Counsel's cross-exceptions.

to work and told his coworkers what Frederick and Gordon had said.

The judge found that Frederick's statement was not accompanied by any threats or promises and was a lawful expression of opinion that the Respondent was better off without the Union. He found that even though Frederick's statement was followed by his allowing Remy to read the "scary" documents, it was not an attempt to undermine support for the Union by getting Remy to resign his membership and was not coercive.

We disagree. Considering the totality of the circumstances, we find that Frederick's statement was coercive. Thus, Supervisor Frederick's vehement statement was made in his office, where Remy had come at his request. Frederick directed Remy's attention to the documents, which Frederick knew contained material about resignation from the Union and the hiring of permanent replacements. Further, the statement was reinforced by the remarks of Supervisor Gordon to Remy in Gordon's office. We would characterize what occurred here as a combination of threats and inducements. That is, the threatening remarks were accompanied by inducements associated with the alleged superiority of the Respondent's benefits package. Accordingly, we reverse the judge and find that, in these circumstances, Frederick's statement violated Section 8(a)(1).[6]

3. In considering the complaint allegations that the Respondent had violated Section 8(a)(1) of the Act by filing a lawsuit in Federal district court against the Charging Parties in retaliation against them for engaging in protected activities, the judge ruled that he could not find from the face of the lawsuit's seven counts that the suit was baseless. He therefore concluded that, under the holdings of *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), he could not proceed to adjudicate the legality of the suit under Section 8(a)(1) of the Act until there was a final adjudication or withdrawal of that suit. At the time the judge issued his decision in this case, there was as yet no ruling by the Federal district court. Accordingly, his recommended Order called for severing the complaint allegations in Cases 5–CA–25227 and 5–CA–25406, which related to the allegedly retaliatory filing of that lawsuit, and holding those allegations in abeyance until final resolution of the suit.

We are advised that after the judge's decision in this case, the Federal district court dismissed on the merits counts 1 through 4 (predicated on Federal law), and dismissed without prejudice counts 5 through 7 (predicated on state law) because the Federal court could decide them only if it had a basis for exercising pendent jurisdiction. Thereafter, the United States Court of Appeals for the Fourth Circuit affirmed the district court's dismissal in an unpublished decision filed on January 21, 1998, and, on February 19, 1998, denied the Respondent's petition for rehearing and suggestion for rehearing en banc. The Supreme Court denied certiorari on October 5, 1998. On about September 30, 1997, the Respondent filed an action against the Charging Parties in the circuit court for Howard County, Maryland, with allegations apparently the same as or similar to the pendent jurisdiction counts filed in the Federal action.

The state court suit is not the subject of a complaint allegation in the case before us, and in our view, a decision on the complaint allegations pertaining to the filing of the Federal lawsuit need not await the outcome of the separate state suit. The Federal suit is at an end, and it is now clear that all of the Federal law counts—which were the only basis for giving the Federal court jurisdiction to consider the state law counts—were found to be meritless. We believe that the judge can now proceed to deciding whether the Federal suit was filed with a retaliatory motive, since the Federal suit is the only lawsuit at issue in this case. We have modified the judge's recommended Order in this regard, i.e., we are still severing the lawsuit allegations from the rest of the case, which is the subject of our final order on the merits, but we are remanding to the judge for a decision on the lawsuit allegations without necessarily awaiting the outcome of the state court trial.[7]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Grinnell Fire Protection Systems Company, Exeter, New Hampshire, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercing employees by calling them troublemakers and telling them they will be laid off for pursuing grievances.

(b) Telling employees that they will lose their jobs if they refuse to cross a picket line.

(c) Telling employees that they have to resign from the Union in order to continue working for it and/or promising employees additional benefits if they do so.

(d) Sending letters to employees implying that employees who are participating in an unfair labor practice strike can be permanently replaced.

(e) Laying off employees in retaliation for having engaged in protected activity.

[6] Member Hurtgen would adopt the judge's analysis on this issue and would find no violation.

[7] If, however, the judge is of the opinion that he must know whether the state court lawsuit is meritorious in order to make his motive finding as to the Federal suit, he may hold the allegations until a final outcome of the latter. We leave this to his sound discretion. In light of our disposition of these complaint allegations we deny as moot the Respondent's earlier motion to remand for a decision on the lawsuit allegations and the General Counsel's motion to quash the Respondent's motion together with a reply brief the Respondent had filed in response to the General Counsel's opposition to the remand motion.

(f) Paying better wages than offered to the Union to employees who abandon the Union and work during a strike.

(g) Refusing to meet and bargain in good faith with the Union.

(h) Unilaterally changing terms and conditions of employment by implementing its final contract offer prior to reaching a good-faith impasse in bargaining.

(i) Bypassing the employees' exclusive collective-bargaining representative by making direct offers concerning wages to unit employees.

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

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

(a) On request, bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit concerning rates of pay, wages, hours and other terms and conditions of employment and, if an agreement is reached, embody the understanding in a signed agreement.

(b) On request by the Union, restore to unit employees the terms and conditions of employment that were applicable prior to April 14, 1994, and continue them in effect until the parties reach either an agreement or a good-faith impasse in bargaining and make them whole for any losses suffered by reason of the unlawful unilateral changes in terms and conditions of employment on and after April 14, 1994, plus interest.

(c) Within 14 days from the date of this Order, offer Christopher Cooper immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to Christopher Cooper's unlawful layoff, and within 3 days thereafter notify him in writing that this has been done and that the layoff will not be used against him in any way.

(e) Preserve and, within 14 days of a 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.

(f) Within 14 days after service by the Region, post at all of its facilities throughout the United States copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 5, 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 1, 1994.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the consolidated complaint in Cases 5–CA–25227 and 5–CA–25406, which the administrative law judge severed from this proceeding and stayed until resolution of *Grinnell Corp. v. Road Sprinkler Fitters Local Union No. 669*, Civ. Action No. N–94–3309 (U.S.Dist.Ct.Md.) is remanded to the judge for decision of the complaint allegations.

MEMBER HURTGEN, dissenting in part.

In my view, the administrative law judge and the majority in this case have misapplied the law concerning bargaining impasse in a most deleterious way and by doing so have allowed the Board to be drawn into a bargaining dispute and to improperly tip the balance.

Whether an impasse exists often requires a difficult and careful analysis. Collective bargaining is a dynamic process and the concept of impasse is a static one, premised on the proposition that at some point, if only temporarily, the bargaining has reached a point where the minds are not going to meet and an agreement, notwithstanding good-faith effort, is not going to be achieved. The Board and courts have fashioned a myriad of verbalizations to describe this condition of impasse but the problem often devolves into fitting the conduct of a particular case into the verbalization of the standard. Because the test is difficult to apply, administrative law judges and the Board tend to default toward finding no impasse unless it is clearly, almost admittedly, presented.

The test is set forth in *Taft Broadcasting Co*., 163 NLRB 475, 478 (1967), and consists of bargaining history, good faith in the negotiations, length of the negotiations, importance of the issue or issues disagreed on, and contemporaneous understanding of the parties as to the

[8] 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."

status of the negotiations. Properly applied, these factors clearly yield the conclusion that as of 6 p.m. on the evening of April 12, 1994, these parties were at impasse.

Bargaining History

Prior to the bargaining here, Respondent was a member of the National Fire Sprinkler Association (NFSA), a multiemployer association. However, it timely withdrew from NFSA, and the instant case involves the initial bargaining on a separate employer basis. The significance of this is the fact that Respondent sought separate bargaining precisely because it felt that it needed special relief from low-wage, nonunion competition. Thus, in the separate bargaining, it steadfastly sought a deal that was different from that agreed to by NFSA. The Union sought "uniformity", i.e., *not* to give Respondent a deal different from the NFSA employers. The parties never reached accord on this issue.

Good Faith

The judge found, and properly so, that the Respondent had engaged in good-faith negotiations. Those negotiations commenced with Respondent's opening proposal on January 28 and continued through April 12. The Respondent is the largest Employer in this business and it faces a great deal of nonunion competition throughout the country. Its labor costs were very high and it needed relief. This was its message to the Union from the beginning and was consistently adhered to. Reduction bargaining must occur periodically in a free market economy and this was clearly needed here. The Union acknowledged the Respondent's need for relief but, understandably, wanted to give up as little as it could as late as it could.

Complicating this straightforward problem were the tandem negotiations between the Union and the NFSA. The Union did not want to give concessions to the Respondent which it had not given to the Association. To this end, the Union was unyielding in its quest for "uniform" terms and conditions for all employers with whom it had relationships.[1]

With further respect to the element of good-faith bargaining, I note that this concept does not always require the offer of better terms and conditions of employment. An employer can offer the status quo or even a reduction in terms and conditions ("regressive bargaining"). Section 8(d) expressly states that concessions are not required.

Although the same "good-faith" standard applies to both "increase" bargaining and "regressive" bargaining, the different natures of the two may have an impact on the issue of impasse. During "increase" bargaining, the employer offers an increase and the union wants a larger increase. Thus, the fact of impasse can only result in an increase, i.e., the implementation of the employer's last offer. However, during regressive bargaining, the fact of impasse can only result in a decrease, i.e., the implementation of the employer's last offer. Thus, in the "regressive" situation, the union strives mightily to avoid impasse. And the employer, who is operating under the terms from which it seeks relief, has an incentive to reach impasse or agreement as soon as possible. Because of this, the Board must be careful to: (1) ensure that the employer's bargaining is in good faith; and (2) guard against a union's effort to falsely make it appear that bargaining progress is just around the corner. In the instant case, there is not even a claim that the Respondent bargained in bad faith. On the other hand, the Union claimed on April 12 that it was flexible and that progress was still possible. However, it would not offer anything concrete. Thus it seems to me that the Union was simply trying to avoid the legal consequences that flow from impasse, i.e., the implementation of reduced terms.

Length of Negotiations

The application of this factor is a complication here as well. The Union suffered a leadership default and placement into trusteeship during the negotiations. The Union's principal negotiator during the last month of the negotiations, Preuett, was a different person from the union chief during the first 3 months. The administrative law judge determined, therefore, that only the "Preuett" month counted as an element in his analysis of this factor. That, I believe, was wrong. Bargaining began in January and, as noted, reductions in costs were critical to the Respondent. It sought, for months of good-faith bargaining, to reach an agreement but was unable to do so. The Union's internal problems cannot fairly be used to ignore several months of negotiations. It may well be that the Union's change in leadership contributed to its inability to accept the Respondent's position on the important issues, but that is a reason why impasse was reached, not a reason to deny its existence. As noted by the judge and the majority, Preuett wanted more time to bargain but he wanted that time to break the Respondent loose from its position. That is not a factor denying impasse but rather a clever bargaining ploy. Time is on his side and he will use it as long as the Respondent, and now the Board, will let him. In sum, the negotiations had clearly gone long enough for an agreement to be reached if that were reasonably possible.

[1] The majority notes that the Union would not agree to the "most favored nation clause" sought by the Association. While that is true, that fact does not at all detract from the pressure on, and desire of, the Union to keep all sheep in the same fold and why, therefore, the Union was not about to agree to give more to Respondent than its settlement with the Association.

The majority reasons that the Union *did* offer Respondent a better deal than it gave to the Association. However, the one "improvement" was minor and inconsequential. It involved commercial wage rates in 2 or 3 of the 50 States. Respondent had not sought this, and the matter was not even discussed prior to the Union's proposal.

Importance of the Issues

As noted above, Respondent desperately needed wage relief to meet the challenge of nonunion competition. It therefore sought a "targeting" program under which the Respondent, when faced with nonunion competition for a particular job, could unilaterally reduce wages to a figure that is 80 percent of the normal journeyman rate.

As important as this proposal was to Respondent, it was equally important for the Union to resist the proposal. The Union was unwilling to give Respondent the unilateral right to lower wages on a particular job. In addition, the Union wanted uniformity among employers. That is, it did not want Respondent to have a better deal than that of the multiemployer association (NFSA). Under the new contract, members of the NFSA did not have the unilateral right to reduce wages on a job. And, even where there was an agreement to do so, there was not a fixed figure (e.g., 80 percent). Rather the parties (NFSA members and the Union) would negotiate a figure. If they could not reach agreement on a figure, the Union would have the final say as to whether any concessionary rate would be granted and as to the amount of the reduction.

The issue was not only a key one for both sides, it was also a matter of principle. That is, the issue was not x percent vs. y percent, or x dollars versus y dollars. Rather, it was whether Respondent would have unilateral control over targeting, and whether there would be uniformity.

As to this key issue of principle, neither party was willing to yield. Finally, on April 12, Respondent gave its final proposal. It included unilateral control over "targeting" and it was thus not "uniform" with the NFSA agreement that was reached on that date. The Union, consistent with its prior view, rejected the proposal. The Union then asked Respondent if its position was "carved in stone." Respondent replied that it was.

Contemporaneous Understanding of the Parties

As applied to this case, this is the most difficult factor, for if the Board is not careful, it will allow the parties to create or defeat impasse simply by self-declaration. The foregoing analysis convinces me that Respondent had genuinely reached its bottom line on the critical issues. It was not willing on April 12, 1994, to go further then or in the near future.[2] Notwithstanding Preuett's credited statements, however, that he wanted an agreement and could be flexible, it is clear that he would not accept the only deal Respondent was willing to make and that his stated flexibility was directed at moving Respondent off its fixed position. During the critical phone conversation on the evening of April 12, Preuett suggested mediation for the purpose of getting the Respondent to increase its offer. Preuett was simply engaging in the time-honored tactic of trying to keep a ball rolling when its own inertia has brought it to a halt. His purpose was to avoid impasse for as long as he could, so as to harmonize a settlement with Respondent and the NFSA, and to force Respondent to change through the passage of time—time which added daily to Respondent's high costs. If he could play the badger long enough, he might get a better agreement than the one he was offered. That was good strategy on his part but it does not mean that an impasse did not exist.

The judge and the majority note that Respondent was pushing to reach impasse. If that is so, there is nothing unlawful or improper in such motivation given Respondent's economic situation and the 4 months of good-faith bargaining which had occurred. It is also only half correct to state Respondent was pushing to impasse. It was pushing to agreement *or* impasse. Agreement was clearly preferable but impasse was the lawful alternative.

My colleagues posit that Respondent was unwilling to move any further, but the Union was willing to do so. However, as discussed above, the Union's desire for more sessions was not for the purpose of altering its position, but rather for the purpose of getting Respondent to alter its position. However, Respondent had made it clear that it would move no further. In sum, the music had come to an end. In these circumstances, it is error for the Board to order one party out onto the dance floor simply because the other party asks us to.

Conclusion

Based on the *Taft* factors, I conclude that impasse was reached on April 12. It follows that Respondent was privileged to implement its proposal on April 14, and that the strike was not an unfair labor practice strike.

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.

[2] Impasse, of course, is generally only a temporary phenomenon. In many cases, the passage of time, along with other events, breaks the impasse and an agreement is reached, albeit with significantly altered positions. Notwithstanding this, the law is clear that, so long as the impasse lasts, unilateral implementation of the final offer is permissible.

WE WILL NOT coerce our employees by calling them troublemakers and telling them they will be laid off for pursuing grievances.

WE WILL NOT tell our employees, in a coercive manner, that we need to get rid of the Union.

WE WILL NOT tell our employees that they will lose their jobs if they refuse to cross a picket line.

WE WILL NOT tell our employees that they have to resign from the Union in order to continue working for us and/or promise employees additional benefits if they do so.

WE WILL NOT send letters to our employees implying that those who participate in an unfair labor practice strike can be permanently replaced.

WE WILL NOT lay off employees in retaliation for their engaging in protected activity.

WE WILL NOT pay better wages than offered to the Union to our employees who abandon the Union and work during a strike.

WE WILL NOT refuse to meet and bargain in good faith with the Union.

WE WILL NOT unilaterally change terms and conditions of employment of our employees by implementing our final contract offer prior to reaching a good-faith impasse in bargaining with the Union.

WE WILL NOT bypass the employees' exclusive collective-bargaining representative by making direct offers concerning wages to unit employees.

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

WE WILL, on request, bargain in good faith with the Union as the exclusive collective-bargaining representative of our employees in the appropriate unit concerning rates of pay, wages, hours and other terms and conditions of employment and, if an agreement is reached, embody that understanding in a signed agreement.

WE WILL on request by the Union, restore to unit employees the terms and conditions of employment that were applicable prior to April 14, 1994, and continue them in effect until the parties reach either an agreement or a good-faith impasse in bargaining and make them whole for any losses suffered by reason of the unilateral changes in terms and conditions of employment on and after April 14, 1994, plus interest.

WE WILL, within 14 days from the date of the Board's Order, offer Christopher Cooper immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Christopher Cooper whole for any loss of earnings and other benefits suffered as a result of the action against him, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to Christopher Cooper's unlawful layoff, and within 3 days thereafter notify him in writing that this has been done and that the layoff will not be used against him in any way.

GRINNELL FIRE PROTECTION SYSTEMS CO.

Ronald Broun, Esq., for the General Counsel.
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Helene D. Werner, Esq. and *William W. Osborn Jr, Esq.,* of Washington, D.C., for Charging Party, Road Sprinkler Local Union No. 699.
Robert Matisoff, Esq., of Washington, D.C.*,* for Charging Party United Association.

DECISION

STATEMENT OF THE CASE

RICHARD A. SCULLY, Administrative Law Judge. On charges[1] filed by Road Sprinkler Fitters Local Union No. 669, U.A., United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO (Local 669 or the Union) and by United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO (the U.A.), the Regional Director for Region 5, National Labor Relations Board (the Board), issued a complaint on, March 29, 1995, and amended complaints on September 29 and December 1, 1995, alleging that Grinnell Fire Protection Systems Company (the Respondent) had committed certain violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended (the Act). The Respondent filed timely answers denying that it had committed any violation of the Act.

A hearing was held in Washington, D.C., on 22 dates between October 16, 1995, and March 28, 1996, at which all parties were given a full opportunity to examine and cross-examine witnesses and to present other evidence and argument. Briefs submitted on behalf of the parties have been given due consideration. On the entire record, and from my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

At all times material, the Respondent was a Delaware corporation with an office and place of business in Exeter, New Hampshire, engaged in the business of installing and maintaining automatic sprinkler and fire protection systems at facilities throughout the United States.

During the 12-month period preceding March 29, 1995, in conducting its business operations, the Respondent sold and shipped goods, materials, and services valued in excess of $50,000 directly across state lines. The Respondent admits, and I find, that at all times material it was an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] The original charge in this matter was filed on April 15, 1994, in Case l–CA–31603. On June 27, 1994, Case l–CA–31603 was transferred to and continued in Region 5 as Case 5–CA–24521. The charges in Cases 5–CA–25227 and 5–CA–25406 were filed on March 30 and June 8, 1995, respectively.

II. THE LABOR ORGANIZATIONS INVOLVED

The Respondent admits, and I find, that at all times material Local 669 and the U.A. were labor organizations within the meaning of Section 2(5).

III. THE ALLEGED UNFAIR LABOR PRACTICES

1. Section 8(a)(5)

A. Background Facts

The Respondent is a subsidiary of Tyco International Ltd. (Tyco) engaged in the design, fabrication, sale, and installation of fire protection systems, commonly referred to as "fire sprinkler systems." It is the largest such business in the United States. Since early in this century, its employees, known as "sprinkler fitters," have been represented for collective-bargaining purposes in various geographical areas by several different locals of the U.A. By far the largest of these is Local 669, a road local whose jurisdiction covers all or parts of 47 States, and which in the 1990s represented approximately 1100 to 1200 of those fitters throughout the nation.[2] For many years, the Respondent had been represented in collective-bargaining negotiations with Local 669 by a multiemployer bargaining group known as the National Fire Sprinkler Association (NFSA). NFSA is a trade association whose membership includes over 150 fire sprinkler contractors. The most recent of a series of collective-bargaining agreements negotiated on its behalf by NFSA was to expire on March 31, 1994. By letter dated September 22, 1993, from President Jerry R. Boggess to Local 669 Business Manager John W. Lundak Jr., the Respondent gave notice that it was revoking from NFSA all previously granted bargaining authority and that in the future it would bargain independently with the Union. The letter also gave notice of termination of the collective-bargaining agreement between the parties and requested that negotiations for a new agreement begin immediately. The Respondent has remained in NFSA and is its largest dues paying member.

In 1992, the Union had instituted a program known as "targeting" to assist signatory contractors to compete with lower-cost nonunion contractors. Under targeting, the parties were sometimes able to negotiate concessionary rate agreements (usually involving a percentage reduction of the wage rate to be paid journeyman fitters on a targeted job and, possibly, adjustments in travel, mileage, subsistence, hours of work, and overtime) on a project-by-project basis in certain geographical areas. The Union had the final say as to whether or not any concessionary rate would be granted and the amount of the reduction. While it was available to it, the Respondent was the principal user of targeting. In May 1993, the Union added the requirement that, in order to participate in targeting after June 1, 1993, a contractor had to commit to remain part of the NFSA multiemployer bargaining group through negotiation of the next agreement or, if an independent, agree to be bound by the agreement negotiated by the Union and NFSA, effective April 1, 1994. The Respondent did not agree to the new condition and the Union withdrew participation in the targeting program from it. In July 1993, after his election as business manager of Local 669, Lundak reinstated the Respondent's ability to participate in targeting. However, after it withdrew collective-bargaining authority from NFSA, the Union again excluded it and other contractors so-situated from the targeting program, effective November 15, 1993.

B. Contract Negotiations

The principal issue in this case is whether or not the parties were at impasse when the Respondent implemented its final contract offer, effective April 14, 1994.[3] In November 1993, Boggess met with Lundak and other union representatives to discuss the upcoming contract negotiations. Boggess testified that he made a presentation outlining the Respondent's needs but that he did not make a formal proposal. A negotiating session was scheduled to be held on January 18, but was later canceled by the Union.

During the early part of 1994, while it was also preparing to negotiate new agreements with NFSA and a number of independent contractors, Local 669 found itself embroiled in internal controversy when Lundak was the target of internal union charges. On January 28, citing Lundak's alleged misconduct, Local 669's president, Dean O. Garness, and financial secretary-treasurer Jesse L. Richards petitioned U.A. General President Marvin J. Boede to impose a trusteeship on the Local. On March 25, Boede informed Local 669 that he had determined that an emergency situation existed, that he was putting it in trusteeship, effective March 28, and that he was appointing Tommy L. Preuett as trustee. The evidence shows that the Respondent was aware of the Union's internal problems and that they were interfering with contract negotiations with it and with NFSA.

On January 28, the Respondent sent the Union its first contract proposal. In a cover letter, Boggess stated that although unionized companies in the industry have had some good years, they were headed for a steep decline if changes were not made, that they were losing market share to nonunion competition because overall labor costs under the contract with Local 669 were so much higher, and that the Respondent had problems with wages in some locations, health care costs and its inability to use apprentices and helpers as it wished. In addressing these concerns, the Respondent's proposal contained several significant changes in the terms of the existing agreement in the areas of wages, job classifications, health and welfare, and pension. The proposal called for foreman to be paid at the existing contract rates in all States and fitters to be paid at rates to be determined by the Respondent within a specified range depending on local economic conditions, adding a new helper classification that would be paid at rates determined by the Respondent, changing the ratio of journeymen to apprentices and helpers from 2 to1 to 1 to 1, replacing the existing National Automatic Sprinkler Industry (NASI) health and welfare and pension plans[4] with Tyco health and welfare and 401(k) plans.

[2] In its answer the Respondent denied the complaint allegation concerning the description of the bargaining unit. The only evidence concerning this consists of copies of Board documents concerning an election held in 1954 involving the Union and a multiemployer bargaining group which included Grinnell. The petition in that matter, 5–RC–1467, describes the unit involved as: "All journeymen sprinkler fitters and their apprentices employed by the companies, as shown in Exhibit B, excluding, all other building tradesmen, clerical, office and supervisory employees as defined by the Act." Exh. B includes the name of Grinnell Company, Inc. In the absence of any other evidence, this would appear to be the best description of the bargaining unit.

[3] Hereinafter, all dates are in 1994 unless otherwise indicated.

[4] The NASI plans were jointly administered Taft-Hartley plans covering fitters throughout the country. The NASI plans included portability and reciprocity, meaning that benefits followed a fitter from one union local to another and from one union contractor to another.

The first formal negotiating session between the Respondent and the Union was scheduled for March 17 in Bethesda, Maryland. The Respondent was represented by Boggess, Vice Presidents Michael Buchanan and James Peck, Tyco Vice President of Human Resources John Helfrich and attorneys McNeil Stokes and Peter Chatilovicz, the latter acting as chief spokesperson. The Union was represented by Lundak, as chief spokesperson, Garness, Ronnie Phillips, who was appointed secretary-treasurer in early February after Richards had resigned, and attorney William Osborne. Boggess began the Respondent's presentation by giving his view of the state of the industry and then turned it over to Chatilovicz who began by explaining the Respondent's reasons for its withdrawal of bargaining authority from NFSA. He said that the Respondent needed an agreement which would resolve the key competitive issues facing it and that it was a mistake to think that it would sign a NFSA agreement simply because other contractors would. Chatilovicz presented the Respondent's second proposal along with a binder containing information concerning the benefit plans the Respondent was proposing. The second proposal contained modifications to the first proposal meant to answer questions raised by the Union, for purposes of clarification, or because they had been omitted in the first proposal. He went over the key elements of the proposal, saying, that on wages the Respondent wanted control of targeting, it wanted to reduce health and welfare and pension costs by substituting the Tyco programs outlined in the proposal, and it wanted to reduce the ratio of journeymen to apprentices.

Under the Respondent's proposal, targeting would apply to all projects where there was nonunion competition, would involve up to a 65-percent reduction in journeymen rates and the rate selected would be solely within the Respondent's discretion. Under the existing agreement targeting was within the discretion of the Union. The proposed health and welfare plan provided for employee contributions which were subject to annual premium increases of up to ten percent. There was no employee contribution under the NASI plan. Under the proposed 401(k) plan, a fitter under 55 years of age had to be employed by the Respondent for 90 days to be eligible to participate.

After a caucus, the Union agreed to the removal of the contract references to NFSA and to a 3-year term and presented a proposal relating to inspections, subcontracting, the impact of possible changes in laws affecting health care benefits, and the continuation of contact terms and conditions in the event negotiations extended beyond the contract expiration date. The parties discussed the selection of foremen and the standards by which they would be chosen, the mechanics of the targeting proposal and the new helper classification. Chatilovicz asked if they wanted to discuss the health and welfare and pension proposals and the Union responded that they needed time to study them.

The parties met again the following day. The session began with Chatilovicz asking Lundak if he had authority to approve an agreement and his responding that he did not. This was disputed by the other union representatives who stated that the business manager had the authority to approve an agreement with an independent and that it need not be submitted to the membership for approval. The Respondent requested a 5-day renewable extension of the contract and the Union said it would get back to it on that request. There was a discussion of the Respondent's wage proposal and it changed the maximum reduction of the journeyman rate on targeted projects from 65 to 75 percent and agreed to have a union/employer committee review allegations that targeting was misused on given projects. It responded to a question that the Union had about the amount of life insurance to be provided by stating that it would be determined based on the full journeyman rate not a targeted rate. The Respondent withdrew its proposal to add a "helper" classification and proposed using "pre-apprentices," where no apprentices were available, at a rate no less than the minimum for apprentices. After a break, Chatilovicz asked for the Union's response to the Respondent's proposal. The Union responded that it did not have an answer and had not yet formulated its counterproposal on wages. Chatilovicz expressed concern that the Union was just listening and not offering anything. Osborne asked why he was so impatient and said that the Union had questions it needed answered. There was additional discussion about the proposed 401(k) plan and targeting before the parties broke for lunch. After the break the union committee did not return and announced that it was through for the day. Before leaving, the Union presented a wage proposal calling for increases in the journeyman's hourly rate of $.25 in the first year, $.75 in the second and $1.25 in the third year of the agreement and a $.25 increase in the differential for foremen. The parties agreed to meet again on March 28.

On March 22, the Union issued to its members a strike notice directed at the Respondent and NFSA. On that date, Chatilovicz contacted Osborne concerning the Respondent's request for a contract extension and was informed that the Union would not agree to it. By letter dated March 24, Boggess informed the Respondent's employees that in the event of a strike, it would hire permanent replacements to do its work. The negotiating session scheduled for March 28 was canceled after the president of the U.A. placed Local 669 in trusteeship.

As noted, Tommy Preuett, a former president and business manager of Local 669, then employed by the U.A., was appointed trustee, effective March 28, and empowered to run its affairs, including negotiating new agreements with NFSA, the Respondent, and other independent contractors whose agreements expired on March 31. The next negotiating session with the Respondent was on March 30 at a hotel in New York City. Preuett attended along with Lundak, Phillips, and Garness. The Union was also negotiating with NFSA on the same date at the same hotel. Preuett described the meeting with the Respondent as a get-acquainted session that did not involve any substantive bargaining. He introduced himself and explained the nature of the trusteeship and his authority to conclude an agreement without ratification by the membership. Chatilovicz went over the background of the relationship between the parties and the difficulty the Respondent felt it had getting the Union to meet with it and give it a counterproposal. He explained the reasons for the Respondent's withdrawal from NFSA and the adverse effects that it had suffered as a result of the Union's withdrawal of targeting from it. He stated that Grinnell considered the important issues to be the institutionalizing of targeting at 75 percent, the 1 to 1 ratio of journeymen to apprentices and the changes in health and welfare and pension that it had proposed. He expressed concern that the Union would reach an agreement with NFSA that did not address Grinnell's concerns and then expect it to accept that agreement. Preuett said that he wanted to work with them to get an agreement, that he did not want a strike, and that none was planned for April 1. He stated that he had only about 3 days to familiarize himself with the contract

issues between the Union and both Grinnell and NFSA and requested a 30-day contract extension. Chatilovicz would not agree and said that the Respondent did want negotiations to drag out 2 or 3 weeks. Preuett said that he was meeting with NFSA the next week and offered to meet on April 11. He said that he wanted to see if the Union could give the Respondent some things it would not give others because of its size. Chatilovicz said they had to meet for at least 2 days the next week and that April 11 was too late. They agreed to meet on April 7. There was a discussion of various issues. On the subject of targeting, Preuett said that he was against a uniform targeting rate because it defeated the purpose of targeting and would permit nonunion contractors to slide under it. On health and welfare, he said that he was reluctant to give up the NASI plans as he was interested a standardized package that would include portabilty and reciprocity and would not isolate the Respondent's fitters from the rest of the industry. There was also an issue because the Tyco plan did not provide health coverage for retirees. Chatilovicz responded that he understood Preuett's concern and that Grinnell was "not wedded" to the Tyco plan, which was the plan that covered its supervisors and managers, and was put on the table as an example of a plan that offered core benefits at a reasonable cost, but that it wanted an agreement that would cut its costs in health and welfare and in pensions. On the proposed change in the ratio of journeymen to apprentices, Preuett stated that he had no problem with it.

The next meeting was held on April 7 in New York City with Preuett representing the Union and Phillips present as a notetaker. Preuett was again conducting negotiations with NFSA at the same hotel on that date. At the morning session, Preuett presented a complete contract proposal and went over its terms, section by section. It included a proposal on wages calling for the same increases included in the Union's previous proposal and a targeting proposal whereby a union agent and Grinnell representative in each district would set a target rate for the following year based on the local marketplace with a mechanism to protect the Respondent from arbitrary action by union representatives. This would not be done until after a contract was signed and would not have guaranteed any rates. On benefits, his proposal called for continued contributions to the NASI health and welfare and pension plans, and to education and industry promotion funds. It called for the employer's contribution to he health and welfare fund to be frozen at the current $3.75-per-hour rate for the term of the contract, pension contributions at the current rate of $2.20 in 1994, $2.30 in 1995, and $2.40 in 1996, and a flat $.75 contribution to supplemental pension funds (SIS) in the States where they existed. After a break, Chatilovicz made a section by section response to the Union's proposal and there was agreement on several articles. Throughout the session the Respondent continued to insist that any agreement had to include a fixed targeting rate of 75 percent. It also wanted reduced health and welfare and pension contributions and to eliminate all SIS and industry promotion and training funds contributions. It amended its proposal to permit nonunit employees to perform inspection work. During the afternoon session, Preuett proposed a freeze on wage rates for the term of the contract and that, within 60 days, a committee would meet to set targeting rates for the next year and, after a review of the results, set rates for the following year. He also proposed separate rates for industrial, commercial, and residential jobs. He proposed health and welfare contributions of $3.75, $3.50, and $3.25 per hour over the 3 years of the contract and a $.50-per-hour SIS contribution, where applicable, in the first year with $.10 increases in each of the 2 succeeding years, and a reduced training fund contribution. He agreed to the Respondent's proposal on travel expenses. Following a break, the Respondent proposed that there be a fixed target rate of 75 percent with the rate to be reviewed after a year and possibly adjusted. It offered either the Tyco health plan or to make a $2.25-per-hour contribution to a NASI or other health plan acceptable to the Union and, in the pension area, either the Tyco 401(k) plan or to make a $1.20-per-hour contribution to a NASI plan and no SIS contributions. The parties recessed at 4:40 p.m. and reconvened at 8:10 p.m. Preuett offered amended proposals on the hiring of apprentices, overtime and training fund contibutions and proposed a contribution of $2.20 per hour to the NASI pension plan, a $.50 SIS contribution for the term of the agreement, and health and welfare contributions of $3.75, $3.40 and $3.40 in the three years covered by the contract. He rejected the Respondent's inspection language. After a break, Chatilovicz responded that the Respondent agreed to the Union's overtime and training fund proposals and some of the language on apprentices but said that it had to have targeting under its control. He prepared a chart indicating that there remained open issues on wages/targeting, health and welfare, pension and SIS, and inspections.

The next meeting was on April 8 in the hotel in New York City where Preuett was also negotiating with NFSA. They reviewed the open issues and discussed targeting with Preuett talking about an industrial, commercial, and residential rate structure and Chatilovicz reiterating the importance of a fixed targeting rate to the Respondent and stating that it was its "final" proposal on that issue. Preuett stated that uniformity of benefits was his primary goal, if it could be done, and that he would have to do some research on the health and welfare plan to find out what level of benefits $2.25 per hour would provide and whether moving to the Tyco plan option was "doable." He asked questions about the 401(k) plan and said that he was not an expert in that area and needed to research the matter. Preuett also said that there was a lot of chaos in the Union resulting from Lundak's election, that the mood of the membership was not good and that, while there were issues the parties did not agree on, he was there to get an agreement. He said that he needed information concerning the Respondent's inspection proposal. Later in the meeting, Chatilovicz said that the Respondent was withdrawing its inspection proposal, saying that it was doing okay under the existing agreement. Preuett said that he needed to get additional information on the issue.[5] The meeting ended with an agreement to meet on April 12 and Chatilovicz asking for specific responses from the Union on targeting, health and welfare and pension and SIS.

The meeting on April 12 was held at the U.A.'s offices in Washington, D.C. In the interim, the Union and NFSA had reached agreement on a new contract. The Respondent was aware of this and knew the details of the settlement. The meeting began with a discussion of the issues that remained open. Preuett said that inspection was still open and that the Union had proposed to create a committee to study problems and define what work inspectors can do. Chatilovicz said that the Respondent had withdrawn its proposal and agreed to the existing language, that he thought Preuett had agreed and now he

[5] Although Chatilovicz testified that Preuett agreed to this, Preuett testified that he did not. Buchanan's notes support Preuett's version.

was making a change. He said they agreed that inspectors would not do bargaining unit work so there was no problem. Preuett responded that the problem was who decided what was bargaining unit work. Chatilovicz said they would discuss it but it was not an economic issue and he wanted to settle the remaining economic issues and get an agreement. Preuett said that he also wanted an agreement. Chatilovicz told him to "stop bullshitting," accused him of "playing games" and suggested getting a Federal mediator to resolve matters. Preuett responded that he was not playing games, that he wanted uniformity in the industry and had made proposals to accomplish this as well as concessions on several issues. Chatilovicz agreed that he had made some movement but asked for Preuett's best proposal. He said that he recognized the issue of uniformity, that he would not be would not be surprised if Preuett had to have the same agreement the Union had reached with NFSA, and, if that was what the Union must have, the Respondent would look at it and see if it could agree. Preuett was accompanied to the meeting by Paul Green an attorney with benefits expertise. Green began to ask a series of questions about the Tyco benefits plans. After a while, Chatilovicz stated that he understood that Preuett was not inclined to move away from the NASI health and welfare plan and was not interested in the Tyco plan and asked why Green, who did not know the specifics of the plans, was there asking questions. Preuett responded that the Union's fund expert was involved with the NASI plans and he feared a conflict of interest. Chatilovicz asked if there was any way Preuett could accept the Tyco plan and he responded that he was not sure. Chatilovicz asked if Preuett would go no lower than a health and welfare contribution of $3.75 and $3.40 and Preuett responded that he could not say without experience to measure by. Chatilovicz asked if Preuett was saying no to the Tyco plan and he responded, that he didn't say no. Green continued to ask questions and Chatilovicz again said that Preuett had said that he was not interested in the Tyco plan. Preuett said that they were bargaining and Chatilovicz responded that if they wanted to bargain they should do so and stop the bullshit. He said if Preuett wanted to give them the NFSA proposal he should do so, but it was insulting to bring in Green to pick at the Tyco plan. After a discussion of the wage rates contained in the agreement the Union had signed with NFSA, Chatilovicz stated that he knew Preuett wanted a uniform agreement and he did not consider it unfair bargaining for the Union to offer the Respondent the NFSA proposal and say it was as far as it could go on wages. Preuett responded that he wanted a wage rate freeze without any fixed percentage reductions and discussed the reduced commercial and residential rates contained in the agreement with NFSA. After a break for lunch, the Respondent presented its "final proposal" on the open issues which provided for a freeze in wage rates for foremen at the 1994 level, an 80-percent reduction for journeymen on any job with competing nonunion bidders, acceptance of the Union's qualification to its proposal concerning journeyman to apprentice ratio, the Tyco health plan with the modification that there would be no employee contribution for the first year except for high option, the Tyco 401(k) plan with a $200 per year service credit, up to a maximum of $1000, and no SIS contributions. Chatilovicz said if Preuett could not accept this he should give them his best and final proposal. Preuett said he would look at it. After an hour and a half caucus, the Union made a counterproposal resubmitting its health and welfare and pension proposals and offering reductions in the commercial rates of $1 in 30 States and $1.50 in 17 States. Preuett said that he felt the offer would lower the Respondent's costs tremendously and make it competitive and that he was willing to meet indefinitely to get an agreement. Chatilovicz said that they would assume that this was the Union's last offer and would look it over. Preuett said that it was not his last offer, that he wanted an agreement and was flexible. After a break, Chatilovicz said that both sides had worked hard to reach an agreement but that, while the Union's proposal provided some savings, it was not enough, that the Respondent was only interested in itself and that it did not want the Union/NFSA agreement, as it would not help it with competition from nonunion contractors. He said they would be in his office until 6 p.m. that evening, in case Preuett changed his mind, and gave him the telephone number. Preuett said that all day the Respondent had been moving toward absolutes and final offers and was trying to push him to an impasse. He said that he did not want an impasse and that he did not give up easily. He asked how far apart they were and in what states the Respondent needed movement. They discussed the differences in the rates in some states and the meeting ended. At about 6 p.m., Preuett telephoned Chatilovicz from an automobile in which he and Phillips were riding. Chatilovicz took the call on a speaker-phone in his office with Helfrich also present. Preuett asked to meet on the following day and Chatilovicz asked what the Union was going to propose. Preuett said he would try to get the Respondent to raise its rates. Chatilovicz said that he had the Respondent's final proposal and it was not willing to change wages and benefits. Preuett asked about bringing in a federal mediator and Chatilovicz asked if the Union was willing to come down to the Respondent's rates and Preuett said no.[6] Chatilovicz said that he did not think a mediator could help. Preuett asked if the Respondent's rates were carved in stone and Chatilovicz responded that they were. Preuett said that he hoped that the Respondent would change its mind and maybe they could get together down the road.

Later that evening Preuett called a nationwide strike against the Respondent, which was still in effect as of the time of the hearing. On the following day, April 13, the Respondent informed its employees and the Union that it was implementing its final offer, effective April 14.

C. The Negotiations Between the Union and NFSA

As noted, at the same time these negotiations were being carried on, the Union was also negotiating a new contract with NFSA. Given the similarity of the issues and parties involved, I find that those negotiations are relevant to those between the Union and the Respondent. See *Excavation-Construction*, 248 NLRB 649 (1980). The evidence indicates that many employers, including the Respondent, were unhappy with the expiring contract, which they viewed as overly generous, and were interested in lowering costs. The NFSA employers were included in the union strike notice of March 22. There had been little

[6] The Respondent contends that in this conversation Preuett said he was unwilling to lower his proposed wage rates and benefits, citing the testimony and notes of Chatilovicz and Helfrich. I credit the testimony of Preuett that he said he was not willing to agree to the rates in the Respondent's final offer. Not only is this consistent with Preuett's request for further bargaining and his statements that he had not made his final offer and was flexible, the testimony and notes of Stokes, based on what Chatilovicz told him about this conversation, support Preuett's version.

progress in these negotiations prior to the imposition of the trusteeship on the Union. Preuett began meeting with NFSA on March 29. NFSA negotiator Cornelius Cahill credibly testified that Preuett introduced himself and stated the scope of his authority to enter a contract without ratification by the Union membership. He asked that he be given time to get his feet on the ground and requested a 30-day extension of the existing contract. There was a discussion concerning the negotiations with Grinnell and about NFSA's concern that Grinnell would get a better deal and the fact that its proposal contained a "most favored nation" clause to protect against that happening. Preuett spoke about the importance of uniformity in the industry and said words to the effect that Grinnell would not get a more favorable contract than NFSA and that he intended to reach an agreement with NFSA first. On April 6, the Union and NFSA agreed on a 1 to 1 apprentice to journeyman ratio. On April 7, Preuett made a proposal on health and welfare contributions of $3.75, $3.50, and $3.25 per hour during the 3 years of the contract, similar to that offered to the Respondent. The parties ultimately agreed to contributions of $3.75, $3.40, and $3.40. They also agreed to a $2.20-per-hour pension contribution during the life of the contract and a $.50-per-hour SIS contribution in States where applicable. On April 8, they agreed on wages. The agreement included an industrial rate that was the rate in the expiring contract, a commercial rate that was $1 less in 30 States and $1.50 less in 17 States and a residential rate that was 75 percent of the industrial rate. The agreement also included a continuation of the existing targeting program on a job-by-job basis without a specific rate of reduction. NFSA continued to seek a "most favored nation" clause and Preuett said that it was unnecessary because the parties had always worked together in good faith. NFSA dropped this proposal after Preuett said he didn't think it was a mandatory subject of bargaining and did not want to discuss it further. At that point, the parties had an agreement.

Analysis and Conclusions

Generally speaking, Section 8(a)(5) prohibits an employer from unilaterally instituting changes regarding wages, hours, and other terms and conditions of employment before reaching a good-faith impasse in bargaining. *NLRB v. Katz*, 369 U.S. 736 (1962); *Milwaukee Spring Division*, 268 NLRB 601, 602 (1984). An impasse is considered to exist when the collective-bargaining process has been exhausted, *D.C. Liquor Wholesalers*, 292 NLRB 1234 (1989), and "despite the parties' best efforts to reach an agreement, neither party is willing to move from its position." *Excavation-Construction*, supra at 650; *Hi-Way Billboards, Inc*., 206 NLRB 22 (1973). The existence of an impasse must be proved by the party asserting it as the basis for its unilateral actions. *Tom Ryan Distributors*, 314 NLRB 600, 604 (1994); *North Star Steel*, 305 NLRB 45 (1991). The relevant factors to be considered in determining whether a bargaining impasse exists were set forth by the Board in *Taft Broadcasting Co*., 163 NLRB 475, 478 (1967):

Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

1. Bargaining history

The present case involves a bargaining history that is unusual in that, although the parties had a relationship going back several decades, for the first time in many years they were negotiating for a contract face-to-face instead of through NFSA. Not only did the Respondent embark on a bargaining path independent of NFSA, its bargaining goals differed significantly. Further complicating matters was the imposition of the trusteeship on the Union and the substitution of Preuett as its negotiator shortly after bargaining had commenced. The result was that the parties' negotiators had no experience or familiarity with one another and no feel for one another's approach to the bargaining process.[7] Under these circumstances, whether viewed from a long range perspective or only from the commencement of the trusteeship, the lack of a significant bargaining history would dictate giving the parties a fuller opportunity to effect an agreement than occurred here. See *Bell Transit Co.*, 271 NLRB 1272, 1273 (1984), and *Old Man's Home of Philadelphia*, 265 NLRB 1632, 1634 (1982). Moreover, the substantial concessions and changes in the nature of the health and welfare and pension benefits the Respondent was seeking, warranted "more extensive discussion than these truncated negotiations permitted." *Harding Glass*, 316 NLRB 985, 991 (1995).

2. Good faith

Although the Union argues strongly to the contrary, I find the evidence does not establish that the Respondent did not bargain in good faith from the outset or that it was not interested in reaching an agreement but, rather, sought "to obliterate its longstanding union relationship." The Union points to the fact that one of the Respondent's earliest actions in preparing for the expiration of the contract was the conduct of a national survey among its district managers in May 1993 to determine, inter alia, the backlog of work they would have had the company operated as "an open-shop contractor" and the wage and benefits costs of nonunion competition, and that it retained the legal services of Stokes in connection with preparing and presenting its bargaining positions. It contends that the survey and the fact of Stokes' association with the American Fire Sprinkler Association, which has described itself as the voice of the open shop contractors in the sprinkler industry, is evidence of an intention to go nonunion. It contends that the Respondent's contract proposals were so regressive and untenable as to evidence a design to frustrate rather than facilitate an agreement and to precipitate a strike by the Union. Further evidence of this design is alleged to be found in the Respondent's efforts prepare for a strike and to recruit potential permanent replacement workers for employees who went on strike.

I do not find that the evidence establishes that the Respondent entered into these negotiations with the intention of going nonunion or that it was not desirous of reaching an agreement. First, although the Union raised the issue of the Respondent's alleged lack of good faith in its charges, the complaint does not contain an independent allegation that the Respondent violated Section 8(a)(5) by bargaining in bad faith, but is limited to the allegation that the Respondent unilaterally implemented its final contract proposal without first bargaining to impasse. At

[7] This became apparent as negotiations progressed with Preuett pursuing his negotiating "technique" and Chatilovicz considering it "bullshit."

the hearing, evidence concerning the Respondent's good faith in bargaining was received for the limited purpose of establishing that alleged violation. See *Dahl Fish Co*., 279 NLRB 1084, 1103 (1986). The credible testimony of Boggess and Peck establishes that the May 1993 survey was used to determine the wages and benefits paid by its competitors as a part of the Respondent's efforts to formulate its bargaining position and strategy for the upcoming negotiations. The evidence shows that the Respondent shared the results of the survey with the Union shortly after it was conducted. Despite the reference to doing business as an "open shop," I find that the Respondent's purpose in conducting the survey was a reasonable and prudent means of appraising its competition and does not establish bad faith on its part. I also find that the Union's assertion that, because Stokes may have been associated with an organization representing nonunion contractors, this shows that the Respondent used his services to assist it to become an open shop is pure speculation and does not constitute probative evidence.

Viewed objectively, the Respondent's proposals on wages and benefits, while a marked departure from those in the existing contract were not so unreasonable or harsh as to warrant a finding that they were put forward in bad faith in order to frustrate bargaining and undermine the Union. See *Reichhold Chemicals*, 288 NLRB 69 (1988). In the benefits area, the Respondent's health and welfare and pension proposals, while considerably less generous than the existing plans, were similar to those provided to its nonunion employees. Preuett acknowledged during negotiations that the existing agreement had alienated many contractors who felt it was unbalanced and that they had been had and they were "on the get-even special" in 1994, seeking to roll back some of its onerous terms. During the negotiations, the Respondent explained its proposals and its reason for them which was to become competitive with nonunion contractors by lowering its labor costs. It also made modifications and concessions during the negotiations. All of this is evidence of good faith on its part. E.g., *McClatchy Newspapers*, 307 NLRB 773, 780(1992); *Litton Systems*, 300 NLRB 324, 330(1990). The Respondent not only made itself available and accommodated the Union with respect to the timing and locations of the negotiating sessions, it took the lead in seeking to get the negotiations started. This is further evidence of good faith. *Walter A. Zlogar, Inc*., 278 NLRB 1087, 1093 (1986). Finally, I do not believe that the fact that the Respondent made detailed preparations for a potential strike, including, recruiting potential striker replacements is evidence of bad faith on its part. The Union had informed its membership in a December 1993 newsletter of the possibility of an April 1 strike against Grinnell and of the need to be prepared for any eventuality and had given it a strike notice before Preuett came on the scene. I find that the Respondent's preparations for a strike did not reflect an intent to avoid reaching an agreement. See *Rose Printing Co*., 289 NLRB 252, 263 (1988).

3. Length of negotiations and importance of issues

Although the parties had agreed on several items by April 12, they were still far apart on wages and benefits, with the Respondent seeking fixed targeting and a move to the Tyco health and welfare and 401(k) plans. The Union was opposed to fixed targeting and preferred the existing NASI health and welfare and pension plans. The Respondent contends that, under these circumstances where these issues were of supreme importance, an impasse may be reached after only a few bargaining sessions. I find that was not the case here. On the contrary, I find that, given the importance of these issues to the parties, the radical departures from the existing contract the Respondent was proposing, Preuett's late entrance into the negotiations, his admitted lack of familiarity with the issues and his need to play "catch-up," it was to be expected that, in order to be fruitful, the negotiations would be long and arduous. It would appear that the Respondent recognized this from the outset, long before Preuett entered the picture, and sought to get the negotiations underway as early as possible. The evidence suggests that, in 1993, the Union was not receptive and was preoccupied by internal problems. Shortly after the negotiations started, they were disrupted by the imposition of the trusteeship on the Union. I find that, under the circumstances, the only bargaining sessions that should be considered in determining the impasse question were those in which Preuett represented the Union. "While it is true that the number of negotiating sessions is not controlling, generally, the more meetings, the better the chance of finding an impasse." *PRC Recording Co*., 280 NLRB 615, 635 (1986). Here, there were only four negotiating sessions, totaling no more than 13 hours of actual bargaining with much of the 4-hour session on March 30 devoted to introductions and general discussion. I do not believe that the Respondent has shown that, when it broke off bargaining, the parties had reached the point where further bargaining would have been futile.

As noted, after being appointed trustee, Preuett was negotiating almost simultaneously with the Respondent and NFSA. The Respondent contends that this was because he intended to settle with NFSA first and then offer the same terms to it on a take-it-or-leave-it basis. There is no question but that in many instances when Preuett reached agreement on an issue with NFSA, he proposed similar terms to the Respondent. This was entirely consistent with his statements to both parties that he felt consistency in the industry was desirable. It was also to be expected inasmuch as the negotiations with NFSA, although it was also seeking to contain the costs of wages and benefits, were conducted within the framework of the existing contract while the Respondent was proposing a new departure in those areas. Consequently, I find the fact that Preuett was able to reach agreement with NFSA after only four sessions does not establish, as the Respondent contends, that a similar number of sessions with it were sufficient to exhaust any possibility of agreement. On the issue of benefits alone, the Respondent's radically different proposals presented significant problems of portability and reciprocity that went far beyond the cost issues that the NFSA proposals raised. Preuett credibly testified that he was not an expert in the benefits area and needed to call on expertise to fully understand what was and was not "doable" with respect to the Tyco benefits plans the Respondent was proposing. When he brought Green, a benefits expert, to the April 12 negotiating session to ask questions that even Helfrich, the Respondent's benefits expert, testified were good questions although he felt they were "late in the game," Chatilovicz expressed annoyance and cut him short by saying that the questions were insulting since Preuett was not interested in the Tyco plans, although the evidence does not show that to have been the case. On the contrary, although the NASI funds were obviously important and a matter of pride to the Union, Preuett had never foreclosed the possibility of accepting the Tyco plans. What he did say was that he needed time to study the problems involved. Given the importance of these issues, his request was not unreasonable.

The evidence does not support the Respondent's principal argument on this issue that Preuett had "painted himself into a corner" by settling with NFSA and could then offer it nothing different. The Respondent's reliance on cases[8] in which an impasse was found to have occurred in situations where the union adamantly insisted that the employer accept the terms standard industry agreement and refused to consider anything else is misplaced. I find the evidence does not establish that Preuett ever made a final proposal to the Respondent that was the same as the settlement with NFSA or that it could reasonably conclude that he would or could not give it a better deal than NFSA. Indeed, on April 12, although Chatilovicz specifically suggested that Preuett offer the terms of NFSA settlement, when he was aware of those terms and that they were unacceptable to the Respondent, Preuett declined to do so. I find no evidence that Preuett was not acting in good faith throughout his negotiations with the Respondent or that he did not mean what he said during those negotiations. The Respondent appears to confuse statements Preuett made in trying to sell his proposals, by stressing that uniformity and stability in the industry would be beneficial to all contractors, with the extent of those proposals. Similarly, I do not believe that statements Preuett may have made during his negotiations with NFSA that "no one would get a better deal," establish that he did not have the flexibility to fashion a deal with the Respondent, as he repeatedly told it he did. First, there is no evidence that the Respondent knew about such statements before it left the bargaining table or, if it did, necessarily understood what Preuett meant by "a better deal." Such posturing during negotiations is to be expected. See *D.C. Liquor Wholesalers*, supra at 1235–1236. It is obvious that the Respondent's size set it apart from the other members of NFSA. At their first meeting, Preuett stated that he recognized that fact and that he wanted to see if the Union could give the Respondent some things it would not give others because of its size. Notwithstanding the efforts by NFSA to get a "most favored nation" clause in its agreement, Preuett refused to agree and the final settlement did not include one. Rather than painting himself into a corner, it appears that Preuett took pains throughout his dealings with both the Respondent and NFSA to maintain the flexibility he needed to fashion a deal with both. On April 12 Preuett had already moved beyond the NFSA agreement wage rates in two states and said that it was not his last offer. The Respondent considers this "insignificant," but the fact is it indicated movement on the Union's part. Preuett may have been reluctant to move as quickly or as far as the Respondent wished at the time it broke off negotiations, but the record does not establish that he would go no further or that continuing to negotiate would have been futile.

"An impasse is not demonstrated simply when one party's concessions are not thought to be adequate or when frustration in the movement has reached a subjectively intolerable level." *AMF Bowling Co. v. NLRB*, 63 F.3d 1293, 1301 (4th Cir. 1995).

For an impasse to occur, neither party must be willing to compromise. *PRC Recording Co*., supra at 640; *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1186 (5th Cir. 1982). It appears that on April 12 the Respondent chose to assume that Preuett had made his final offer and would make no further concessions, rather than to listen to what he was saying at the bargaining table. The Respondent's assumptions as to what the Union would do are not an adequate substitute for collective bargaining. *Excavation-Construction*, supra at 650. It also appears that it chose to draw an arbitrary line as to when negotiations should end, rather than to let them run their course, although it has articulated no compelling reasons for doing so. By April 12, with the NFSA negotiations concluded, it finally had Preuett's full-time and attention, his assurance that he was flexible and that he had not made his final proposal. The Respondent acknowledged that the Union's latest offer had given it some savings, although in its view not enough, but it was unwilling to put Preuett's flexibility to the test since he was unwilling to agree to its final proposal. Under these circumstances, I find that no genuine impasse existed. *Wycoff Steel*, 303 NLRB 517, 523 (1991); *Towne Plaza Hotel*, 258 NLRB 69, 78 (1981).

4. Contemporaneous views of the parties

The Respondent's view that impasse had been reached is not determinative. *Wycoff Steel*, supra at 523. This appears to be based on Chatilovicz' assertion that the Union had made a "final offer" on April 12 that was unacceptable to it. The evidence does not support a finding that the Union had made its "final offer" when the Respondent refused to bargain further. During the meeting on April 12, Preuett made it clear that he did not believe the parties were at impasse, although he apparently suspected that the Respondent was trying to push him to one, and that he was unwilling to give up trying to reach an agreement. He reiterated that willingness in the post-meeting telephone call to Chatilovicz in which he asked to meet the following day and to call on the services of a Federal mediator. His testimony at the hearing was that he was surprised by the Respondent's final offer on April 12 and refusal to meet further unless he would accept that offer and that he felt that the parties were making progress toward an agreement. As noted above, I found Preuett to be a credible and persuasive witness and believed his testimony that he had while he was unwilling to accept the Respondent's most recent "final offer," he was still exploring whether he could accept the Tyco health and pension plans and do more for it on wages. Since he still had movement to make, there was no impasse.

Finally, I do not find that the fact that Preuett called a strike after the Respondent left the bargaining table proves the parties were at impasse. Preuett credibly testified that he called the strike "in an effort to bring [Grinnell] back to the bargaining table, because it was obvious that they were not going to meet with us any more." It is clear that the Union felt that the Respondent had not bargained with it in good faith and that its refusal to continue to meet was further evidence of this. Once the Respondent refused to meet and negotiate with him, it made little difference how much movement Preuett was willing to make.

Based on the foregoing, I find that the Respondent has not demonstrated that the parties had exhausted the possibility of reaching an agreement, that neither party was willing to move from its position or that it was warranted in assuming that further bargaining would be futile. Since the parties had not reached a genuine impasse at the time it refused to continue those negotiations on and after April 13 and when it unilaterally implemented its last contract offer, the Respondent violated

[8] *Grant Trucking*, 272 NLRB 590 (1984); *Betlem Service Corp.*, 268 NLRB 354 (1983); and *J. D. Lunsford Plumbing*, 254 NLRB 1360 (1981).

Section 8(a)(5) and (1) of the Act. E.g., *Harding Glass Co*., supra; *D.C. Liquor Wholesalers*, supra.

The Nature of the Strike

I find that the nationwide strike Preuett called on the night of April 12, after the Respondent advised him it would not bargain further and would not meet with him unless the Union was willing to accept its final offer, was caused at least in part by the Respondent's violation of Section 8(a)(5), found here, and was affected and prolonged by the Respondent's unlawful implementation of its final contract offer. Accordingly, I find that it was an unfair labor practice strike. E.g., *C & E Stores*, 221 NLRB 1321, 1322 (1976); *Larand Leisurelies*, 213 NLRB 197 (1974), enfd. 523 F.2d 814 (6th Cir. 1975).

2. Section 8(a)(1)

A. Alleged threat to Fire Striking Employees

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act on or about February 15 in Corpus Christi, Texas, when Supervisor Dwight Green told employees they would be fired if they participated in a strike.

In early 1994, the Respondent had employees working at the Koch and Citgo jobsites in the Corpus Christi area. Mark Shadrock has worked for the Respondent as a fitter at several Texas locations for about 4 years prior to the strike in 1994 and was working at the Koch jobsite in February. He testified that on the evening February 15 Green conducted a safety meeting for the employees working at both jobsites at a bar called Lou's. During the meeting, at which 10 to 15 employees were present, there was a discussion about the contract negotiations and Green said that Grinnell had made its final offer to the Union and it was up to the Union to accept it or not. He also said that if there was a strike, "their trucks were going to roll the next morning with us or without us." Employee Mike Munoz asked, "does this mean we're fired if we go on strike?" Green responded, "yes, that's what it means." He also said the Company would hire replacements and did not have to hire them back after the strike ended. Shadrock did not recall any of the safety matters discussed at the meeting but remembered that Green passed out safety t-shirts. Gerald Byrom has worked for the Respondent as a fitter and as a foreman on and off for about 10 years since 1973. He was present at Lou's for the safety meeting with Green on February 15 which 15 to 20 employees attended. Green discussed safety matters for about 45 minutes and then said if they weren't in their trucks the day after the strike, they would be replaced. Munoz asked if this meant they would be fired and Green said, "that's exactly what I mean."

Dwight Green testified that he was in Corpus Christi on a weekly basis during January through March supervising two jobsites in the area. During the week ending February 25, he conducted a 10 to 15-minute safety meeting at the Koch jobsite in the lunch area. Later that evening, he met the men at Lou's bar to distribute safety T-shirts, which are awarded on a quarterly basis if there have been no accidents. He arrived around 6 or 6:30 p.m. and gave out a T-shirt to each of the men present. After some discussion, Shadrock asked what was going to happen with the contract. Green responded that he did not know, that Grinnell had put an offer on the table and he had heard that the Union was not going to negotiate with Grinnell until it had settled with other contractors. He said nothing else to Shadrock and nobody else asked him any questions and he specifically remembered that Mike Munoz did not ask him any questions. He testified that he did not say that Grinnell had made a "final offer," there was no mention of replacement workers during the conversation and he did not say that employees would be fired if they went on strike. Munoz testified that he has been employed by the Respondent for 6 years and is currently a foreman. He was a fitter before the strike which he participated in until June when he returned to work. He testified that he and other employees met with Green at Lou's bar in February and that Green handed out T-shirts. He said there was no discussion of contract negotiations, that he did not remember Green saying anything about that subject, and that he did not ask Green any questions. Cliff Thompson testified that he has been employed by the Respondent since 1991 and is currently a foreman. He worked at the Koch jobsite during 1994 and remembered attending a get-together at Lou's in mid-February with Green and employees from both jobsites. They drank some beers and Green gave out T-shirts. During a discussion, someone, probably Shadrock, asked Green about the status of the contract. Green said, "we've got a good package put together and its on the table and they're looking at it." He did not recall Green saying anything more or any further conversation relating to the contract. He did not remember Munoz asking any questions,or Green saying anything about replacement workers or that employees would be fired if they didn't cross the picket line.

Analysis and Conclusions

This is strictly a matter of credibility. The General Counsel has the burden of proof to establish this allegation and I find that it is not supported by a preponderance of the credible evidence. Although the testimony of Shadrock and Byrom is consistent, as it relates to Green's saying strikers would be fired, their testimony as a whole was unconvincing. First, it seems unlikely that Green would hold a safety meeting after work hours in a bar rather than at a jobsite. Neither of these witness was able to recall a single safety issue that was discussed although, according to Byrom, the safety portion of the meeting lasted for 45 minutes. Byrom's version of how the alleged unlawful statement came about was totally lacking in detail or context and I do not credit it. Finally, both witnesses claimed that a written statement of what Green had said was prepared, signed by most of those present and sent to the Union, but no such writing was produced at the hearing. Green credibly testified to being asked about the contract negotiations while meeting with the employees gathered at Lou's and telling them what little he knew about them. He also credibly denied discussing what would happen in the event of a strike or answering a question by Munoz on that subject. His denial is supported by the testimony of Munoz and Thompson. While both are former members of the Union who went on strike and eventually returned to work for the Respondent and are currently employed as foremen, I do not find those facts are sufficient to undermine their otherwise credible testimony. Nor does the fact that their recollections of certain of the details of the meeting at Lou's differ from that of Green and each other (Munoz heard no mention of a contract offer and Thompson said Green was present for 3 hours). I shall recommend that this allegation be dismissed.

B. Alleged Statements by Phillip Black

The complaint alleges that on or about March 10 Supervisor Phillip Black in a telephone conversation told an employee that the Respondent intended to go nonunion and that the employee

had to resign from the Union if he wanted to continue his employment with it.

Gerald Byrom testified that, on March 10, Black ,whom he had grown up with and known for many years but now lives in Maryland, telephoned him at his home in San Antonio, Texas. They discussed what was going on and Black said that Grinnell had come up with a deal to replace the Union's retirement fund with a 401(k) plan. Black said that, in order to stay with Grinnell, Byrom would have to drop his membership in and send his card back to the Union. He also said that Grinnell had some money set aside with which to fight the Union. With the exception of some conversation about the medical condition of Black's wife, that was the extent of Byrom's testimony as to what was said during this call.

Black testified that he and Byrom had grown up together and worked together in Texas and that they were close friends. He said that he and his wife and the Byroms had always celebrated their wedding anniversaries together and that his wife had placed a call to the Byroms to wish them a happy anniversary. His telephone bill showed it to have been on March 7. After their wives exchanged greetings and discussed his wife's medical condition, he spoke with Byrom for 3 to 5 minutes. After exchanging anniversary greetings and discussing family matters, Byrom asked if negotiations were going on and Black said that they were. Byrom said that he wanted and needed to work and spoke about his medical condition and whether Grinnell's insurance would cover him if he kept working or if there was a strike. Black said that he did not initiate any discussion about the contract negotiations, did not remember talking about retirement plans or say that Grinnell had set aside money to fight the Union. He said that he did not tell Byrom that in order to work during a strike he had to drop his union card or suggest that he should resign from the Union. Black stated that he had attended a meeting on March 1 in which District Manager Chet Tucker had informed him that the negotiations were going on and they were trying to get a contract. Tucker had said that if there was a strike everyone had the right to work and if employees had any questions they should direct them to him, but that he did not say anything about employees resigning from the Union in order to work during a strike. On March 3, he was given a document by Tucker that described what supervisors could and could not say if asked questions.

Analysis and Conclusions

This is also a matter of credibility. Byrom's testimony about his telephone conversation with Black was even more cryptic and less credible than his description of what occurred in the meeting with Green. His testimony does not establish that Black said that Grinnell intended to go nonunion. Black was a believable witness. I credit his testimony that Byrom raised the subject of the contract negotiations and his concern about the effect of a strike on his health insurance. I also credit his testimony that he did not say that Byrom had to resign from the Union in order to continue to work for the Respondent. I shall recommend that this allegation be dismissed.

C. Alleged Threats by Gary McDuffee Jr.

The complaint alleges that in March 1994 Supervisor Gary McDuffee Jr. told an employee he was a troublemaker and that he would be laid off for pushing a grievance concerning travel pay and that if employees refused to cross a picket line they would lose their jobs.

Christopher Cooper worked for the Respondent as an apprentice from 1989 until he was laid off in March 1994. Cooper testified that in February he had a dispute with his supervisor Gary McDuffee Jr. over subsistence pay that Cooper was due when he was travelling 50 miles a day to meet a company truck which took him to the jobsite where he was working. After receiving a paycheck and realizing the subsistence pay had not been included, Cooper spoke to McDuffee two or three times about it. On the last occasion, in a pump room at the Acustar jobsite in Huntsville, Alabama, Cooper demanded that he be paid. McDuffee told him that he would lay him off and then said that he would sent Cooper to McDuffee's father who was also a supervisor in Birmingham, Alabama, and let him lay off Cooper. At that point, Cooper telephoned McDuffee's father who said to work it out with his son. Cooper told McDuffee what his father had said and McDuffee told him he did not need any troublemakers in Huntsville. Thereafter, Cooper filed a grievance over the subsistence pay and it was paid before it got to the first step of the grievance procedure. He testified that when McDuffee handed him an envelope with about $100 in payment of the grievance at a jobsite in Hazel Green, Alabama, McDuffee was red in the face and shaking with anger. Cooper also testified that in mid-March during a conversation about contract negotiations at the Hazel Green jobsite McDuffee told employees that Grinnell wasn't bluffing and that if they didn't cross the picket line they wouldn't have jobs.

Myron Mann had worked for the Respondent from July 1988 and was a foreman in March 1994. He testified that in March he was present at a conversation in the pump room at the Acustar jobsite in which Cooper asked for subsistence pay for previous weeks and McDuffee told him not to push it or he would lay him off or have his dad lay him off. Mann testified that during March at the Hazel Green jobsite, after McDuffee had been to a superintendent's meeting and was asked about the contract negotiations, McDuffee said that the Union would not negotiate with Grinnell and that anyone who would not cross the picket line "will not have a job" after the strike was over. During the same conversation McDuffee also said they "may" not have a job.

McDuffee, the supervisor in Huntsville, testified that in January he needed additional fitters due to the workload and got two from Birmingham, Cooper and Sam Muncher. Initially, Cooper rode to Huntsville in a company truck with Muncher and, later, with Foreman Phil Whittle and was not entitled to subsistence pay. After Whittle retired, Cooper drove his vehicle about 60 miles a day to meet and ride with Myron Mann in a company truck. Under the contract, Cooper was entitled to subsistence pay of $10.50 per day since he had to travel over 40 miles in his own vehicle. On March 28, he received a grievance from the Union based on failure to provide Cooper subsistence pay for the 2 weeks he had been riding with Mann. McDuffee said he conferred by telephone with his supervisor Bobby McArthur in Atlanta and was told to pay Cooper the subsistence pay immediately. After talking with McArthur, he went to the Hazel Green jobsite on April 1 and paid Cooper out of his own pocket so he could get his money right away. He apologized to Cooper but said that should have come to him first with his problem. McDuffee denied that Cooper had ever spoken to him about the subsistence pay before the grievance was filed or that he told him not to push it. He denied telling Cooper he was a troublemaker or telling him he would lay him off for pushing the grievance. McDuffee said

that after he talked with Cooper they went back to where Mann was working and Mann asked if he knew anything about the negotiations. He responded that if the negotiations fell through Grinnell would do business as usual and would hire replacement workers. He did not say that Grinnell wasn't bluffing or that if employees did not cross the picket line they would not have jobs.

Analysis and Conclusions

Based on their demeanor while testifying and the content of their testimony, I credit Cooper who was a believable and convincing witness over McDuffee who was just the opposite. McDuffee appeared ill-at-ease throughout his testimony and his claim that Cooper had never raised the subject of the subsisitence pay with him before the grievance was filed, although they had talked at the jobsite two or three times a week, was simply not believable. Cooper's testimony was corroborated by that of Mann who was also a more credible witness than McDuffee.[9] McDuffee's father, Gary McDuffee Sr., said that he did not recall talking to Cooper about subsistence pay and telling him to work it out with his son, but that "it could have happened." He did recall discussing the matter with his son and telling him "to get it worked out." I find that McDuffee's telling Cooper he didn't want troublemakers working for him and threatening to lay him off for trying to obtain benefits provided in the collective-bargaining agreement was coercive and violated Section 8(a)(1). *W. F. Bolin Co*., 311 NLRB 1118, 1122 (1993). I also find his telling employees that they would not have a job if they did not cross the picket line was coercive and a violation of Section 8(a)(1). *Vincent et Vincent of Allentown Mall,* 259 NLRB 1025, 1026 (1981).

D. Alleged Statements by William Frederick

The complaint alleges that on March 21 Supervisor William Frederick told an employee that the Respondent needed to get rid of the Union.

James Remy had worked for the Respondent as a fitter and as a foreman in Spokane, Washington, since 1992, but was no longer employed by it at the time of the hearing. On March 21, he went to the fabrication shop to pick up material and report on the job he had finished. As he was talking with Supervisor Wayne Gordon, Supervisor William Frederick asked him to stop in his office. While speaking with Frederick, Remy asked if he had heard how the contract negotiations were going and Frederick asked what he had heard. Remy said that he had not heard much other than negotiations were still going on. During their conversation Frederick told him, "we just need to get rid of this fucking Union." Frederick also said that the Union wasn't representing the men fairly and that Grinnell had better benefit and wage packages than what the Union was offering. He gave Remy a packet of documents which he took into Gordon's office to review. The documents included descriptions of the Tyco health plan as well as instructions concerning the hiring of replacement workers and how to resign from the Union. He said he found the documents to be "scary" and spoke to Gordon about them. Gordon said that he had been to a meeting in Texas and was told he had to resign from the Union to keep his job as construction manager and that during a strike anyone who wanted to work for Grinnell would have to resign from the Union. After returning the documents to Frederick, Remy went back to work and told his coworkers what Frederick and Gordon had said. After work that evening, he reported what Frederick had said to a Union business agent and at his request sent the Union a letter recounting the conversation. The letter was attached to the affidavit he gave the Board which was produced for the Respondent's counsel at the hearing.

Frederick testified that he has been employed by the Respondent for over 20 years and was a district general manager in Spokane in March 1994. He testified that Remy came into the fabrication shop where he had his office rarely and that he had no recollection of talking to Remy about contract negotiations in March 1994. He denied telling Remy that Grinnell had to get rid of the Union or that it was not fairly representing employees. He also denied giving Remy any information concerning benefits or showing him a copy of the Red Book, which the Respondent distributed to its supervisors and contained guidelines to be followed in the event of a strike.

Analysis and Conclusions

I credit the specific, detailed testimony of Remy about his conversation with Frederick over the latter's denials. It appears that Frederick was concerned about possible repercussions for having shown Remy materials he was supposed to have kept confidential. However, even crediting Remy, I find Frederick's remarks were not unlawful. The Board considers the totality of the relevant circumstances in evaluating the lawfulness of an employer's statements. *Mediplex of Danbury*, 314 NLRB 470, 471 (1994). I find that Frederick's statement which was not accompanied by any threats or promises was a lawful expression of opinion that Grinnell was better off without the Union. See *Cleveland Sales Co*., 292 NLRB 1151, 1156 (1989), and *Thomas Industries*, 255 NLRB 646 (1981). Even considering that Frederick's statement was followed by his allowing Remy to read through the Red Book, which contained material Remy found "scary," I do not believe that it was an attempt to undermine support for the Union by getting Remy to resign his membership or that it was coercive. I shall recommend that this allegation be dismissed. I am unable to find any evidence in the record to support the complaint allegations that Frederick and Gordon made unlawful statements to employees on June 18 at Post Falls, Idaho, and those allegations should also be dismissed.

E. Alleged Statements by Tom Von Cannon

It is alleged that on April 13 and 14 Supervisor Tom Von Cannon told employees they had to resign from the Union in order to continue their employment with the Respondent.

Roy Hale had worked for the Respondent since 1989. On the evening of April 13, as he and other employees were preparing to go to work at jobsites in the Richmond, Virginia, area, they learned from a union hotline that it was on strike against the Respondent. Hale, Steve Goad, and Jerry Greenwood drove to the Respondent's Richmond office to talk with their supervisor Tom Von Cannon. When they entered the office Von Cannon was on the telephone. He finished the call and asked what he could do for them. Greenwood asked about the strike and Von Cannon said that he had just learned about it. Von Cannon asked what they were going to do, were they going to resign from the Union and continue to work or go on strike, and said

[9] Mann candidly admitted that he did not get along with McDuffee who he felt tried to intimidate him. I do not find Mann's testimony that McDuffee said that employees who did not cross the picket line "would not" have a job and another time that they "may not" have a job detracts from his credibility. People often say that same thing more than once in different terms in the same conversation.

that he needed to know. Von Cannon told them that he had already resigned from the Union and had posted a copy of his resignation letter on a bulletin board which they could use as a guideline to prepare resignation letters. He gave them copies of his resignation letter. When they indicated that they were undecided, Von Cannon said that Grinnell would protect them and he had checked into it and that it would only cost them $14 to be reinstated with the Union if the strike ended. He said that if they wanted to remain employees of Grinnell and work the following Monday, they had to have their resignations in by 4:30 p.m. on Friday, April 15. Hale testified that he left the office, went to the jobsite to collect his belongings and went to his home near Roanoke. On Friday morning, Von Cannon telephoned him at his home to ask what he was going to do. He gave Hale a number to use to fax his resignation to the Union and called back a short time later with a corrected number. Von Cannon called back later in the day to ask if everyone had submitted their resignations and said they had to do so by 4:30 p.m. or they would no longer be employees of Grinnell. Hale faxed a letter of resignation to the Union that day but reconsidered over the weekend and decided to join the strike. He drove to Richmond on Monday and turned in his truck.

Hubert Mills also worked for the Respondent in Virginia under the supervision of Von Cannon. He testified that he was working on a job near his home in the Roanoke area on April 14 when he learned about the strike. The following day, he was told by his wife that Von Cannon had telephoned and said that he should "keep on working, that Grinnell had resigned his card." He also got a call from Von Cannon who said "I needed to resign my card, that it needed to be in by 4:30 p.m." He said that he wrote out and faxed a letter of resignation to the Union. He got the wording from a letter that Von Cannon had provided to Mills' cousin Jerry Greenwood to use as a guideline.

Von Cannon testified that he is currently employed by the Respondent in the sales and service area and had previously been a construction manager in its Richmond office for about 10 years. He had been a member of the Union but resigned his membership on March 27. He said that he first learned of the strike when Hale and other employees came to his office on the morning of April 13 and told him the had heard about it from a union hotline. They asked him what he was going to do. He told them he had already decided to remain with Grinnell and that he had sent resignation letter to the Union and the U.A. and posted copies in the office. He was asked how to go about resigning and he referred them to the posted copies of his letters. He told them they could copy the letter but had to use their own pencil and paper. He denied telling them that they had to resign from the Union in order to continue to work for Grinnell. He said that he did discuss whether they could continue to work with Grinnell and that he told them he wanted them to stay. They discussed the possibility of being fined if they continued to work and remained in the Union. In the discussion, Von Cannon told them how to go about resigning and referred them to his posted letter. He testified that he telephoned Hale at his home on Friday afternoon. Hale said that he had written a resignation letter and requested the Union's fax number. Von Cannon gave him the number and asked if he had heard from any of the other employees. He called Hale back with a corrected fax number but had no further discussion. On the following Monday, Hale and others came to the shop to turn in their trucks. Von Cannon was not asked about any coversations with Hubert Mills.

Analysis and Conclusions

Based on their demeanor while testifying and the content of their testimony, I credit Hale and Mills over Von Cannon. Their testimony establishes that on two separate occasions Von Cannon told employees that in order to continue working for the Respondent during the strike they had to resign from the Union. The evidence shows that Von Cannon provided copies of his resignation letters to Hale and Greenwood to be used as a guideline for them and other employees in drafting resignations from the Union. Greenwood, in turn, provided a photocopy to Mills who still had it and produced it at the hearing. I find this completely undermines Von Cannon's credibility as he testified that had not given anyone copies of his letters or allowed them to be copied except by hand. Consequently, I did not believe his testimony that his remarks about resigning were made only in answer to employees' questions about what they could do to avoid being fined by the Union. Moreover, the fact that Von Cannon gave both Hale and Mills a deadline of 4:30 p.m. on Friday, April 15, by which to have their resignations in to the Union if they wanted to work on Monday and called both on that date to make sure that they met the deadline indicates that resignation was a prerequisite to their continuing with the Respondent. The fact that Hale testified that he knew that whether or not he should resign from the Union was his choice does not exonerate the Respondent. The Board uses an objective standard in evaluating such statements and the employees' subjective reactions are irrelevant. E.g., *Maremont Corp*., 294 NLRB 11 (1989); *Emerson Electric Co*., 247 NLRB 1365 (1980). The Respondent violated Section 8(a)(1) by Von Cannon's telling employees that they had to resign from the Union in order to continue working for it. *Becker's Glass Shop*, 285 NLRB 789, 794 (1987).

F. Alleged Statements by Joe Christenbury

Charles Turnage testified that he worked for the Respondent in North Carolina since 1988. On April 13, after he learned about the strike, he and other employees on his crew returned to the Grinnell office in Fayetteville to turn in his equipment. There were several other employees present who filling out resignation forms provided by the company secretary and faxing them to the Union. Supervisor Douglas Barnes asked Turnage and another employee what they were going to do. Turnage said he had not made up his mind and Barnes said to let him know by Monday. As he was leaving, Foreman Greg Leslie told him to call District Manager Joe Christenbury to find out what to do. On the morning of April 14, he called Christenbury at his office in Charlotte and asked what he should do because he needed to work. Chistenbury indicated that he was familiar with the "day work" Turnage was doing and told him that he would have to resign from the Union in order to come back to work, specifically, "they hoped to see me Monday, but if I did not resign, I would not have a job Monday." They discussed the fact that the Union could fine him if he worked during the strike and Christenbury told him it was up to him to decide whether or not to resign. Christenbury also told him that if he were to resign he could become a foreman and get a company truck and answered questions concerning the benefits the Respondent would provide if he returned to work. Turnage did not resign and stayed on strike.

Christenbury testified that he talked by telephone with approximately a dozen employees concerning the strike during the first few days but that he did not remember speaking with

Turnage. He said that he was familiar with the Respondent's Red Book policies concerning what supervisors could and could not do during the strike and that he did not make any promises to anyone and did not tell anyone that he had to resign from the Union in order to keep his job with Grinnell.

Analysis and Conclusions

I found Turnage's detailed testimony concerning how he came to speak with Christenbury and what was said during their conversation to be more credible than Christenbury's lack of recollection as to whether the conversation ever occurred. I find that Christenbury told Turnage he had to resign from the Union in order to continue to work for the Respondent and promised him additional benefits if he did so in violation of Section 8(a)(1).

G. Employment Questionnaire

The complaint alleges that, between October 1993 and April 1994, the Respondent maintained a form which unlawfully queried applicants regarding their union status and sympathies. The Respondent does not dispute that the questions "Have you ever belonged to a union?" and "What are your feelings in regards to joining a union?" contained on the form are unlawful but contends that it was never used as a basis for selecting or rejecting applicants all of whom were referred to it for employment by the Union and that it constitutes a de minimus technical violation of the Act. The only testimony about it was from Larry Claggett, who worked for the Respondent as a construction superintendent in Oklahoma beginning on 1990 until March 1994 when he was required to choose between continuing in supervision or remaining a member of the Union and opted for the latter. He testified that while a supervisor he used the form in interviewing applicants for employment as apprentices and he asked the above-quoted questions of everybody he interviewed. He said that there was never a situation where he did not hire someone because of negative answers to those questions or where the Union rejected an applicant to its apprentice program. In his brief, counsel for the General Counsel acknowledges that the only use of the questionnaire established in the record was "benign" and that its use has been discontinued, but requests that a violation be found because over the years the damage has been done. In the absence of any evidence that the questionnaire was ever used for an improper purpose, I find under the circumstances there is nothing to be gained by finding a violation. I shall recommend that this allegation be dismissed.

H. Alleged Retaliatory Lawsuit

During the hearing, this matter was consolidated with a new unfair labor practice complaint alleging that the Respondent had violated Section 8(a)(1) by filing and prosecuting a lawsuit seeking, inter alia, declaratory and injunctive relief and damages against the Union and the U.A., in the united district court for the district of Maryland. The complaint in that action contains seven counts, the first four of which allege, inter alia, that the defendants have violated federal antitrust and labor statutes by engaging in a conspiracy against the Respondent and by denying it the opportunity to participate in targeting and by conducting an unlawful strike against it. Counts v, vi, and vii allege that the defendants' actions have also violated state laws prohibiting tortious interference with contracts and prospective business relations and defamation. The unfair labor practice complaint alleges that the Federal court lawsuit was filed and maintained in retaliation against activity protected by the Act. It alleges that counts v, vi, and vii of the Federal court lawsuit are baseless. The General Counsel contends that further prosecution of these counts should be enjoined under the United States Supreme Court's holding in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), that the prosecution of an improperly motivated suit lacking a reasonable basis constitutes a violation of the Act that may be enjoined by the Board. He also asserts that, should any or all of the first four counts be finally adjudicated as lacking in merit or withdrawn, that part of the Federal lawsuit, too, should be found be retaliatory and baseless and violative of Section 8(a)(1). As yet, there has been no final adjudication or withdrawal of any part of the Federal court lawsuit. Consequently, under *Bill Johnson's*, a ruling on the unfair labor practice complaint concerning counts i through iv, which are not alleged to be baseless, must be stayed pending a resolution in the Federal court action. See *Dahl Fish Co*., 279 NLRB 1084, 1105 (1986).

As for counts v, vi, and vii, the Respondent argues that the lawsuit must be considered as a whole as they are inextricably intertwined with the other counts and that, if those counts are not clearly baseless, the Board cannot enjoin any part of the suit. In similar circumstances, the Board has enjoined an employer from prosecuting specific portions of a lawsuit found to be preempted by Federal labor law while deferring action on others that were not and as to which there existed genuine issues of fact and interpretations of state law to be resolved. See *Manno Electric,* 321 NLRB 278 (1996). Although *Bill Johnson's* involved a state court lawsuit, its rationale would appear to apply to the present Federal court action. See *Diamond Walnut Growers*, 312 NLRB 61, 69 (1993), and *Electrical Workers IBEW Local 532 (Brink Construction)*, 291 NLRB 437, 442 (1988). In *Bill Johnson's*, the Court held that, in making a prejudgment evaluation as to whether the lawsuit has a reasonable basis, the Board is not limited to a review of the pleadings, but if there is a genuine issue of material fact that turns on credibility of witnesses or the proper inferences to drawn from undisputed facts, it cannot be concluded that the suit should be enjoined. The Court left it to the Board's discretion as to how it should go about determining whether there is a genuine issue of fact but it also suggested that a procedure similar to that employed in Federal civil practice concerning Motions for Summary Judgment might be employed when appropriate. Given the national scope of the strike and the voluminous evidentiary record that had already been developed, that procedure seemed particularly appropriate and was applied here.

In the case of the Respondent's claims of tortious interference based on the Union's nationwide strike, its claims would not be subject to Federal preemption if they were based on actions that involved violence. *Mine Workers v. Gibbs*, 383 U.S. 715 (1966); *United Construction Workers v. Laburnum Construction Corp*., 347 U.S. 656 (1954). The Respondent has submitted a number of uncontradicted affidavits attesting to acts of violence and vandalism allegedly arising from actions of strikers. While none is sufficient to establish or to raise a genuine issue of fact on the claim that the Union was responsible for the acts of vandalism by unidentified perpetrators or the incidents involving alleged threats and violence by union members away from union sponsored picket lines, they do describe alleged incidents of violence and intimidation occurring at picket lines established by the Union during the strike. The affidavit

of Elaine Keeler describes an incident in which pickets at the Grinnell office in Toledo, Ohio, surrounded the vehicle in which she and her 2-year-old son were riding, blocked its egress from the parking lot and beat on the vehicle with their signs. It alleges that at other times pickets have photographed and written down the license plate numbers of employees and others entering the office. The affidavit of Bob Craig describes a threat of injury and the brandishing of a knife to him by a union member picketing at the Grinnell office in Toledo and an incident in which pickets threw rocks at two employees and their truck, striking one in the face. The affidavit of Jim Schwander describes an incident at a Grinnell jobsite in Wilmington, Delaware, in which pickets prevented delivery trucks and a train from entering. These affidavits, if substantiated, would establish violent and intimidating picket line activity which is not protected by the Act, i.e., blocking an employee's egress from the Employer's facility, *Carpenters (Reeves, Inc.)*, 281 NLRB 493 fn. 3 (1986), throwing objects at vehicles and their occupants, *Lumber Workers Local 3171 (Louisiana-Pacific)*, 274 NLRB 809, 814 (1985), brandishing a weapon, *Railway Carmen Local 543 (North American Car Corp.)*, 248 NLRB 285 (1980), and photographing individuals and copying license plate numbers, *Plastic Workers Local 18 (Grede Plastics)*, 235 NLRB 363, 383 (1978). Where a union authorizes a picket line it must maintain control over the picketing or bear responsibility for misconduct that occurs there. See *Boilermakers, Local 696 (Kargard Co.)*, 196 NLRB 645, 647–648 (1972). Whether or not the Union was aware of such picket line misconduct, failed to act to prevent it, and, thus, bears responsibility for it, present issues of fact that cannot be resolved in this proceeding. The defamation count of the Respondent's suit is not preempted if defamatory statements attributable to the defendants were malicious and caused it damage. *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966). Malice is to be determined in accordance with the rule adopted *in New York Times v. Sullivan*, 376 U.S. 254 (1964), which requires a showing that the statements were false and uttered with knowledge of their falsity or with reckless disregard of whether they were true or false. In the Respondent's lawsuit there are numerous claims of damage caused by statements circulated by the defendants through a nationwide direct mail campaign. It asserts that the statements falsely accused it of using inadequately trained or unskilled workers to perform its work during the strike which resulted in substandard and dangerous installations. An affidavit by Grinnell official Michael Buchanan asserts that its replacement workers were fully trained and properly supervised and deposition testimony of Union Trustee Preuett acknowledges that there were several areas where, during the strike, Grinnell was performing work with union fitters from other local unions with jurisdiction in those areas. This alone raises a genuine issue of fact on the question of malice that can only be resolved in the Federal lawsuit.

3. Section 8(a)(3) and (1)

A. Layoff of Christopher Cooper

As discussed above, in March, Supervisor Gary McDuffee unlawfully coerced Christopher Cooper by calling him a troublemaker and threatened to lay him off because he insisted that he receive subsistence pay due him under the collective-bargaining agreement. On April 8, a week after Cooper was paid the money he was due in settlement of his subsistence pay grievance, McDuffee informed him that he was being laid off. Cooper asked why and was told to read the form he was given which said it was due to lack of work. Cooper testified that the Hazel Green job on which he was working at the time had not been completed and as far as he knew there was plenty of work. The complaint alleges that Cooper's layoff was discriminatory and unlawful. The Respondent contends that Cooper was lawfully laid off due to lack of work.

Analysis and Conclusions

In cases where an employer's motivation for taking certain actions is in issue, those actions must be analyzed in accordance with the test outlined by the Board in *Wright Line*, 251 NLRB 1083 (1980) enfd. 662 F.2d 800 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved *in NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). This true even where the alleged reasons for its actions are found to be pretextual. *Bridgeway Oldsmobile*, 281 NLRB 1246 fn. 2 (1986); *Jefferson Electric Co*., 271 NLRB 1089, 1090 (1984). Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support the inference that protected activity was a motivating factor in the employer's decision. Once that has been done, the burden shifts to the employer to establish that it would have taken the same action even in the absence of protected activity.

I find that the General Counsel has made out a prima facie case that Cooper was laid off because of protected activity on his part. Cooper's availing himself of rights under the collective-bargaining agreement was protected activity under the Act. E.g., *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984); *Interboro Contractors*, 157 NLRB 1295, 1298 (1966). McDuffee had knowledge of Cooper's protected activity because he was directly involved in the resolution of Cooper's grievance over the subsistence pay. He also demonstrated animus by initially refusing to grant Cooper's request for compliance with the contract, even though he apparently did not dispute that Cooper was entitled to the subsistence pay, and by his coercive statements and threats which violated Section 8(a)(1). The timing of an action can be persuasive evidence of its motivation. *Limestone Apparel Corp*., 255 NLRB 722, 736 (1981). Cooper's layoff came shortly after McDuffee's threat to lay him off and within a week of his payment of the disputed amount. Finally, the strongest evidence of the motivation involved here is in the words of McDuffee who threatened Cooper with a layoff if he persisted in his claim for the subsistence pay.

I also find that the Respondent has not established that it would have taken the same action even in the absence of protected activity on Cooper's part. The Respondent relies on the testimony of McDuffee that there was not enough work and that he did not want to lay off someone who had been hired in Huntsville instead of Cooper who had come from Birmingham. I did not believe him. First, the evidence shows that McDuffee retained apprentice Shannon Carroll when he laid off Cooper. Carroll, like Cooper, originally worked in Birmingham where he resided and had come to work in Huntsville only a couple of weeks before, while Cooper had been working there since January. McDuffee also claimed that he kept Carroll instead of Cooper because he did not have to pay him subsistence pay and because Carroll was a better employee. The only reason Carroll was not entitled to subsistence pay for commuting from Birmingham was that he was riding in a company truck with Foreman Sam Muncher, with whom he was working, while Cooper would have had to drive his own vehicle. However,

this was the same thing that Cooper had done when he first started working in Huntsville and rode with Muncher. McDuffee offered no reasons for his statement that Carroll was more qualified than Cooper, who had been working for the Respondent since 1989, and there is nothing in the record to support his claim. As noted above, I did not consider McDuffee to be a credible witness and I find that the reasons he gave for laying off Cooper were pretexts. I find that he was laid off in retaliation for having insisted on being paid the subsistence pay to which he was entitled under the contract. Accordingly, I find that the Respondent violated Section 8(a)(3) and (1) by laying off Cooper on April 8. *Lowe Paper Co*., 302 NLRB 622 (1991); *Howard Electric Co*., 285 NLRB 911, 913 (1987).

B. Alleged Discharge of Strikers

After the Union's March 22 strike notice was issued, the Respondent's president, Boggess, sent a letter to all employees describing what had occurred during the contract negotiations and summarizing Grinnell's contract proposal. The letter also states:

> Believe me when I say that Grinnell does not want a strike. Unfortunately, whether or not there is a strike is out of our control. If there is a strike, you should know that we will exercise our legal right to operate our business. You and other Grinnell employees also have a legal right to work. If it is necessary, Grinnell will hire permanent replacements to get our work done. We owe that to our customers and to those employees who want and need to work.

On March 28, Boggess sent another letter to employees in which he referred to the strike notice and stated, inter alia:

> You have a legal right to work during a strike and no one can prevent you from doing so. If you are a union member, however, you may be fined if you cross a picket line. But, you cannot be fined if you resign your membership and then cross a picket line. You should also know that if the strike ends and you have resigned, the Union cannot prevent you from working for Grinnell, nor for any other union contractor so long as you pay your union dues where dues are required.
>
> If some of our employees choose to strike, Grinnell will hire permanent replacements to do that work. If the strike ends, permanent replacements have a legal right to keep their jobs as long as they choose to do so. Striking employees have a right to return to work only if Grinnell has job openings or if job openings should arise in the future.

The Union went out on strike on the night of April 12. On April 13, Boggess sent a letter to all employees stating that the Respondent and the Union were unable to reach an agreement and were at impasse and that it was implementing the terms of its final offer. It also states:

> We just learned that the Union has called a strike against Grinnell. Although the Union has the right to strike, Grinnell has the right to run its business. Grinnell must do so in order to meet its commitments to its customers and to keep those customers from going elsewhere. We also have an obligation to those employees who want to work.
>
> Each of our employees has the right to work and may do so even though a strike has been called. As we told you before, if you are a union member and you choose to work, you may be fined unless you resign your membership. If you resign you may not be fined. Also, if the strike ends, you will have the right to continue working for Grinnell so long as you pay your dues.
>
> If some of our employees strike, we will hire permanent replacements to perform our work. Permanent replacements have the right to work even if a strike ends.

The complaint alleges that by these statements to employees, the Respondent threatened the employment status of its employees who engaged in the strike in violation of Section 8(a)(3) and (1).

The General Counsel contends that under the Board's decision in *Noel Corp*., 315 NLRB 905 (1994), the Respondent effectively terminated any employee who joined the strike by telling them that, if they did so, they would be permanently replaced at a time when it had not actually hired replacements for all potential strikers. The Respondent contends that the statements concerning permanent replacements in Boggess' letters were truthful and lawful expressions of its intent to hire replacements should it need to do so in order to operate. It also contends that this allegation is untimely and barred by Section 10 (b) of the Act.

Analysis and Conclusions

It was not necessary for these charges to specify the exact nature of the violation or the legal theories which might support it. The function of a charge is not to give the employer notice of a specific claim against it, but to draw "the Board's attention to a cause for economic disturbance." *Redd-I, Inc*., 290 NLRB 1115, 1117 fn. 12 (1988). In *NLRB v. Fant Milling Co*., 360 U.S. 301, 307–308 (1959), the Supreme Court stated that the Board's inquiry is not confined "to the specific matters alleged in the charge" and that

> Once its jurisdiction is invoked the Board must be left free to make full inquiry under its broad investigatory power in order properly to discharge the duty of protecting public rights which Congress has imposed upon it. There can be no justification for confining such an inquiry to the precise particularizations of a charge.

I find that this allegation is encompassed within the amended charges filed by the Union on June 14 and 30. Both were within 6months of the dates the letters were sent and allege, inter alia, violations of Section 8(a)(1), (3), and (5) of the Act by "informing employees that they will be terminated if they engage in a strike" and "discharging and/or disciplining employees for engaging in activities protected by Section 7 of the Act." It meets the requirement that a "complaint allegation be related to and arise out of the same situation as the conduct alleged to be unlawful in the underlying charge, although it need not be limited to the specific violations alleged in the charge." *Nickles Bakery of Indiana*, 296 NLRB 927 (1989).

I also find that the factual situation involved here is sufficiently different from that in *Noel Corp*. as to make it inapplicable. There, the crucial factors were that less than 2 hours before the time the strike was scheduled to start a supervisor told employees that striking employees would be permanently replaced and that the employer had already hired permanent replacements when it had not done so. Unlike *Noel Corp*. and

American Linen Supply Co[10]. and *Mars Sales & Equipment Co*.[11] on which it is based, here, there was no false statement by the employer that permanent replacements had been hired when in fact they had not. The statements in Boggess' prestrike letters that employees are subject to permanent replacement in the event of an economic strike did not violate the Act. See *Eagle Comtronics, Inc*., 263 NLRB 515 (1982). In the case of his letter of April 13, the situation is factually closer to that in *Chromalloy American Corp*.[12] where the Board found no violation by the employer when it sent employees, who were already on strike, a letter telling them if they did not return to work by a certain date it would take necessary steps to obtain permanent replacements. In Boggess' letter, which spoke in terms of an economic strike, there was no mention of a deadline and nothing to indicate that replacements had already been hired or that the process of hiring replacements had begun. The Respondent's poststrike letter did not "effectively terminate" striking employees but it did, as the complaint alleges, threaten their employment status in violation of Section 8(a)(1) by implying that employees who were participating in what was an unfair labor practice strike could be permanently replaced. *See Cagle's Inc*., 234 NLRB 1148, 1149 (1978).

C. Alleged Implementation of Better Terms Than in Final Offer

The complaint was amended during the hearing to allege that the Respondent violated Section 8(a)(5), (3), and (1) when, following implementation of the terms of its final contract offer, it paid certain employees higher wage rates than provided in that offer.

The complaint amendment followed the testimony of some employees, called as witnesses by the Respondent concerning other issues, that when they worked for the Respondent after the strike they were paid the same wage rate called for in the old expired contract. Mike Munoz testified that he went out on strike but later returned to work for the Respondent as a fitter in June. He said that when he returned to work he was paid the same wage rate as before he left. He called Dwight Green to see about returning to work but they did not discuss wages. He said that his testimony that he was paid the same rate as before the strike was based his assumption that he would be paid the same amount. Cliff Thompson testified that he joined the strike at the start but returned to work in May. He said that he called Green who offered to put him to work at the same wage rate as under the old contract. Wayne Gordon testified that he had been a construction superintendent for the Respondent for 17 years in Spokane, Washington. He had been a member of the Union, but quit in 1994 in order to continue in his supervisory position. In January 1995, he was removed from that position and has since worked as a fitter/foreman. He testified in answer to a leading question on cross-examination that since he began working as a fitter/foreman he has been paid the same rate as in the expired collective-bargaining agreement. Also, Joe Christenbury, the Respondent's district general manager in Charlotte, North Carolina, testified during cross-examination that employees who worked during the strike were paid the same wage rate as before the strike started.

Analysis and Conclusions

In the case of Munoz and Thompson, I find their testimony was so vague and lacking in detail as to the jobs they worked on and the amounts they were paid as to be insufficient to support a finding of a violation. Green denied that they were paid more than the rate contained in the Respondent's final offer. Without knowing what they were actually being paid it is impossible to conclude that they were getting more than the rate provided in the final contract offer. Similarly, I find Gordon's testimony, a single answer to a leading question, without more, is insufficient to establish that, while working as a fitter, he was in fact paid a wage rate that was more than that provided in the final contract offer.

Christenbury was recalled to testify further about this issue and said that after the strike began 29 of 60 employees stayed on the job in his district. His testimony and the records he produced show that of these 29 "crossovers," 11 were apprentices and 2 were journeymen who continued to work as fitters and were paid 80 percent of their previous rate in accordance with the terms of the implemented offer. About half of the remaining 16 crossovers had been foremen before the strike and continued as such after it commenced, while the other half were made foremen and all were paid the same rate foremen were paid under the old contract. He admitted that in some cases two or more of these "foreman" worked on the same job at the same time even though under normal circumstances there would only have been one foreman on the job. He also explained the reasons why this occurred. He had pipe on the ground that needed to be installed, he had "customers screaming" and he had only about half of his normal workforce to do the work. As discussed above, Christenbury offered similar inducements, foreman's wages and a company vehicle, to Charles Turnage in an attempt to persuade him to cross the picket line. I find that this evidence supports the inference that after the strike began the Respondent offered and paid foreman's wages[13] to as many as eight journeymen who at times were doing fitters' work, not foreman's, in order to induce them to stay on the job and not go on strike. By offering these employees better wages than offered in the Respondent's last contract proposal it violated Section 8(a)(5) and (1). See *Central Management Co*., 314 NLRB 763, 767 (1994). By paying better wages to employees who abandoned the Union and worked during the strike, it discriminated in their favor and discouraged membership in the Union in violation of Section 8(a)(3). See *General Clay Products Corp*., 306 NLRB, 1046, 1052–1053 (1992).

D. Alleged Failure to Recall Employees from Layoff

The complaint alleges that in April 1994 the Respondent violated Section 8(a)(3) by failing to recall from layoff six employees at its Indianapolis, Indiana fabrication plant because of their activity and support for the Union.

The evidence shows that some of the employees at the Indianapolis plant were represented by the Union but were covered by a different collective-bargaining agreement than the sprinkler fitters. When the fitters went on strike, the fabricators honored a picket line set up at the Indianapolis plant for 2 days

[10] 297 NLRB 137 (1989), enfd. 945 F.2d 1428 (8th Cir. 1991).

[11] 242 NLRB 1097 (1979), enfd in pertinent part 626 F.2d 567 (7th Cir. 1980).

[12] 286 NLRB 868 (1987) enf. denied on other grounds 873 F.2d 1150 (8th Cir. 1989).

[13] This was the full journeyman's rate under the old contract, plus an additional $1.50 per hour foreman's pay. Under the Respondent's final offer journeymen were to receive 80 percent of the rate in the old contract. Consequently, the eight new "foremen" were being paid $17.53 per hour instead of the $12.82 called for in the final contract offer.

and then returned to work. John Gates testified that he was an employee at the fabrication plant and was on layoff when the strike began. On April 18, he made his weekly call to the plant to see if there was any work and was told by Grinnell official Don Smith that he no longer had a job and that he had been "terminated" and "replaced with replacement workers." Gage asked if he had been fired and Smith said he had been fired. Gage asked about coworker Todd Shelton who was also on layoff and was told that he had also been "replaced." On the afternoon of April 19, Gage was called by Plant Manager Jesse Salmon who told him to report for work on the day shift on the following day. When he arrived at the plant in the morning, Salmon told all the union workers to come to the dock and the others to go to work. Salmon began calling out names and assigning employees to different shifts. When he got to Gage, he told him there was no work for him and he should go home. Gage asked if he was fired and Salmon responded that he was temporarily laid off. On April 22, Gage got a letter from Salmon, dated April 15, telling him to report for work on April 18. He called Salmon after receiving the letter and was told there was no work for him. He called the plant several times thereafter but was told there was no work for him. He has not worked there since. On cross-examination, Gage said that in their April 18 conversation Smith told him he had been terminated for not coming to work and asked him if he had received a letter. In the April 19 conversation, he asked if he was fired and Salmon said, "No you haven't, show up for work tomorrow morning." He testified that in June Salmon called and asked if he was interested in returning to work and he said he was not. Todd Shelton gave similar testimony that he was on layoff when the strike started, that he went into the plant a few days later after receiving a letter telling him to do so and that he was told by Salmon that he had been "terminated" and "replaced by replacement workers." In June, he was called and offered a job by Salmon which he declined. Wallace Marcum testified that he has worked at the fabrication plant since 1989. In early April, he was laid off from the day shift. After 2 weeks he was called back and told to report on a Monday morning. When he got to the plant there were six replacement workers present and they went to work on the day shift. Marcum was assigned to the second shift by Salmon, who told the other workers who were present to go home that they were laid off and permanently replaced. None of these three employees participated in picketing at the plant.

Salmon credibly testified that, on April 13, the plant operated as usual but, on April 14, there was a picket line and no one appeared for work. On Friday, April 15, he interviewed replacement workers and sent letters to approximately 12 employees on layoff telling them to report for work on Monday, April 18. On Monday, many of the striking fabricators came into work along with three replacements he had hired and he had too many people. After conferring with his superior, Don Smith, he called all the employees to the shipping dock. He told employees that the three employees with the least seniority, Bundren, Kemp, and Gates, had been replaced and would be placed on a preferential recall list and told the others to report to the night shift. On April 19, the picket line was up, the regular employees did not report for work and he hired three more replacement workers for a total of six fabricators. On the following morning, the regular fabricators again reported for work and he had too many employees. He read off the names of six with the least seniority, Bundren, Kemp, Gates, Shelton, Hardy, and Vest, and said that they had been replaced and were placed on a preferential recall list. Of those employees, he remembered only Gates as being present. Gates left the plant with those employees who were assigned to the night shift. Salmon testified that Shelton showed up for work on April 21 and he told him he had been replaced and put on a preferential recall list. He denied telling Shelton that he had been terminated. Smith credibly denied ever having a telephone conversation with Gates.

Analysis and Conclusions

The General Counsel's brief does not contain any discussion concerning his legal theory or authority in support of a finding that the Respondent violated the Act by failing to recall the six named employees from layoff. The evidence in support of the allegation is disjointed and fragmentary at best. It appears that when its fabrication employees honored the Union's picket line and failed to report for work the Respondent hired six permanent replacements. When an undetermined number of the striking workers offered to return to work, they were permitted to do so. As a result, there was not enough work to require the recall of all of the at least 12 fabrication employees then on layoff. At least one, Marcum, and possibly more of those on layoff were recalled. The fact that the six named employees were not also recalled does not establish that there were jobs available for them or that the failure to recall them was because of protected activity on their part. There is no evidence to establish, nor any reason to believe, that if there had not been a strike on April 13 that the fabrication employees honored on a couple of days, they would have been recalled at that time. I shall recommend that this allegation be dismissed.

CONCLUSIONS OF LAW

1. The Respondent, Grinnell Fire Protection Systems Company, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union and the U.A. are labor organizations within the meaning of Section 2(5) of the Act.

3. All journeymen sprinkler fitters and their apprentices employed by Grinnell Fire Protection Systems Company, but excluding all other building tradesmen, clerical, office and supervisory employees, as defined by the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material, the Union has been the exclusive representative of all employees employed in the above-described unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, within the meaning of Section 9(a) of the Act.

5. The Respondent violated Section 8(a)(1) of the Act by coercing an employee by calling him a troublemaker and telling him he would be laid off for pursuing a grievance; telling employees that they would lose their jobs if they refused to cross a picket line; telling employees that they had to resign from the Union in order to continue working for it; by promising an employee additional benefits if he did so; and by sending letters to employees implying that employees who were participating in what was an unfair labor practice strike could be permanently replaced.

6. The Respondent violated Section 8(a)(3) and (1) of the Act by laying off employee Christopher Cooper in retaliation for his having insisted on being paid subsistence pay to which

he was entitled under the collective-bargaining agreement and by paying better wages than offered to the Union to employees who abandoned the Union and worked during the strike.

7. The Respondent violated Section 8(a)(5) and (1) of the Act by on and after April 13 refusing to meet and bargain in good faith with the Union; on or about April 14 unilaterally changing terms and conditions of employment by implementing its final contract offer when there was no impasse in bargaining; and offering employees better wage rates than contained in its final contract offer to the Union.

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

9. The strike that commenced on or about April 12 is an unfair labor practice strike.

10. The Respondent did not engage in the unfair labor practices alleged in the complaint not specifically found here.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, 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.

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act by unlawfully implementing the terms of its last contract offer in the absence of a lawful impasse, I shall recommend that it ordered to restore the terms and conditions of employment of unit employees as they existed prior to April 14, 1994, continue them in effect until the parties reach an agreement or a good-faith impasse and make whole all employees for all losses they may have suffered as a result of its unlawful conduct, computed as prescribed *in Ogle Protection Service*, 183 NLRB 682 (1970), with interest computed as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1973).

Having found that the Respondent discriminatorily laid off employee Christopher Cooper, I shall recommend that it be ordered to offer him immediate reinstatement and make him whole for any loss of earnings and other benefits, computed as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, supra.

[Recommended Order omitted from publication.]