Waxie Sanitary Supply *and* Building Material, Construction, Industrial, Professional and Technical Teamsters, Local No. 36, International Brotherhood of Teamsters, AFL–CIO. Cases 21–CA–32812, 21–CA–32893, and 21–CA–33185

December 20, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On February 9, 2000, Administrative Law Judge Burton Litvack issued the attached decision. The General Counsel and the Respondent filed exceptions, briefs in support of exceptions, answering briefs, and reply briefs. The Respondent filed objections to the General Counsel's exceptions and the Charging Party filed a brief in opposition to the Respondent's exceptions.

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] only to the extent consistent with this Decision and Order.[3]

1. The judge found that the Respondent did not violate Section 8(a)(5) and (1) of the Act by delaying execution of an agreed-upon collective-bargaining agreement for one day from August 13, until August 14, 1998,[4] for review by the Respondent's attorney and signature by the Respondent's president. The General Counsel excepts to this finding. We reject the General Counsel's contentions and affirm the judge's finding.

The judge also found that the Respondent violated Section 8(a)(5) and (1) by delaying execution of the agreement an additional 33 days from August 14 until September 16. The Respondent excepts to this finding, contending, inter alia, that its delay in executing the agreement was excused by (1) a good-faith doubt regarding the Union's continued majority status and (2) a need to seek legal advice regarding the impact of the August 14 decertification petition upon its bargaining obligation. We reject the Respondent's contentions.

The Respondent's good-faith doubt contention is defective, both procedurally and substantively. The Respondent failed to raise or litigate the contention before the judge. Accordingly, evidentiary issues relevant to the contention have not been fully or fairly explored, and the Respondent may not press the contention before the Board. *International Paper Co.*, 319 NLRB 1253, 1276 (1995), enf. denied 115 F.3d 1045 (D.C. Cir. 1997). In any event, the record shows that the parties reached full agreement on the terms of the contract at the conclusion of the August 13 negotiating session, before the August 14 filing of the decertification petition. The decertification petition by itself did not provide a basis for a good-faith doubt of the Union's continued majority status and did not privilege nonexecution of the contract. See *Flying Dutchman Park, Inc.*, 329 NLRB 414, 417 (1999).

The Respondent also contends that its delay in executing the agreement was excused by a need to seek legal advice regarding the impact of the August 14 decertification petition upon its bargaining obligations. We reject this contention. The Respondent did not support its contention with sufficient evidence—that is, evidence showing specifically when it sought legal advice, who sought the advice, what advice was sought, and when the requested advice was received. Instead, the Respondent's evidence shows only that unidentified Respondent officials discussed the general situation with legal counsel at unspecified times between August 14 and September 16.

The Respondent's reliance on *Massey-Ferguson, Inc.*, 184 NLRB 640, 644 fn. 6 (1970), is misplaced. There, the employer immediately notified the union that it was suspending bargaining to obtain legal advice regarding the impact of a decertification petition. Furthermore, the judge in *Massey-Ferguson* found that notwithstanding the employer's request to suspend bargaining while it sought legal advice, the employer there violated the Act when it refused the union's request 8 days later to resume bargaining. Here, by contrast, there is no evidence that the Respondent cited its purported need to obtain legal advice when it delayed signing the admittedly acceptable contract on August 14, and the Respondent continued to refuse union requests made 7, 19, and 20 days later to sign the contract.

2. The judge found that the Respondent's holiday bonus was not a term of employment and concluded that therefore the Respondent did not violate its bargaining obligation by its admitted unilateral discontinuance of

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

[2] No exceptions were filed with regard to the judge's findings and conclusion that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally discontinuing the Respondent's driver safety bonus program. No exceptions were filed to the judge's findings and dismissal of complaint allegations that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally discontinuing a practice of allowing employees to use the Respondent's vehicles to train for a commercial driver's license or by refusing to execute a collective-bargaining agreement from July 21, 1998, through August 13, 1998.

[3] We will modify the judge's recommended Order in accordance with our decisions in *Ferguson Electric Co.*, 335 NLRB 142 (2001), and *Excel Corp.*, 325 NLRB 17 (1997).

[4] All dates hereafter are in 1998, unless otherwise specified.

the bonus. The General Counsel excepts to this finding and conclusion. For the reasons stated below, we find merit in the exception and conclude that the Respondent violated Section 8(a)(5) and (1) by discontinuing the holiday bonus without first providing the Union notice and an opportunity to engage in meaningful bargaining regarding the decision.

Since at least 1995, the Respondent maintained a holiday bonus program entitled "All Sell All Grow." The bonus program was described in detail in a handout distributed to new employees. According to the handout, bonuses would be paid if gross profits increased more than 7.5 percent compared to the preceding year. An employee's projected bonus amount would be a specified percentage of the employee's annual salary. The specified percentage varied according to the percent increase in the Respondent's gross profits. The employee would receive at least 70 percent of the projected bonus amount. Finally, the employee would receive the remaining 30 percent of the projected bonus amount at the discretion of the employee's manager. The handout also contained a table listing percent increases in gross profits (7.5 to 25 percent) and, for each listed percent increase, the corresponding specified percentage to be used in calculating the bonus. The Respondent posted monthly gross profit information in the employee lunchroom so that employees could monitor the size of the anticipated bonus throughout the year. The Respondent paid the bonus at the annual Christmas party. Employee witnesses received bonuses ranging from $25 to $571 between 1995 and 1997.

An employer must bargain with the union before changing existing terms and conditions of employment. *NLRB v. Katz*, 369 U.S. 736, 742 (1962). A holiday bonus is a mandatory bargaining subject if the employer's conduct raises the employees' reasonable expectation that the bonus will be paid. *Sykel Enterprises*, 324 NLRB 1123, 1124–1125 (1997); *Laredo Coca-Cola Bottling Co.*, 241 NLRB 167, 173–174 (1979), enfd. 613 F.2d 1338 (5th Cir. 1980), cert. denied 449 U.S. 889 (1980). Here, the Respondent's conduct caused employees to reasonably expect payment of the bonus. The bonus had been paid for at least 3 consecutive years, was determined pursuant to a specific formula, and was described in detail in a handout distributed to new employees. Furthermore, the Respondent posted monthly profit figures in the employee lunchroom so that employees could chart the prospective size of the holiday bonus during the year.

The judge's critical finding—that the bonus was not a term of employment—was based in part on the fact that payment of the bonus was dependent upon the Respondent attaining a specified minimum percentage increase in gross profits. However, an employer's conduct can create a reasonable employee expectation that a bonus will be paid even where the bonus is dependent in whole or in part upon the employer's profit. *Sykel Enterprises*, supra at 1124 (bonus based in part on "how the Company operated that year"); *Laredo Coca-Cola Bottling, Inc.*, supra at 173 (bonuses paid "because sales were high"); *Phelps Dodge Mining Co.*, 308 NLRB 985, 987, 1000 (1992), enf. denied 22 F.3d 1493 (10th Cir. 1994) (bonuses "linked to the current overall profitability"). See also *Gas Machinery Co.*, 221 NLRB 862, 865 (1975) (employer's financial condition and ability to pay not factors in determining whether bonus is bargainable subject).

The judge's critical finding—that the bonus was not a term of employment—was also based in part upon his factual finding that the bonus was not based on employee performance. However, this factual finding is not supported by the record evidence. To the contrary, the Respondent's employee handout describing the bonus as well as Respondent Vice President Kay's testimony show that an employee's department manager could withhold up to 30 percent of the employee's bonus based on the employee's performance. In any event, a bonus can be a term of employment regardless of whether it is based on employee performance. See, e.g., *Laredo Coca-Cola-Bottling Co.*, supra at 174 (bonus based on employee earnings); *Phelps Dodge Mining Co.*, supra at 1000 (bonus based on employee pay rates or hours worked); *Woonsocket Spinning Co.*, 252 NLRB 1170, 1172 (1980) (bonus based on employee hours worked and years with employer).

In its answering brief before the Board, the Respondent renews its contention that the Union waived its right to bargain regarding the holiday bonus.[5] However, the subject of the holiday bonus was not discussed during the negotiations leading to the collective-bargaining agreement. Nor was the subject addressed in the agreement itself. Accordingly, we reject the Respondent's waiver contention as not supported by the evidence.

In support of its waiver contention, the Respondent relies upon the management-rights clause in the agreement.[6] However, the clause does not refer, either directly

[5] Having found that the holiday bonus was not a term of employment, the judge did not reach the Respondent's waiver contention regarding the holiday bonus.

[6] The clause provides: "It is expressly agreed that all rights which are ordinarily vested in and exercised by employers, except those which are clearly and expressly relinquished herein by the Company, shall continue to vest exclusively and be exercised exclusively by the Company."

or indirectly, to the holiday bonus and there is no bargaining history evidence that the parties intended the management rights clause to waive the Union's right to bargain regarding the holiday bonus.

For these reasons, we find that the Respondent failed to demonstrate a clear and unmistakable waiver of the Union's right to bargain regarding a term of employment.[7] We find that the Respondent's unilateral discontinuance of the holiday bonus violated its statutory bargaining obligation. *Hi-Tech Cable Corp.*, 309 NLRB 3, 4 (1992), enfd. per curiam 25 F.3d 1044 (5th Cir. 1994); *Johnson-Bateman Co.*, 295 NLRB 180, 184–185 (1989).

ORDER

The National Labor Relations Board orders that the Respondent, Waxie Sanitary Supply, San Diego, California, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Delaying the execution of a memorialized version of a collective-bargaining agreement with the Union because of the pendency of a decertification petition before the Board.

(b) Discontinuing the driver safety bonus program, a mandatory subject of bargaining, for its bargaining unit drivers at its San Diego, California facility without first providing notice to the Union and affording it an opportunity to engage in meaningful bargaining over the matter.

(c) Discontinuing the holiday bonus program, a mandatory subject of bargaining, for its bargaining unit employees at its San Diego, California facility without first providing notice to the Union and affording it an opportunity to engage in meaningful bargaining over the matter.

(d) 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) Reinstate its driver safety bonus program for its bargaining unit drivers at its San Diego, California facility and maintain it in effect until any modification is negotiated with the Union or until an impasse in bargaining is reached.

(b) Reinstate its holiday bonus program for its bargaining unit employees at its San Diego, California facility and maintain it in effect until any modification is negotiated with the Union or until an impasse in bargaining is reached.

(c) Make whole its bargaining unit drivers at its San Diego, California facility for any loss of earnings, with interest calculated in the manner set forth in the Remedy section of the judge's decision, because of its unlawful discontinuance of the driver safety bonus program.

(d) Make whole its bargaining unit employees at its San Diego, California facility for any loss of earnings, with interest calculated in the manner set forth in *New Horizons for the Retarded, Inc.*, 283 NLRB 1173 (1987), because of its unlawful discontinuance of the holiday bonus program.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, 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 its facility in San Diego, California, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director of Region 21, 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 August 14, 1998.

(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,

[7] In finding that the Respondent did not prove waiver of the Union's right to bargain regarding the holiday bonus, Chairman Hurtgen would apply the "contract coverage" analysis set forth by the D.C. Circuit in *NLRB v. Postal Service*, 8 F.3d 832 (1993), to determine the legality of the Respondent's actions, but would reach the same result under a "clear-and-unmistakable-waiver" analysis. See his separate opinions in *Good Samaritan Hospital*, 335 NLRB 901, 905 (2001), and *Dorsey Trailers, Inc.*, 327 NLRB 835, 836–837 (1999).

[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."

attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT delay the execution of a collective-bargaining agreement with Building Material, Construction, Industrial, Professional and Technical Teamsters, Local No. 36, International Brotherhood of Teamsters, AFL–CIO because of the pendency of a decertification petition before the Board.

WE WILL NOT discontinue our driver safety bonus program for our bargaining unit drivers at our San Diego, California facility without first providing notice to the Union and affording it an opportunity to engage in meaningful bargaining over the matter.

WE WILL NOT discontinue our holiday bonus program for our bargaining unit employees at our San Diego, California facility without first providing notice to the Union and affording it an opportunity to engage in meaningful bargaining over the matter.

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

WE WILL reinstate our driver safety bonus program for bargaining unit drivers at our San Diego, California facility and maintain it in effect until any modification is negotiated with the Union or until an impasse in bargaining is reached.

WE WILL reinstate our holiday bonus program for bargaining unit employees at our San Diego, California facility and maintain it in effect until any modification is negotiated with the Union or until an impasse in bargaining is reached.

WE WILL make whole our bargaining unit drivers at our San Diego, California facility for any loss of earnings, with interest, because of our unlawful discontinuance of our driver safety bonus program.

WE WILL make whole our bargaining unit employees at our San Diego, California facility for any loss of earnings, with interest, because of our unlawful discontinuance of our holiday bonus program.

WAXIE SANITARY SUPPLY

David Mori, Esq., for the General Counsel.
Robert W. Bell, Jr. Esq., (*Gray, Cary, Ware, & Friedenrich LLP*), of San Diego, California, for the Respondent.
Richard D. Prochazka, Esq., (*Richard D. Prochazka & Associates*), of San Diego, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. The original and amended unfair labor practice charges in Case 21–CA–32812 were filed by Building Material, Construction, Industrial, Professional and Technical Teamsters, Local International Brotherhood of Teamsters, AFL–CIO (the Union), on June 17 and December 29, 1998; the unfair labor practice charge in Case 21–CA–32893 was filed by the Union on August 6, 1998; and the unfair labor practice charge in Case 21–CA–33185 was filed by the Union on February 17, 1999. After an investigation of said unfair labor practice charges, on May 27, 1999, the Regional Director of Region 21 of the National Labor Relations Board (the Board), issued an amended consolidated complaint, alleging that Waxie Sanitary Supply (Respondent), engaged in acts and conduct, violative of Section 8(a)(1) and (5) of the National Labor Relations Act.[1] Respondent timely filed an answer, denying the commission of the alleged unfair labor practices. Pursuant to a notice of hearing, the above-captioned matters were set for, and came to, trial before the above-named administrative law judge in San Diego, California, on August 23 and 24, 1999. During the trial, all parties were afforded the opportunity to examine and to cross-examine witnesses, to offer into the record all relevant documentary evidence, to orally argue their legal positions, and to file post-hearing briefs. Counsel for each party has filed a post-hearing brief, and said documents have been carefully considered by the undersigned. Accordingly, based upon the entire record, including the post-hearing briefs and my observations of the testimonial demeanor of each of the witnesses, I issue the following

FINDINGS OF FACT

I. JURISDICTION

At all times material herein, Respondent, a State of Arizona corporation with an office and place of business located in San Diego, California, has been engaged in business as a distributor

[1] At the hearing, pursuant to a non-Board settlement, counsel for the General Counsel moved, and was granted permission, to withdraw those portions of the amended consolidated complaint, alleging a violation of Sec. 8(a)(1) and (3) of the Act.

of janitorial supplies. During the 12-month period ending February 19, 1999, which period is representative, in the normal course and conduct of its above-described business operations, Respondent purchased and received at its San Diego, California facility goods and products, valued in excess of $50,000, directly from suppliers located outside the State of California. Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

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

III. THE ISSUES

The amended consolidated complaint alleges, and counsel for the General Counsel argues, that, on or about July 14, 1998,[2] Respondent and the Union entered into a complete collective-bargaining agreement, encompassing the terms and conditions of employment of all the drivers, warehousemen, technicians, and installers employed by Respondent at its San Diego, California facility and that, since on or about July 21, Respondent engaged in acts and conduct, violative of Section 8(a)(1) and (5) of the Act, by ignoring the Union's request that it execute a memorialized version of the parties' above-described agreement and delaying in executing said document. It is further alleged and argued that Respondent engaged in further violations of Section 8(a)(1) and (5) of the Act by unilaterally, and without giving prior notice to the Union and without affording it an opportunity to bargain, discontinuing a policy of allowing bargaining unit employees to use company vehicles for training and license testing purposes, discontinuing driver safety bonuses for bargaining unit employees, and eliminating a Christmas bonus for bargaining unit employees. In defense, Respondent argues that, at no time prior to August 13, did there exist a collective-bargaining agreement between the parties and that any delay in executing said agreement was not unreasonable; that it never implemented a policy of permitting employees to use company vehicles for training and testing purposes; that the driver safety bonus and the Christmas bonus were waived by the Union during bargaining and by contract; and that the Christmas bonus did not constitute a term and condition of employment.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. Respondent's Delay in Executing The Parties' Collective-Bargaining Agreement

The basic facts are not in dispute. Thus, the record establishes that Respondent, an Arizona corporation, is engaged in business as a distributor of janitorial supplies and that it operates a warehouse and distribution facility in San Diego, California. Charles Wax is president of Respondent; Lisa Kay is the vice president of human resources; and both individuals maintain offices at Respondent's San Diego facility. The record further establishes that, on August 13, 1997, the Union was certified by the Board as the exclusive collective-bargaining representative of all drivers, warehousemen, technicians, and installers employed by Respondent at its San Diego, California facility; that, in mid-October 1997, Respondent and the Union commenced negotiations for a collective-bargaining agreement, with Clarke Stillwagen, its president, and Arthur Cantu, its recording secretary, representing the Union and Thomas Puffer, the chairman of the executive committee of the San Diego Employers Association, and Lisa Kay representing Respondent; that the parties thereafter held 16 negotiating sessions; that, on or about June 25, during a bargaining session at Puffer's office, Respondent presented the Union with a "last, best, and final" contract offer; that Respondent's employees ratified this final offer on or about July 13; and that, on the same day or the day after ratification, Stillwagen notified Puffer by telephone of the employees' acceptance of Respondent's final offer.

The record reveals that Stillwagen was responsible for placing the parties' collective-bargaining agreement into draft form and that, in doing so, he utilized two documents—Respondent's June 25 final offer (GC Exh. 2) and a document entitled "Combined Proposal" (R. Exh. 1), which is a compilation of each of the parties' tentative agreements (TA's) reached during the course of the bargaining. Two days after the employees' ratification of Respondent's final offer, on July 15, the Union's president completed the draft agreement (GC Exh. 3) and, by hand, delivered copies to Lisa Kay at Respondent's facility and to Puffer's office.[3] Stillwagen heard nothing from either Kay or Puffer until he received a letter, dated July 21, from Kay.[4] In her letter, after assuring Stillwagen that she would "proofread [the draft collective-bargaining agreement] for any corrections or omissions," the latter stated that she would "also need to review it with Tom Puffer to ensure the contract you forwarded accurately sets forth the company's last proposal. As you are probably aware, Tom is out of the country on vacation and will not be back until August 5. Also, I am on vacation the week of

[2] Unless otherwise stated, all events occurred during 1998.

[3] With the draft agreement, Stillwagen included a cover letter, in which he stated that the draft agreement was being submitted "for signature" and invited Lisa Kay to advise him of any "additions or corrections." With regard to who was authorized to approve and execute the completed collective-bargaining agreement, Stillwagen testified that "there were several discussions along that line. . . . My understanding from the beginning was that the negotiating team was authorized by Charles Wax to negotiate a [contract] and my understanding was both parties at the table could reach agreement" and "that the Waxie negotiating team would keep Charles Wax appraised of what was going on . . . ." After being questioned further as to whether Wax would have to approve any agreement reached at the bargaining table, Stillwagen averred that he "certainly understood that [Charles Wax] would review the document and would ultimately sign the document" as Respondent's official, who would have the right of final approval of the agreement. On this identical point, Puffer testified that, during the course of the bargaining, he and Kay "many times" told the union negotiators that Charles Wax would have final approval over what was negotiated at the bargaining table.

[4] Kay testified that she did not immediately examine the draft agreement as ". . . Tom Puffer was on vacation and he was the person I used for these kinds of things" and "I was busy," having to prepare for travel to other company divisions the following week. Apparently, Kay's work schedule is less than 5 days a week.

August 5."[5] Ten days later, on July 31, Kay wrote to Stillwagen that "I have now had an opportunity to review the document that you sent us. It is not suitable for signature, because it does not accurately reflect WAXIE's proposal." She continued, stating her desire to "meet and discuss these issues. I will be out of town until August 11, and will need some time upon my return to talk with Tom Puffer about this situation (as you may know, Tom has been out of town). I will also be out of town on business on August 12. Please get in touch with me and let me know a time that is convenient for you to meet after I return."

The record further reveals that, while, according to Lisa Kay, she believed he would not return from his European cruise until August 5, Thomas Puffer, in fact, returned from his trip on July 28, but that he did not return to work until Monday, August 3.[6] Puffer testified that the first indication he had of problems in the negotiated collective-bargaining agreement was a telephone call from the plant manager at Respondent's San Diego facility, who told him that Kay was on vacation and that the negotiated contract did not cover Respondent's Christmas bonus. Shortly thereafter, Puffer received a memorandum, via fax, from the Union's attorney, Richard Prochazka, stating "it is imperative that representatives of [the Union] meet with you to review any alleged `problems' with the contract previously drafted and delivered to your office nearly three weeks ago" and threatening the filing of an unfair labor practice charge over Respondent's failure to meet. In response, Puffer replied to Prochazka by fax, enclosing a copy of Kay's July 31 letter and stating, "I don't know what problems she has, but will meet with the Union upon her return to resolve the matter." As the attorney had warned, the Union filed its unfair labor practice charge in Case 21–CA–32812 on August 6. A meeting, between the parties, for the purpose of resolving the "issues," raised by Kay, was scheduled for 2:30 p.m. on August 13, at Puffer's office.

While bargaining on the parties' collective-bargaining agreement remained unresolved, on July 21, Yale Ogden Willis, an inventory analyst and bargaining unit employee at Respondent's San Diego facility, began, during break periods, to solicit fellow bargaining unit employees to place their signatures on a petition, which contained the following language:

> WE, THE UNDERSIGNED, DO NOT WISH TO BE REPRESENTED BY LOCAL 36 for the purpose of collective bargaining. The undersigned are petitioning the National Labor Relations Board to conduct a vote to see if there remains a majority of employees that continue to want union representation. Our signatures below represent a request that the NLRB conduct a vote.[7]

Analysis of General Counsel's Exhibit 12, the petition, discloses that 16 employees signed on July 21; that all remaining employee signatures but one were obtained by Willis in July; and that the last signature is dated August 13. Willis testified that he solicited signatures by going ". . . to the individual employees and [asking] them if they would be interested in signing the petition." He added that no supervisors observed him while soliciting signatures.

As scheduled, at approximately 2:30 p.m. on August 13, Stillwagen, Kay, and Puffer met in Puffer's office. Indicative of the importance of the session to the parties, each party was also represented by an attorney—Prochazka for the Union and Therese Hymer for Respondent, who acted as its spokesperson. While the significance of the contractual issues, which Kay intended to raise with the Union's representatives, is in dispute, there is no disagreement as to what occurred during the parties' two hour meeting. Thus, they discussed no less than 10 different contract language changes—all of which Clarke Stillwagen superciliously described as "items, typographical errors, omissions. . . . nothing having to do with negotiations" but several of which Thomas Puffer described as substantive in nature. Testifying that, at some point subsequent to July 15, and prior to the meeting, he became aware that the wage rates, set forth in Article IX of the draft collective-bargaining agreement were incorrect, having been "inadvertently" copied from a rejected union wage rate proposal and not from Respondent's final offer, Stillwagen distributed copies of a "corrected wage page" to Respondent's representatives at the outset of the meeting.[8] Thereafter, during the meeting, the parties worked from a copy of the Union's draft agreement, which contained the corrected wage rate page, and, using a pen, wrote in all agreed-upon changes, initialing each one. With regard to Kay's issues, Respondent desired that the words "employees shall be compensated within the following rate ranges," which appear in its final offer provision above the wage rates, be inserted above the wage rates, and the Union agreed.[9] Next, also in article IX, in the first of the "General conditions," Respondent requested and the Union agreed to change "swing" to "second" shift. According to Stillwagen, "Well, the company . . . preferred the use of second shift to swing shift." Third, in the first sentence of Section 1 of article XVI, the Roman numeral XV is inserted after the word article. According to Stillwagen, this was a clerical error as he "left out the article number that it was referencing." Next, Respondent pointed out, and the Union agreed to correct, what appears to be a typing error on page 14 of the draft contract. Fifth, in Section 2 of article XXI, the sick leave article, Respondent demanded and the Union agreed to change "sec-

[5] With regard to the matter of vacations, there is no dispute that Puffer left San Diego for a European cruise vacation on July 15 and did not return until July 28; that Charles Wax was on a European vacation from some time in July through August 11; and that Kay was on vacation during the week of August 3, not returning to work until August 11. Stillwagen testified that he was aware of Puffer's vacation but that he was not aware of Kay's vacation plans. The latter testified that, during breaks in the bargaining, she informed the Union negotiators of her intent to take a trip with her family to Kansas in early August. Counsel for the General Counsel does not contend that an adverse inference be drawn from the vacations taken by Puffer, Wax, and Kay in July and August, and I shall not draw one.

[6] Puffer denied any communications with Kay after his return from his trip through August 3.

[7] Willis testified that he prepared the petition after speaking to a Board agent, who helped him with the language.

[8] There is no record evidence that, prior to August 13, Stillwagen ever informed either Kay or Puffer that the draft agreement, which he had delivered to Respondent for signature, contained an incorrect wage rate structure.

[9] Stillwagen termed this a "clarification."

ond" to "first (1st) day of sick leave." As to this change, Stillwagen testified that, while "there had been discussions throughout the negotiations on whether . . . sick leave should be paid from the first day or the second day and my notes indicated it should be the first day," making the change represented "no problem" to the Union. In fact, as Puffer admitted during cross-examination, Stillwagen had not made a mistake, for, on April 22, the parties reached a TA as to section 2, which contains the language of the draft agreement.

The next change is a deletion of the last sentence of Section 2 of article XXVI, the funeral leave provision. Stillwagen did not recall the discussion, but stated that the sentence was "excess language," which had been "inadvertently" inserted, and "we deleted it." He added that no bargaining over the change occurred but rather "it was a matter that it should not have been in there, so we took it out." Analysis of the deleted language establishes that such was contrary to the parties' TA on the provision, which was reached on March 4, and that it gave defined bargaining unit employees a day of paid leave to which they were not otherwise entitled. While Stillwagen minimized it, Puffer described the above as a substantive change. There is no dispute that the seventh change, the insertion of a lower case "k" in article XXX, appears to have been an obvious typing error. As to the eighth change, the language of article XXXI, pension plan, is crossed out and the following language is inserted—"The Company agrees to make this plan available under the same conditions and limitations as exists for like employees." Stating that the deleted language did not represent a mistake and that the inserted language is new, Stillwagen testified that Respondent's representatives believed that the language of the article "should be more expansive" and that the union representatives had no objection to the change. He was uncontroverted in these regards. Ninth, in article XXXII, performance appraisal, the following words were inserted—"No employee shall receive a reduction of pay as a result of the performance appraisal." According to Stillwagen, Respondent's representatives correctly pointed out that the above language appears in its final offer, and he admitted that ". . . I did, in fact, delete it. . . . That was an error on my part." Puffer testified that he viewed Stillwagen's omission as a substantive change. Tenth, with regard to the effective date of the parties' agreement, article XXXVII, Stillwagen conceded that there had been no prior bargaining on this subject and that the date, July 13, which he placed in the draft agreement, was his own choice. He added that Respondent requested the change to August 1, so that the effective date "would coincide with their payroll periods," and "we had no objection to that." While Stillwagen denied that a collective-bargaining agreement's effective date constitutes a substantive provision, Puffer maintained that it was substantive[10] and that it "would have had to have been negotiated." However, Puffer then minimized the significance of the issue,[11] stating that Stillwagen's choice of a date was controversial for no reason other than all of the agreements, which he negotiates, have effective dates at the beginning of a month.

At the conclusion of the bargaining and after the Union had acceded to all of Respondent's requested changes, Stillwagen executed the changed draft agreement, General Counsel's Exhibit 10 and, according to Lisa Kay, demanded that one of Respondent's representatives sign it "right then and there."[12] However, according to Stillwagen, attorney Hymer "said they couldn't sign it. They weren't prepared to sign it." While, during direct examination, he could not recall Hymer mentioning Charles Wax, Stillwagen conceded, during cross-examination, that Hymer "may" have said she wanted one final review of the contract before giving it to Wax for signature. On this point, Puffer and Kay each testified that the completed agreement had to be given to Wax for his approval and signature. The meeting ended at approximately 4:30 that afternoon, with Hymer taking General Counsel's Exhibit 10 for review.[13]

There is no dispute that Respondent failed to execute a memorialized version of General Counsel's Exhibit 10, General Counsel's Exhibit 11, until September 16—a month after the parties apparently resolved all problems regarding their collective-bargaining agreement. In this regard, on Friday, August 14, the day after the parties' meeting, employee Willis filed a decertification petition, seeking to decertify the Union as the exclusive bargaining representative for Respondent's drivers, warehousemen, technicians, and installers employed at its San Diego facility, with the Board. Also, at some point during the day, Wax received General Counsel's Exhibit 10 from attorney Hymer for his signature. Lisa Kay admitted that, upon being informed of the filing of the decertification petition that day, Wax decided against executing the collective-bargaining agreement and that, in view of the decertification petition and Respondent's need to research the Board's rules in circumstances such as involved herein and to devise a strategy, he continued delaying in doing so. A week later, on August 21, Stillwagen wrote to Kay and Puffer, reminding them that they had been given a "complete copy" of the parties' collective-bargaining agreement, containing each of the changes requested by Respondent, on August 13, and requesting information as to when Respondent would execute the document. On September 1, Kay wrote to Stillwagen, noting that 21 individuals—or two-thirds of the bargaining unit employees—had executed the decertification petition and that the said petition represented "a change in circumstances" and that, therefore, as the Union's representative status was open to "question," Respondent no longer considered it appropriate "for [it] to sign and thus enter into an agreement that relates to a group of employees who now overwhelmingly appear not to want . . . representation by the

[10] While Puffer could point to no cost problems with the Union's choice of an effective date, Kay stated that there would have been an economic benefit to two individuals had July 13 remained as the effective date—"a couple of employees needed to be moved to the minimum of the pay range" and "it would have caused them to be paid a higher rate of pay . . . ."

[11] Puffer averred that "in all candor, the effective date is not a problem."

[12] Stillwagen recalled that it was Prochazka who demanded that it be signed then.

[13] Kay testified that Charles Wax was working in his office late that afternoon but was in the midst of a meeting and unavailable.

[Union]."[14] Two days later, on September 2, Richard Prochazka wrote to Therese Hymer, arguing that the filing of the decertification petition did not represent a lawful change in circumstances so as to permit Respondent to refuse to execute the parties' contract, and, on September 14, Hymer replied to Prochazka, writing that it had been informed that no less than two-thirds of the bargaining unit employees supported the decertification petition; that, nevertheless, the Union was "forcing [Respondent] to sign and implement the agreement in spite of the majority of the employees' apparent desires; and that Charles Wax would execute the collective-bargaining agreement. As stated above, he did so on September 16.

As alleged in the amended consolidated complaint and argued by counsel for the General Counsel, upon receiving the final contract draft on July 15,[15] Respondent engaged in acts and conduct, violative of Section 8(a)(1) and (5) of the Act, by "engaging in a series of unreasonable delays in executing the collective-bargaining agreement from July through September . . . ." In contrast, counsel for Respondent argues that the draft agreement, which Stillwagen presented to Respondent on July 15, did not "reflect" a complete agreement between the parties; that, assuming complete agreement was reached on August 13, such was subject to review and ratification by Charles Wax; and that Wax did not unreasonably delay the execution of the collective-bargaining agreement. Analysis of the record as a whole convinces me that Respondent did, in fact violate Section 8(a)(1) and (5) of the Act by unreasonably delaying the execution of the parties' collective-bargaining agreement—not from July 15, as alleged in the amended consolidated complaint but, rather, for the 32-day time period from August 14 through September 16, 1998.

In agreement with counsel for Respondent, my conclusion, that Respondent engaged in no conduct, violative of Section 8(a)(1) and (5) of the Act prior to August 14, is predicated upon my belief that, inasmuch as the parties did not arrive at a meeting of the minds on all substantive terms so as to form a complete collective-bargaining agreement until August 13, Respondent had never been under any obligation to execute the draft collective-bargaining agreement, which was presented to it by Clarke Stillwagen on July 15. In this regard, pursuant to Section 8(d) of the Act, either party to a collective-bargaining agreement is obligated to execute, or assist in executing, a memorialized version of said agreement if requested to do so by the other party. *H. J. Heinz Co. v. NLRB*, 311 U.S. 514 (1947); *Grocery Warehouse*, 312 NLRB 394, 397 (1993); *Kennebec Beverage Co.*, 248 NLRB 1298 (1980). Further, the Board has held that, in fulfilling its Section 8(d) mutual, on-going obligation to bargain in good faith, neither party may engage in dilatory acts and conduct which result in unreasonable delay in any aspect of the collective-bargaining process, including the execution of a memorialized agreement. *Lee Lumber & Building Material*, 306 NLRB 408, 420 (1992); *Thill, Inc.*, 298 NLRB 669, 672 (1990); *Pioneer Broadcasting*, 202 NLRB 1005, 1009 (1973). However, the Board cautions that the above-described obligation to execute a memorialized version of a complete collective-bargaining agreement "arises only after a meeting of the minds on all substantive issues has occurred"—when the agreement covers all the essential terms. *Alexandria Manor*, 317 NLRB 2, 5 (1995); *Canyon Coals, Inc.*, 316 NLRB 448, 452 (1995); *Transit Service Corp.*, 312 NLRB 477, 481 (1993); *Ebon Services*, 298 NLRB 219, 224 (1990); *Castro Village Bowl*, 290 NLRB 423, 432 (1988); *Koenig Iron Works*, 282 NLRB 717, 718 (1987); *Luthor Manor Nursing Home*, 270 NLRB 949 at fn. 1 (1984). On this point, while the Board law is that one party's "inadvertent errors" in a draft agreement or "minor deviation" therein from proposals submitted by the other party may not be indicative of any lack of agreement between the parties to collective bargaining (*Grocery Warehouse*, supra; *Taylor Bus Services*, 284 NLRB 530 (1987)), it has long held that a lack of a meeting of the minds may be inferred when a draft agreement contains discrepancies which "seriously [alter the] meaning of a respondent's proposals" or when discrepancies "may be traced to ambiguity for which neither party is to blame" or to "differences in the understanding of the parties." *Henry Bierce Co.*, 307 NLRB 622, 628 (1992); *Castro Village Bowl*, supra at 432; *Automatic Plastic Molding Co.*, 234 NLRB 681, 682 (1978). While there is no dispute that the bargaining unit employees accepted Respondent's final offer and that Stillwagen ostensibly based his July 15 draft agreement, which he presented to Respondent for signature, upon the final offer and all prior tentative agreements, he admitted that the agreement's effective date, July 13, was a date selected by him absent any prior bargaining over the subject with Respondent's representatives, Thomas Puffer and Lisa Kay. Clearly, the effective, commencement, or termination dates of collective-bargaining agreements are material terms, and the Board has held that a lack of agreement on these issues alone may signify the lack of a complete agreement on all substantive terms so as to justify an employer's refusal to execute a written collective-bargaining agreement. *Transit Service Corp.*, supra at 482–483; *Koenig Iron Works*, supra; *Mercedes-Benz of North America, Inc.*, 258 NLRB 803 at 803 (1981). Further, in section 2 of the funeral leave article of the July 15 draft agreement, Stillwagen inserted a second sentence, which is not covered by the parties' March 4 tentative agreement on the article and which would have had the effect of granting defined bargaining unit employees a day of paid leave to which they were not otherwise entitled. There is no record evidence that this language was ever the subject of bargaining, and Stillwagen's explanation, that the sentence was inadvertently included in the draft agreement, is not particularly credible. In my view, the parties' dispute over the inserted sentence was clearly one of substance and not one of mere excessive language and represented, at worst, the Union's conscious effort to deceive Respondent in order to gain an additional contract benefit or, at best, a serious misunderstanding over an aspect of the funeral

[14] Specifically, Kay wrote that "the decertification petition . . . raises a clear question about the Teamsters representation of the unit."

[15] While the amended consolidated complaint alleges the existence of a collective-bargaining agreement on or about July 14, in his post-hearing brief, counsel for the General Counsel is silent on the point and his arguments herein presuppose the existence of an agreement. In his post-hearing brief, counsel for the Union does advance the argument that "when the Union accepted the Employer's final offer . . . . the acceptance of that offer constituted the formation of a contract." Presumably, this is also the position of the General Counsel.

leave article. Finally, the copies of the draft agreement, which were presented to Respondent on July 15, mistakenly contained a wage rate scale, which had been rejected by the Union and had not been part of Respondent's final offer to the former and, as to which, despite being aware of its error for approximately 30 days, the Union failed to correct until August 13. Inasmuch as the draft agreement's wage scale was lower than what Respondent had proposed in its final offer and as the inclusion of the previously rejected wage scale proposal was left unexplained by the Union, such represented a difference in understanding regarding Respondent's wage rates offer until clarified by the former. In these circumstances,[16] it matters not that Respondent failed to immediately notify the Union of its problems with the draft agreement, and, given the lack of agreement over the effective date of the agreement, inclusion of the funeral leave article language about which there had never been agreement and perhaps no bargaining, and the inclusion of previously rejected wage rates in the draft agreement, I conclude that, prior to August 13, there existed no meeting of the minds, between the parties, over all substantive terms of so as to signify a complete collective-bargaining agreement and that, therefore, Respondent was under no obligation to have executed the Union's July 15 draft agreement. *Transit Service Corp.*, supra; *Henry Bierce Co.*, supra.

However, there is no dispute that, at the parties, bargaining session on August 13, the Union corrected the wage rates provision and agreed to each change in the collective-bargaining agreement, demanded by Respondent, including the effective date and the removal of the disputed sentence from the funeral leave provision; that at conclusion of the 2-hour bargaining session, the parties had arrived at a complete collective-bargaining agreement; that Stillwagen immediately executed the said agreement, General Counsel's Exhibit 10; and that he then demanded it be executed by Respondent's representatives. I credit Puffer and Kay that Attorney Hymer refused Stillwagen's demand and asserted that she wanted an opportunity to review the document one last time before presenting it to Charles Wax for signature and further find that Hymer presented General Counsel's Exhibit 10 to Charles Wax for signature the next day, August 14, and that, as admitted by Kay, later in the day, upon being informed of the filing of the decertification petition, Wax decided against signing the contract and continued to delay executing the agreement until September 16, in view of the decertification petition and Respondent's need to research Board rules and to devise a strategy. Inasmuch as I find nothing unreasonable about attorney Hymer's desire for a final opportunity to examine the document I, therefore, conclude that Respondent's obligation, pursuant to Section 8(d) of the Act, to execute General Counsel's Exhibit 10, without delay, attached immediately upon presentation of the document to Wax on August 14. It is current Board law that "the mere filing of a decertification petition" does not itself suspend an employer's on-going obligation, pursuant to Section 8(d) of the Act, to bargain in good faith and does not require or permit an employer to withdraw from bargaining or to refuse to execute a collective-bargaining agreement. *Lee Lumber & Building Material*, supra at 419; *Dresser Industries*, 264 NLRB 1088, 1089 (1982). Based upon Kay's admission, it is clear that Respondent's basis for its initial refusal and subsequent delay in executing the August 13 collective-bargaining agreement until September 16 was the filing of the instant decertification petition, and Kay's comment, in her September 1 letter to Stillwagen, that the said petition "raises a clear question about the Teamsters representation of the unit" is, of course, contrary to Board law.[17] While, in his post-hearing brief, counsel for Respondent beneficently characterizes his client's delay, for the purpose of analyzing the legal and practical effects of the decertification petition, as "prudent and reasonable," such was also patently violative of Section 8(a)(1) and (5) of the Act, and I so find.

B. Respondent's Unilateral Discontinuance of Driver Training For Its Bargaining Unit Employees

The record establishes that employee, Ronald D. Mathews, worked for Respondent as a warehouse worker from May 1990 through April 1998 and that, February 1998, he decided to seek a transfer to a "commercial driver" position with Respondent. Mathews testified that, in order to be employed in said job classification, an individual must possess a commercial driver's license and that, in order to qualify for and obtain such a license from the State of California Department of Motor Vehicles, the person must, initially, pass a written test in order to obtain a permit, then train with a commercially licensed driver in the type of commercial vehicle[18] in which he will take the driving test, and then take the driving test, using the same type vehicle in which he practiced. According to Mathews, on February 9, he obtained his permit and informed Ken Hubbard, Respondent's driver's manager, that he had done so and asked for his permission to train by driving a company truck. Hubbard gave his permission and, thereafter in February, on "two or three"

[16] The crux of counsel for the General Counsel's argument in support of the amended consolidated complaint allegation of unlawful delay since July 15, is that Respondent was aware of the distribution of the decertification petition and delayed in meeting with the Union until a sufficient number of signatures were collected by employee Willis. However, assuming, which I do not, an obligation by Respondent to have executed the July 15 draft contract, there is not a scintilla of record evidence that Respondent was aware of Willis' activities. Moreover, counsel makes no contention that Puffer, Kay, or Wax scheduled their vacations in order to conceal otherwise unlawful delay. Further, I find nothing sinister in Kay's desire to discuss her problems with the draft contract with Puffer before meeting with the Union or the latter's desire to meet with Kay prior to meeting with the Union. Finally, while it is true that Kay was incorrect about the date on which Puffer was to return from his vacation and perhaps they could have met and discussed her issues with the draft agreement prior to her vacation, it is also true that Wax was then on vacation and would not have been able to execute the draft agreement before August 11.

[17] In *Dresser Industries, Inc.*, the Board noted that "the filing of a decertification petition, standing alone, does not provide a reasonable ground for an employer to doubt the majority status of a union." Id. at 1088.

[18] Mathews described a commercial vehicle as one which requires a commercial license to operate it with endorsements particular to the type of vehicle.

occasions,[19] he drove a company truck,[20] with Hubbard riding with him, making deliveries. Mathews further testified that, on the last occasion in which he drove a company truck, he completed a delivery; that, upon returning to Respondent's facility, he was approached by his supervisor, Eddie Azucena, the warehouse supervisor; and that Azucena told him "it had come from upstairs that I was no longer allowed to drive company vehicles that I didn't have an actual license for. . . . I asked him who it was that told him that I was no longer allowed to drive the trucks . . . . He told me it had come from Jim Stowers," Respondent's operations manager. Subsequently, according to Mathews, in February or March, he spoke to Stowers in the warehouse, and "I asked him why I had been denied driving company . . . commercial vehicles. . . . He said he didn't know and that he would get back to me on it." Approximately a week and a half later, Mathews again approached Stowers in the warehouse, and "I asked him again why I was not allowed to drive the company . . . commercial vehicles, and he told me . . . that it had been a corporate wide decision to stop the driver training on company vehicles . . . and that I was not being singled out." Mathews testified that he had personal knowledge of one other warehouse employee, Dave McCabe, who, in order to become a driver for Respondent, trained for his commercial driving license by driving a company commercial vehicle—"I witnessed him driving a company vehicle to obtain" his license with Alberto Arguilez, a senior driver in late 1997 or early 1998. During cross-examination, Mathews testified that, while he eventually passed his driving test and received a Class A commercial driver's license, employees are required to have only Class B commercial licenses in order to operate Respondent's bobtail trucks.

With regard to this allegation of the amended consolidated complaint, Lisa Kay, who denied that Respondent ever had an company-wide driver training program, confirmed that Dave McCabe had been permitted to train for a commercial driver's license, on company trucks in 1996 and 1997. She did not know why McCabe had been given such permission but testified that such had not happened in any other company division.[21] During cross-examination, she added that Harry Babb, Respondent's vice-president of operations, made the decision to no longer permit employees to train on company trucks for commercial licenses and that such was "a corporate-wide decision," which was "part of our strategic plan" to make policy in the company's divisions "consistent." With regard to Mathews, she stated that "what happened was when [Babb] realized that there was an employee in San Diego who had used a company vehicle and he realized there was insurance risks and so on, he wanted to make sure that this wasn't occurring in other divisions . . . too. . . . [Babb] found out that Bob Mathews had used a truck. His newly appointed supervisor had allowed it and probably did know that he shouldn't be doing it. And as soon as [Babb] learned that had occurred, he immediately made sure everyone knew that was not an okay thing to do." Finally, it was uncontroverted that Respondent never informed the Union of Babb's "directive" to no longer permit employees to train for commercial driver's licenses on company trucks or provided the Union with an opportunity to bargain prior to placing said directive into effect.

The amended consolidated complaint alleges that Respondent's unilateral elimination of its policy, allowing employees to use its vehicles for training for the commercial driver's license test, was violative of Section 8(a)(1) and (5) of the Act. It is, of course, well settled that an employer violates said section of the Act by unilaterally changing the wages, hours, and other terms and conditions of employment of bargaining unit employees[22] without first providing their collective-bargaining representative with notice and a meaningful opportunity to bargain about the change. *NLRB v. Katz*, 369 U.S. 736 (1962); *Bryant & Stratton Business Institute*, 321 NLRB 1007 (1996); *Mercy Hospital of Buffalo*, 311 NLRB 869,873 (1993); *Associated Services for the Blind*, 299 NLRB 1150, 1150–1151 (1990). As stated by a United States Court of Appeals, the vice of this unfair labor practice "... is that the employer has *changed* the existing conditions of employment. It is this *change* which is prohibited and which forms the basis of the unfair labor practice." *NLRB v. Dothan Eagle*, 434 F.2d 93, 98 (5th Cir. 1970). However, it is clear that not all unilateral changes in bargaining unit employees' terms and conditions of employment constitute unfair labor practices. Thus, the unilaterally imposed change must be "a material, substantial, and a significant" one and must have a "real impact" on, or be "a significant detriment to," the employees or their working conditions. *Outboard Marine Corp.*, 307 NLRB 1333, 1339 (1992); *UNC Nuclear Industries*, 268 NLRB 841, 847 (1984); *Trading Port Inc.*, 224 NLRB 980, 983–984 (1976); *Pacific Diesel Parts Co.*, 203 NLRB 820, 824 (1973); *Coca Cola Bottling Works, Inc.*, 186 NLRB 1050, 1062 (1970), affd. *Retail, Wholesale and Department Store Union v. NLRB*, 466 F.2d 380 (D.C. Cir. 1972). In support of the amended consolidated complaint allegation that Respondent's unilateral elimination of its driver training program for bargaining unit employees at its San Diego facility was violative of Section 8(a)(1) and (5) of the Act, counsel for the General Counsel, citing *Associated Services for the Blind*, supra at 1162, argues that, for bargaining unit employees who sought to become drivers for Respondent, the opportunity to train for the commercial driver's license test on

[19] During cross-examination, Mathews was able to recall the details of two occasions, on which he drove a company truck. As to the possible third, ". . . I wouldn't have any details on that."

[20] Mathews described Respondent's trucks as being "box trucks" or "bobtails." The vehicles are 26 feet in length, have six wheels, and carry a cargo container on the back.

[21] During cross-examination, Kay mentioned another former warehouse employee, Benny Blake, who moved from a warehouse job to that of a driver and who possibly trained for his commercial driver's license in company trucks.

[22] In *Ford Motor Co. v. NLRB*, 441 U.S. 488, 498 (1979), the Supreme Court defined the mandatory subjects of bargaining as those matters which are "plainly germane to the 'working environment'" and "not among those 'managerial decisions, which lie at the core of entrepreneurial control.'" Normally, the mandatory subjects of bargaining concern anything having to do with bargaining unit employees' wages, hours, or other terms and conditions of employment. *Phelps Dodge Mining Co.*, 308 NLRB 985, 999 (1992), enf. denied 22 F.3d 1493, 1496–1498 (10th Cir. 1994); *Johnson-Bateman Co.*, 295 NLRB 180, 182 (1989).

company vehicles was a benefit, and, as such, constituted a mandatory subject of bargaining—a term or condition of employment, which could not be unilaterally changed. Contrary to counsel for the General Counsel, I do not believe that the record evidence warrants a conclusion that Respondent ever had in effect a driver training program for its employees, who desired to obtain commercial driver's licenses in order to become drivers for Respondent. As recognized by counsel for the General Counsel, the certain record evidence is that, prior to Mathews being denied permission to continue doing so, just one other employee, Dave McCabe, had been permitted to train for a commercial license in company trucks, and the fact that, over the years, one other individual had been permitted to do so is hardly sufficient to establish a policy or past practice, let alone one which arises to a term or condition of employment. Moreover, the fact that Respondent felt compelled to publish a company-wide directive, that no employees should be afforded permission to train for commercial driver's license tests in company trucks, was merely reflective of Respondent's desire to ensure that a Mathews-type situation would not arise elsewhere and not of a desire to eliminate a corporate wide past practice, about which there exists no record evidence. Finally, in agreement with counsel for Respondent, assuming the existence of a policy and a unilateral change, there is no record evidence that Respondent's denial of continued permission to employee Mathews to practice for his commercial driver's license test on a company truck had any negative or detrimental impact upon his job as a warehouse worker or his ability to obtain a commercial driver's license and, accordingly, appears not to have risen to the level of a substantial and material change in terms and conditions of employment. *Outboard Marine Corp.*, supra; *Coca Cola Bottling Works, Inc.*, supra. Accordingly, I shall recommend that the allegations of paragraph 9(a) of the amended consolidated complaint be dismissed.

C. Respondent's Unilateral Discontinuance of its Driver Safety and Holiday Bonus Programs

At the hearing, the parties stipulated that, in 1994, Respondent implemented a driver safety bonus program at its San Diego facility whereby bargaining unit drivers, who had not been involved in any chargeable accidents during the previous year, earned an additional $.25 per hour beyond their regular wage rates and that drivers, who continued to be accident free for an additional year, received an additional $.05 per hour up to a maximum of $1.00 per hour over their regular wage rates. The parties further stipulated that Respondent continued paying the driver safety bonus to bargaining unit drivers through September 1 but, since said date, has discontinued the foregoing policy and practice. Employee, Donald Templeton, a driver for Respondent at its San Diego facility, testified that he first learned that Respondent was no longer paying the driver safety bonus in September when "it was no longer on my paycheck. It [had been] listed on the paycheck. The pay stub is safety and there was no amount in there on the one pay period in the end of September. . . . I asked Jim Stowers, the operations manager, and he said it had been discontinued because [the driver safety bonus program] wasn't in the Union contract."

As to Respondent's holiday bonus program, there is no dispute that, since, at least, 1985, the company has maintained in effect an annual employee bonus program, entitled "All Sell All Grow," for bargaining unit employees. Thus, employee Templeton testified that he received bonus payments in 1995, 1996, and 1997 and that the bonus checks were distributed at the annual employee Christmas party. According to Templeton, all employees, who had been employed for, at least one year, were eligible to receive the bonus, the amount of which, according to employee, Angelo Lieras, was based upon Respondent's profit for the year. On this point, Lisa Kay testified that the holiday bonus is based upon "the profitability of the company" and that the mount of the bonus, which each employee receives, is a percentage of his or her annual wages, based upon a formula, which takes into account Respondent's percentage growth in gross profit margin each year and utilizes a "multiplier" for calculating the bonus percentage. She added that Respondent must achieve a certain profitability level before the bonus is paid and that, notwithstanding the calculation of the bonus percentage, whether a department's employees receive the entire bonus or merely a portion is within the discretion of the department manager. There is also no dispute that, while other employees of Respondent did receive the bonus, bargaining unit employees did not receive the holiday bonus in 1998. According to Templeton, "a few weeks before the party, Jim Stowers . . . caught each one of us by ourselves and informed us that we weren't to receive a . . . bonus this year because it wasn't in the Union contract."

Arthur Cantu testified that, on or about August 27, 1997, subsequent to the Union's certification and prior to the commencement of bargaining, he mailed an information request letter to Respondent. In said document, Respondent's Exhibit 2, besides requesting copies of the company's health and welfare, life insurance, pension, and profit-sharing plans and copies of the company's holiday, vacation, and sick leave policies, he requested that Respondent provide the Union with a listing "of any other employee benefits provided by the Company." While he did recall that Respondent provided the Union with a list of its employee benefits, shown a copy of Respondent's Exhibit 3, a document, which is entitled "Summary of Benefits" and in which is listed numerous employee benefits including a "Driving/Safety Awards Program" and a bonus program of a "percentage of employees salary based on gross profit growth of company," Cantu could not recall if such was the listing of employee benefits document provided. In this regard, Lisa Kay testified that she responded to the Union's August 27 information request letter by sending to the Union a copy of an employee handbook and Respondent's Exhibit 3. Asked how the latter was sent to the Union, Kay replied, "I . . . think I just put it in an envelope and sent it without a cover letter. So I don't know when I did that."[23]

Examination of General Counsel's Exhibit 11 discloses that there is no mention of a driver safety bonus program or a bonus program based on Respondent's gross profit growth. Cantu further testified that, during the negotiations, he was never

[23] During cross-examination, she recalled she sent it to the Union early during the bargaining.

made aware of the existence of said bonus programs by Respondent, and employee Templeton, who testified that he was a member of the employee bargaining committee, that said committee met regularly with Stillwagen and Cantu, and that the latter would inform the employee about the state of the negotiations, denied ever discussing the existence the bonus programs with the Union officials. Cantu testified that the management rights clause of the parties' collective-bargaining agreement[24] means "basically whatever we did not see in the contract they were not obligated to continue" but that, during bargaining, there was no discussion that the management rights clause would permit Respondent to discontinue existing benefits. Lisa Kay conceded that, during the bargaining, there was never any discussion about the driver safety bonus program or the bonus program, based on Respondent's gross profit growth, and that Respondent eliminated the two bonus programs for bargaining unit employees "because [they were not] part of the collective-bargaining agreement." Finally, there is no dispute that Respondent failed to notify the Union of its decisions to eliminate the driver safety bonus program and the holiday bonus program for bargaining unit employees and to afford it an opportunity to engage in bargaining over the matters prior to implementation.

The amended consolidated complaint alleges that Respondent's elimination of its driver safety and holiday bonus programs was violative of Section 8(a)(1) and (5) of the Act. As set forth above, an employer violates said section of the Act by unilaterally changing the mandatory subjects of bargaining without first providing the bargaining unit employees' collective-bargaining representative with notice and a meaningful opportunity to bargain about the change. *NLRB v. Katz*, supra; *Bryant & Stratton Business Institute*, supra; *Associated Services for the Blind*, supra; *Johnson-Bateman Co.*, supra. There is no dispute that Respondent eliminated its driver safety and holiday bonus programs for its bargaining unit drivers without notice to the Union or affording it an opportunity to engage in meaningful bargaining. It is well settled, and Respondent does not argue to the contrary, that wage incentive programs, such as its driver safety bonus, are mandatory subjects of bargaining. *Johnson-Bateman Co.*, supra; *Wellman Industries*, 248 NLRB 325, 339 (1976). However, counsel for Respondent does contend that the holiday bonus is not a term or condition of employment as it is not "a benefit that employees have regularly received such that they would reasonably expect and rely on it as part of their remuneration." In support of the allegation of the amended consolidated complaint, counsel for the General Counsel relies upon two Board decisions—*Sykel Enterprises*, 324 NLRB 1123, 1125 (1997), and *Laredo Coca Cola Bottling Co.*, 241 NLRB 167, 173–174 (1979), enfd. 613 F.2d 1338 (5th Cir. 1980), cert. denied 449 U.S. 889 (1980). In *Laredo Coca Cola*, the employer had paid a Christmas or yearend bonus, which was based on the employer's sales and subjective matters such as an evaluation of each employee's job performance and attitude, to employees for the previous two years and, in *Sykel Enterprises*, the employer had paid a Christmas bonus, which was based on the company's yearly "performance" and the employee's attendance and job performance, to employees for the four prior years.[25] In finding unilateral discontinuances of the bonus payments unlawful in both cases, the Board concluded that the bonuses were mandatory subjects of bargaining, noting that, rather than the amounts or the manner of calculation, "what is crucial in determining whether a bonus is part of the wage structure rather than a gift is . . . whether, by course of conduct or otherwise, Respondent has justified its employees' expectations that they would receive the bonus as part of wages." Analysis of both cited cases discloses that the Board apparently relied upon just one factor in concluding that the employees' expectation of payment in each was reasonable—the successive years of past payment of the bonus.[26] Arguing in support of his client's position, counsel for Respondent relies upon *Phelps Dodge Mining Co. v. NLRB*, supra, in which the Court of Appeals concluded that bonuses, or "appreciation payments," given to employees over a 5-year time period by their employer did not constitute wages or a term and condition of employment because the bonuses were paid at irregular time intervals and varied as to amount and the manner in which they were calculated. *Id*. at 1497.[27] Counsel for Respondent argues that the company's holiday bonus, which had only been given to employees for the previous 3 years, should be similarly considered as a gift as such is inextricably tied to its profitability, which can never be certain from year to year. In *Mr. Potty, Inc.*, 310 NLRB 724, 729 (1993), the Board concluded that regular sales bonus payments to employees constituted emuneration as ". . . the bonus was not linked to the financial condition of the [employer] and, most critically, the bonus was inextricably linked to, and based upon, job performance." Likewise, in *Laredo Coca Cola*, supra, and *Sykel Enterprises*, supra, job performance was a factor relied upon by the employers in determining the amount of the bonus payments. Herein, in contrast to these latter two decisions, notwithstanding that they had received a holiday bonus for three consecutive years, as the said bonus had nothing to do with each employee's job performance, as department managers had discretion to deny bonus payment to employees under their supervision, and as payment of the bonus was entirely linked to the uncertain nature of

[24] Said provision reads as follows:

It is expressly agreed that all rights which are ordinarily vested in and exercised by employers, except those which are clearly and expressly relinquished herein by the Company, shall continue to vest exclusively and be exercised exclusively by the Company.

[25] In *Sykel Enterprises*, the bonus payments were not the same for each employee and also varied from year to year.

[26] Clearly, regular giving of a gift, such as a Christmas ham or turkey each year, does not become a part of an employer's wage structure so as to constitute a term or condition of employment. *Benchmark Industries*, 270 NLRB 22 (1984).

In *Nello Pistoresi & Son*, 203 NLRB 905 (1973), enf. denied 500 F.2d 399 (9th Cir. 1974), the Board found that payment of a Christmas bonus, the amounts of which were subjectively determined and not the same for each employee, 2 years in succession was sufficient to make the benefit a term and condition of employment. The Court of Appeals reversed, concluding that the history was too short to find the bonus constituted wages and that the amounts were too indefinite.

[27] In its underlying decision, the Board obliquely concluded that the appreciation payments ". . . constituted significant economic benefits to eligible employees based on the employment-related factors of wages and hours worked." Id. at 985.

Respondent's profitability for the year, I do not believe that its bargaining unit employees could have a reasonable, annual expectation of receiving the bonus so as to constitute an anticipated remuneration. Accordingly, as the holiday bonus program did not constitute wages or other terms and conditions of employment, Respondent was under no obligation to have given notice to the Union prior to eliminating it for bargaining unit employees, and I shall recommend dismissing paragraph 9(c) of the amended consolidated complaint.

In support of his contention that Respondent's elimination of its 4 year old driver safety bonus program for bargaining unit employees was violative of Section 8(a)(1) and (5) of the Act, counsel for the General Counsel relies upon *Mr. Potty, Inc.*, supra, which involved an employer's unilateral elimination of a sales bonus for bargaining unit employees. In determining that the employer's unilateral conduct was unlawful, the Board found certain facts about the bonus program, each of which is present in the instant matter, to be of significance. Thus, in *Mr. Potty, Inc.*, as herein, bonus payments were awarded to eligible bargaining unit drivers on a consistent basis (with each paycheck), the bonus payments were in uniform amounts, the bonus payments were linked to the wage rates of each eligible bargaining unit employee and not to Respondent's financial condition, and the amount of each eligible bargaining unit employee's bonus was inextricably linked to, and based upon, his job performance—lack of chargeable accidents. Id. at 729.

In defense of the allegation, counsel for Respondent argues that "... the parties' conduct together with the express language of [the management rights article] of the collective-bargaining agreement indicate the parties intention to waive [any employee benefit] not specifically agreed to" during bargaining. I find no merit to this defense. At the outset, the Board has long recognized that the burden of proof is on the party asserting the existence of waiver of a statutory negotiating right as to a mandatory subject of bargaining—in this case, Respondent. *TCI of New York*, 301 NLRB 822, 824 (1991); *East Kentucky Paving Corp.*, 293 NLRB 1132, 1135 (1989). Further, while not to be lightly done, a waiver of such a right may be inferred from extrinsic evidence of contract negotiations but only if the matter at issue has been fully discussed and consciously explored during negotiations and the labor organization has consciously yielded or clearly and unmistakably waived its interest in the matter. *AK Steel Corp.*, 324 NLRB 173, 181 (1997); *Ohio Power Co.*, 317 NLRB 135, 136 (1995); *KIRO, Inc.*, 317 NLRB 1325, 1328 (1995). Moreover, waiver may be manifested by the written terms of a collective-bargaining agreement (*Armour and Co.*, 280 NLRB 824, 828 (1986)), and, in such a manner, "a union may waive a member's statutorily protected rights . . . ." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). However, when, as herein, such a right is involved, the Supreme Court ". . . will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is `explicitly stated.' More succinctly, the waiver must be clear and unmistakable." 460 U.S. at 708. In evaluating whether language of a management rights clause, such as herein involved, constitutes a clear and unmistakable waiver, the Board has held that it will examine the precise wording of the relevant contractual provision and that "management-right clauses [which] are couched in general terms and [which] make no reference to any particular subject area will not be construed as waivers of statutory bargaining rights." *Bozeman Deaconess Hospital*, 322 NLRB 1107, 1108 (1997); *KIRO, Inc.*, 317 NLRB 1325, 1327 (1995); *Dubuque Packing Co.*, 303 NLRB 386, 397 (1991); *Johnson-Bateman Co.*, supra. Finally, the critical issue in deciding if management rights clause language constitutes a waiver "is not . . . whether [a statutory] right might reasonably be inferred from the management-rights clause; it is whether that interpretation is supported by 'clear and unmistakable' language." *Elliott Turbomachinery Co.*, 320 NLRB 141 (1995). *Owens-Brockway Plastic Products*, 311 NLRB 519, 525 (1993); *Universal Security Instruments*, 250 NLRB 661, 662 (1980).

Adhering to these principles, there is no clear record evidence that, either prior to or during the 16 negotiating sessions between Respondent and the Union, the latter's representatives were made aware of the existence of Respondent's driver safety bonus program or that the issue was ever discussed during the bargaining sessions between the parties. Thus, there is no certain record evidence that Union Agents Cantu and Stillwagen ever saw a copy of Respondent's Exhibit 3 prior to the bargaining,[28] and Cantu was uncontroverted that, during the bargaining, Respondent never made him aware of the existence of the driver safety bonus program. Employee Templeton was likewise uncontroverted that the bargaining unit employees never informed either Union official of the benefit. Further, and most significantly, Lisa Kay admitted that the bonus was never discussed during the bargaining. In these circumstances, I believe that Respondent has failed to meet its burden of proof and that there is no record evidence mandating the conclusion that, during the bargaining, the Union consciously yielded or clearly and unmistakably waived its interest in bargaining regarding the matter of Respondent's driver safety bonus program. With regard to the management rights article of the parties' collective-bargaining agreement, close scrutiny reveals that, at best, it is a "generally-worded" contractual provision, which abstrusely retains for Respondent "all rights which are ordinarily vested in and exercised by employers ...." I do not believe that the asserted "right" to eliminate bargaining unit employees' benefits, such as the driver safety bonus program, is necessarily contemplated by a broad reference to "all rights which are ordinarily vested in and exercised by employers;" the provision is clearly vague and, as such, insufficient to meet the standard of a "clear and unmistakable waiver." Accordingly, I do not believe that the contractual management rights article privileged Respondent to eliminate its driver safety awards program for bargaining unit drivers. *High-Tech Cable Corp.*, 309 NLRB 3, 4 (1992); *Johnson-Bateman Co.*, supra; *Kansas Education Assn.*, 275 NLRB 638, 639 (1985). Based upon the foregoing, I be-

[28] Cantu could not recall ever seeing R. Exh. 3, and Kay's testimony that, without enclosing a cover letter, she mailed the document to the Union is, in my view, insufficient evidence to warrant an inference that Stillwagen and Cantu were ever made aware of the existence of the driver safety bonus and clearly and consciously declined to bargain over the benefit.

lieve that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally eliminating the driver safety bonus program for bargaining unit drivers without notifying the Union and affording it a meaningful opportunity to bargain. *Mr. Potty Inc.*, supra.

CONCLUSIONS OF LAW

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

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

3. The following employees of Respondent constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All drivers, warehousemen, technicians and installers employed at its San Diego, California facility; excluding all other employees, office employees, clerical employees, guards, and supervisors as defined in the Act.

4. By delaying the execution of the memorialized version of its collective-bargaining agreement with the Union from August 14 to September 16, 1998 because of a pending decertification petition before the Board, Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act.

5. By unilaterally discontinuing its driver safety bonus program, a mandatory subject of bargaining, for its bargaining unit drivers, without first providing notice to the Union or affording it an opportunity to engage in meaningful bargaining over the matter, Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act.

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

7. Unless specifically found, Respondent engaged in no other unfair labor practices.

THE REMEDY

Having found that Respondent has engaged in serious unfair labor practices, I shall recommend that it be ordered to cease and desist from said unlawful acts and conduct and to take certain affirmative acts designed to effectuate the policies of the Act. With regard to its driver safety bonus program, I shall recommend that Respondent be ordered to reinstitute said program for bargaining unit employees and maintain it in effect until any modification is negotiated with the Union or an impasse in bargaining is reached. I shall also recommend that Respondent be ordered to reimburse each of its bargaining unit drivers for any wages lost, with interest, as a result of its unlawful elimination of the driver safety bonus program for bargaining unit drivers, with interest calculated in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Finally, Respondent must post the attached notice to inform employees of their rights and the outcome of these matters.

[Recommended Order omitted from publication.]