Oxford Chemicals, Inc.*and* Warehouse Union Local 6, International Longshoremen's and Warehousemen's Union. Case 20–CA–20344

30 September 1987

DECISION AND ORDER

BY MEMBERS JOHANSEN, STEPHENS, AND CRACRAFT

On 11 December 1986 Administrative Law Judge Jerrold H. Shapiro issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in opposition to the General Counsel's exceptions.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings, and conclusions only to the extent consistent with this Decision and Order.

The judge dismissed allegations that the Respondent violated Section 8(a)(5) and (1) of the Act, finding that before the Respondent unilaterally modified terms and conditions of employment, an impass in bargaining had been reached, and that the Respondent did not threaten to terminate employee Grant if he supported the Union. No exceptions have been filed concerning to the judge's disposition of these issues.

However, the judge also concluded that the Respondent's withdrawal of recognition from the Union was privileged because the unit size had diminished to one employee, rendering it an inappropriate unit for bargaining. He found that the unit consisted solely of employee Grant and that the dual-function employee, Evans, did not exhibit a sufficient community of interest with Grant to warrant her inclusion in the unit. We disagree with the judge's analysis and find that the Respondent's withdrawal of recognition violates Section 8(a)(5) and (1) of the Act as alleged.

As the judge sets forth in his decision, the Union has represented the Respondent's shipping and receiving employees at its Brisbane, California warehouse for over 35 years. At all times during 1985, and until unit employee Peters' retirement on 30 April 1986, the unit was composed of two employees, Peters and Grant. The Respondent also employed a third employee, Evans, who initially performed solely nonunit clerical work. The Respondent decided that it would not hire a replacement for Peters, but rather would operate with only the remaining employee complement. This necessitated several adjustments, including Evans' taking on the responsibility of preparing UPS packages for delivery, a job previously done by either Grant or Peters. The judge found that these new duties accounted for between 2 and 3 hours of every working day, or between 25 and 37-1/2 percent of Evans' time. Although the judge correctly finds that these changes made Evans a dual-function employee and cites the correct case, *Berea Publishing Co.*, 140 NLRB 516 (1963), as setting the standard for unit inclusion of dual-function employees, he nevertheless erroneously concludes that Evans fails to exhibit the necessary community of interest with the unit to warrant her inclusion.

The judge cited four factors that he characterized as tending to establish that Evans did not share a community of interest in terms and conditions of unit employment. He found that the following factors together established that Evans has no community of interest with Grant and is properly excluded from the unit: Grant's higher hourly wage rate; differences in insurance plans and employee contribution requirements; the fact that Evans' normal duties also included clerical tasks that were separate and distinct from the shipping and receiving duties exclusively performed by Grant; and the fact that the UPS assignment was less physically demanding than most of the other warehouse work. We find that by focusing on these differences, rather than on whether the employee performs unit work, the judge misperceives the essence of the *Berea* test.

The Board held in *Berea* that the same test for unit inclusion applies both to part-time employees and to dual-function employees; that is, "whether the employee is regularly employed for sufficient periods of time to demonstrate that he, along with the full-time employees, has a substantial interest in the unit's wages, hours, and conditions of employment."[2]

Here it is undisputed that Evans' regular duties involve spending a minimum of one quarter of each working day in the warehouse retrieving merchandise, packaging it, weighing and metering it, and placing it on pallets for the UPS driver to receive. It is also undisputed that this is work that has previously been performed by unit personnel and that would have to continue to be performed in order

[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] *Berea Publishing Co*, above, 518–519

to carry out the normal business of the Respondent.[3] The Respondent made a business decision not to replace certain unit personnel, but to redistribute unit work, and in the process converted a former nonunit clerical employee into a dual-function employee. We find that the amount of unit work this employee now regularly performs, regardless of its difficulty relative to other types of unit work and regardless of the performance of other nonunit work, is sufficient to demonstrate that this employee has a substantial and continuing interest in the terms and conditions of employment of shipping and receiving warehouse employees.[4] Moreover, we find that once this standard has been met, it is both unnecessary and inappropriate to evaluate other aspects of the dual-function employee's terms and conditions of employment in a kind of second tier community-of-interest analysis.[5] See *Fleming Industries*, 282 NLRB 1030 fn. 5 (1987). That is, inclusion of a dual-function employee within a particular unit does not depend on a showing of community-of-interest factors in addition to the regular performance of a substantial amount of unit work.

Accordingly, we reverse the judge's finding that dual-function employee Evans should not appropriately be included within the bargaining unit and his conclusion that the Respondent did not violate Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union as the representative of the established shipping and receiving warehouse unit.[6]

ORDER

The National Labor Relations Board orders that the Respondent, Oxford Chemicals, Inc., Brisbane, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize the Union, Warehouse Union Local 6, International Longshoremen's and Warehousemen's Union, as the exclusive collective-bargaining representative of all shipping and receiving employees employed at the Brisbane, California facility.

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

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

(a) Recognize and, on request, bargain in good faith with the Union as the exclusive representative of its employees in the above-described appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its facility in Brisbane, California, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 20, 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.

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

MEMBER CRACRAFT, concurring.

I join my colleagues in their substantive findings, including the finding that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from the Union. I disagree, however, with the majority's holding that the community-of-interest factors will not be considered in determining unit inclusion of dual-function employees.

My colleagues find that the amount of time a dual-function employee spends performing unit work is the sole factor properly considered in determining whether the employee is to be included in the unit. Once this standard has been met, the majority states it is "unnecessary and inappropriate to evaluate other aspects of the dual-function employee's terms and conditions of employment in a kind of second tier community-of-interest analysis." (Footnote omitted.) I disagree, and would find, as the Board did in *Wilson Engraving Co.*, 252 NLRB 333 (1980), that an analysis of whether dual-function employees share a community of interest with

[3] These facts distinguish this case from cases such as *U.S. Pollution Control*, 278 NLRB 274 (1986), *Landing Construction Co*, 273 NLRB 1288 (1984), and *Mc-Mor-Han Trucking Co*, 166 NLRB 700 (1967), cited by the Respondent

[4] See, e g, *Marine Petroleum Co*, 238 NLRB 931 (1978), *Ely & Walker*, 151 NLRB 636 (1965) Cf *Bonanno Family Foods*, 230 NLRB 555 (1977)

[5] The judge's misplaced reliance on the fact that Grant's hourly wage rate and insurance coverage differed from Evans' most particularly points out the error in using such indicia in an analysis of this type The wages and benefits of the Respondent's unit employees were subject to negotiation by collective bargaining, which necessarily did not control the wages and benefits of nonunit clerical employees Any resulting disparity in wages and benefits should not provide a separate basis for continuing to exclude an employee from the unit when that employee now performs a sufficient amount of unit work To adopt the judge's analysis would amount to excluding Evans on the basis that up to now she had been an excluded employee, a patent form of circular reasoning

[6] The Respondent has not raised any other affirmative defense to its withdrawal of recognition from the incumbent Union

[7] 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"

unit employees is warranted in determining the appropriateness of their inclusion in the unit.

In this case I would include dual-function employee Evans in the unit, but in reaching that conclusion, I would analyze community-of-interest factors insofar as they concern the actual bargaining unit work performed. Thus, in addition to considering the fact that Evans spends 25 to 37-1/2 percent of her time performing unit work, I would also note that while she is performing unit work, she and Grant share common supervision, common workspace, and common method of payment (hourly). Based on all these factors, I would include Evans in the unit. See *NLRB v. Georgia, Florida, Alabama Transportation Co.*, 566 F.2d 520 (5th Cir. 1978), and cases cited there.

APPENDIX

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

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

WE WILL NOT refuse to recognize Warehouse Union Local 6, International Longshoremen's and Warehousemen's Union as the exclusive representative of the employees in the bargaining unit.

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

WE WILL recognize and, on request, bargain in good faith with the Union as the exclusive representative of our unit employees and, if an understanding is reached, embody such understanding in a signed agreement.

OXFORD CHEMICALS, INC.

Lucile L. Rosen, Esq., for the General Counsel.
Judy S. Coffin, Esq. and *Carol R. Caine, Esq. (Littler, Mendelson, Fastiff & Tichy)*, for the Respondent.
Albert V. Lannon, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge. This proceeding, in which a hearing was held September 29, 1986, is based on an unfair labor practice charge filed May 9, 1986, and an amended charge filed June 9, 1986, by Warehouse Union Local 6, International Longshoremen's and Warehousemen's Union (Union), and a complaint issued June 23, 1986, on behalf of the General Counsel of the National Labor Relations Board (Board), by the Regional Director for Region 20, alleging that Oxford Chemicals, Inc. (Respondent) has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act (Act). The complaint, as amended during the hearing, alleges Respondent violated Section 8(a)(1) and (5) of the Act, as follows: Section 8(a)(1) by threatening employees with loss of employment if they supported the Union; Section 8(a)(5) and (1) by, without having bargained to agreement or impasse with the Union, reducing employees' hourly rate of pay, changing its practice of hiring employees through the Union's hiring hall, and changing its practice of prohibiting management personnel from performing bargaining unit work; and Section 8(a)(5) and (1) by withdrawing recognition from the Union. Respondent filed an answer denying the commission of the alleged unfair labor practices.[1]

On the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs, I make the following

FINDINGS OF FACT

A. *The Evidence*

1. Background

Respondent, a corporation, distributes industrial chemicals used as cleaning compounds. It operates several warehouses to distribute its products. The only one involved in this case is Respondent's Brisbane, California warehouse.

During 1985 and 1986, until April 30, 1986, Respondent regularly employed four persons in its Brisbane warehouse: the manager, two shipping and receiving clerks, and a clerical employee. Ronald Brewster was warehouse manager from July 1984 until April 21, 1986. He was replaced by Warren Nurriden, who occupied the position from May 1, 1986, until June 20, 1986. Nurriden was replaced by Anthony Ottati, who has been warehouse manager since June 26, 1986. The two shipping and receiving clerks were Patrick Grant and John Peters. Grant is still employed. Peters terminated his employment April 30, 1986, when he retired (Tr. 67–68). The clerical employee, Rose Evans, is still employed.

Since Respondent began operating the Brisbane warehouse in 1949, the Union has represented the warehouse employees, who, during the time material, were Grant and Peters. The clerical employee, who, during the time material, was Evans, has not been a part of the unit represented by the Union. The most recent collective-bargaining contract between Respondent and the Union covering the warehouse employees was effective from June 1, 1982, until May 31, 1985, and for the sake of convenience is referred to as the 1982–1985 contract.

[1] In its answer Respondent admits it is an employer engaged in commerce within the meaning of Sec 2(6) and (7) of the Act and meets the Board's applicable discretionary jurisdictional standard Likewise, Respondent admits the Union is a labor organization within the meaning of Sec 2(5) of the Act

2. The contract negotiations

In March 1985 the Union wrote Respondent that it intended to modify and amend the 1982–1985 contract. The same month, Respondent, by letter, wrote the Union that it intended to terminate the 1982–1985 contract, effective on the date of its termination, and that it looked forward to meeting with the Union to negotiate a new collective-bargaining contract.

The Union and Respondent did not begin contract negotiations at this time because apparently they mutually agreed to wait for the outcome of the negotiations between the Union and the Industrial Employers and Distributors Association (Association). The Association represents a group of employers in the warehouse business who bargain with the Union on a multiemployer unit basis, with the Association acting as their collective-bargaining agent. Early in June 1985 the Union and Association reached agreement on the terms of a new 3-year contract, called the 1985–1988 Union Association master agreement, or master agreement. Shortly thereafter, the Union mailed a contract proposal to Respondent and the other employers who were not a part of the multiemployer unit represented by the Association. The proposal was entitled "Terms of Settlement" and was for a term of 3 years. It proposed that Respondent agree to the terms of the 1982–1985 contract with certain modifications and amendments, which included a 12-cent-an-hour pay raise effective June 1, 1986; a 24-cent-an-hour pay raise effective June 1, 1987; a $500 bonus to be paid to the unit employees the first year of the contract and a $240 bonus the second year; an increase in the Respondent's health and welfare trust fund contributions during the first and second years of the contract; and a dues-checkoff provision whereby Respondent agreed to deduct fees and dues from the wages of employees who authorized such deductions. The Union's proposal retained essentially unchanged the cost-of-living allowance (COLA) provision contained in the 1982–1985 contract.

The contract negotiations between Respondent and the Union did not start until February 1986.[2] The first negotiation session took place February 7. Thereafter, negotiation sessions were held February 12, February 24, March 12 or 13, May 7, and May 22. Respondent's negotiators at the first bargaining session were its attorneys Wesley Fastiff and Judy Coffin, who were accompanied by Warehouse Manager Brewster. For the remainder of the negotiations Attorney Coffin, accompanied by the warehouse manager, was Respondent's negotiator. The Union's negotiators at the first two negotiation meetings were Union President Albert Lannon and Business Representative Henry McKnight. During the remainder of the negotiations Lannon, accompanied by a union business agent and/or employees, was the Union's negotiator.

Coffin and Lannon testified about what occurred during the several negotiation sessions. Whenever there is a conflict in their testimony I have credited Coffin's because her testimonial demeanor was better than Lannon's. However, the description of the several negotiation sessions set forth is based on Coffin's typed notes of the negotiations. These notes are based on Coffin's handwritten notes of the negotiations that were taken during each of the negotiation sessions. Coffin's typewritten notes (R. Exhs. 3–8) are for the most part consistent with her testimony, and in one or two instances where there is a conflict between the notes and Coffin's testimony, I have relied on the notes because, being based on Coffin's handwritten notes that were taken contemporaneously with the negotiations, they are more reliable than her testimony.[3]

The negotiators, during the first bargaining session of February 7, discussed the several modifications and amendments of the 1982–1985 contract contained in the Union's "Terms of Settlement" proposal.

Attorney Fastiff told the union negotiators that this proposal was unacceptable because Respondent could hire workers off the street for substantially less money than the Union was proposing, and that Respondent was thinking in terms of a contract proposal that contained more streamlined wages and benefits. Fastiff stated that Respondent would submit a written proposal along those lines for the Union's consideration. Union President Lannon replied that the Union had been waiting for several months to negotiate and was not interested in waiting much longer, that the Union's proposal was a modest one, and that the Union did not want to fight about it and would "look at the company's proposal"; but he warned there would be a problem if Respondent expected the Union to make "concessions."

Fastiff stated Respondent wanted to negotiate a new contract and in the interim would be willing to extend the provisions of the 1982–1985 contract for 6 months, with the sole change being the elimination of the contractual hiring hall provisions.[4] Union Representative McKnight replied that if Respondent paid the health and welfare contributions it owed to the trust fund and paid the $500 wage bonus provided for in the Union's "Terms of Settlement," that the Union would "buy" the 6-month extension of the 1982–1985 contract. Fastiff rejected this counteroffer and stated Respondent did not feel it owed any moneys to the health and welfare trust.[5] The meeting ended with the parties agreeing to meet on February 12 for their next negotiation session.

The February 12 bargaining session began with Respondent's negotiator, Attorney Coffin, handing Union

[2] All dates, unless otherwise specified, refer to the year 1986

[3] Coffin's handwritten notes were available during the hearing for the General Counsel to inspect.

[4] The 1982–1985 contract contains a provision whereby Respondent agrees to fill any vacancy by hiring applicants through the hiring facility maintained by the Union and further agrees to give preference to applicants who previously had been represented by the Union in bargaining units performing warehouse work

[5] As I have found above, between May 31, 1985, the expiration date of the 1982–1985 contract, and the February 7 negotiation session, the 1985–1988 Union-Association master agreement was negotiated. The master agreement increased the amount of money employers covered by that agreement were obligated to contribute to the trust for employees' health and welfare benefits The Union took the position Respondent, even though it was not a party to the master agreement, was obligated to pay the higher contribution rate. Respondent refused, but continued to pay the rate it had been paying at the time of the 1982–1985 contract's termination Respondent took the position that it was not contractually or legally obligated to pay the higher rate

Negotiator and President Lannon a written contract proposal changing the 1982–1985 contract as follows: deleted the section entitled "Maintenance of Standards and Existing Agreements"; deleted the section which, as described above, obligated Respondent to hire applicants through the Union's hiring facility and to give preference to those applicants who previously had been represented by the Union; deleted the COLA provision; and deleted one paid holiday—the floating holiday. This proposal, which called for a contract of 3 years' duration, proposed an across-the-board wage reduction of $2 an hour and no increase in Respondent's health, welfare, and pension contributions for the contract's duration.

After reading the proposal, Lannon tore it up and stated, "Give us a serious proposal." Coffin replied that the proposal was a serious one because Respondent wanted to increase its profits and believed its proposal would help do this. Lannon asked what was wrong with the Union's proposal. Coffin stated Respondent did not want to increase its cost of doing business. Lannon accused Coffin of not listening at the last negotiation session when the Union explained its proposal because, despite the fact that the Union negotiators had said that its pension proposal did not call for an increase in contributions, Respondent had not accepted this proposal. Coffin replied that if in fact this was true, Respondent accepted the Union's pension proposal. Lannon stated the Union would delete certain language contained in its health and welfare proposal. The negotiators also spent a considerable amount of time arguing over whether Respondent was obligated to pay the increased rate of health and welfare contributions set by the master agreement.

After a caucus, Coffin repeated that the Union's proposal was unacceptable. Lannon stated that the Union's position was it would not accept a proposal that granted the Respondent's employees less than what other employees employed in the area were receiving. Lannon explained to Coffin the Union was "not inclined to take any reduction" from the terms of the master agreement in the area of "health and welfare, pension, backpay and wages," and further explained to Coffin that it was not the Union's fault Respondent had agreed to a "lucrative contract" during the negotiations that resulted in the 1982–1985 contract and stated that the Union was unwilling to give back any of the benefits obtained in that contract. Coffin replied by stating Respondent wanted some reductions. The meeting ended with Coffin stating she would look over a copy of the 1985–1988 Union-Association master agreement.[6]

When the parties met for the third time, February 24, Attorney Coffin told Union President Lannon that the Respondent accepted the Union's proposals dealing with jury duty, holiday pay, seniority, dues checkoff, severance pay, overtime, and pensions, but that in all other respects, Respondent's position, as expressed at the previous negotiation meeting, remained the same.

The Union at this time offered a new proposal. Lannon withdrew the Union's sick leave and $500 wage bonus proposals. He proposed that the parties enter into a contract of 6-month duration that would expire September 1, 1986; that wages be increased 12 cents an hour effective June 1; that the COLA provisions remain the same as in the 1982–1985 contract; that new hires be paid $11.78 an hour, the rate set by the 1985–1988 Union-Association master agreement, and that on June 1 the hourly rate for new hires be increased by 12 cents an hour to $11.90; that employee Grant's hourly rate be "red-circled" at $12.35 an hour plus any future COLA increases plus the June 1 hourly increase of 12 cents; that Respondent pay the moneys it owed to the health and welfare trust because of its failure to pay the increased rate of contributions set by the 1985–1988 Union-Association master agreement; and that the health and welfare provisions remain the same as those set by the 1985–1988 Union-Association master agreement. Coffin stated Respondent would consider this proposal and respond to it by the next negotation session.

Attorney Coffin opened the next negotiation session on March 12 or 13 by informing Union President Lannon that the Union's proposed 6-month agreement made at the last negotiation session was unacceptable. Coffin also informed Lannon that Respondent had investigated and discovered that the wages paid by other employers doing business in the area were substantially less than the rates of pay contained in the 1985–1988 Union-Association master agreement. Lannon conceded there was not one employer in the area under contract with the Union that paid less than the $11.78 hourly rate set by the master agreement, and stated if Respondent was talking about paying less than that, "we are in trouble." Coffin replied that Respondent was talking about paying less than the $11.78 rate set by the master agreement, but was willing to accept an across-the-board reduction in current wages of $1.50 an hour rather than the $2 figure it had previously proposed, "but that's it." Lannon rejected this proposal. Coffin asked whether Lannon was saying the Union would not go below the wage rates set by the 1985–1988 Union-Association master agreement. Lannon indicated this was the Union's position.

Coffin repeated Respondent's position, namely, Respondent had examined the Union's proposal for a 6-month contract as a short-term proposal, and decided that in light of the wage rates being paid by other employers in the area, it was too costly for Respondent to accept. Lannon replied by stating, "Well, this is our proposal. Today, tomorrow, next week and next month." In response to Coffin's inquiry about where the negotiations would "go from here," Lannon stated Respondent had to decide whether it would pay the wages and benefits of the 1985–1988 Union-Association master agreement or whether it wanted "a battle." Coffin stated Respondent did not want a battle, but absent some movement by the Union, Respondent was still proposing an across-the-board $1.50 an hour reduction in wages. Lannon stated Respondent had been misguided in making its bargaining proposals and would pay the price. Lannon warned that Respondent was looking for "a brawl," and, at this point,

[6] I note that the 1985–1988 Union-Association master contract for the first year of the contract calls for an hourly wage rate of $11 78, whereas the hourly rate for the unit employees under the 1982–1985 contract, which was being paid during the time material, was $12 33 an hour

Lannon got up and, with the other members of the Union's negotiation committee, abruptly left the meeting room, thus ending this negotiation session.

On March 25 Coffin wrote Lannon, in pertinent part, as follows:

> At our meeting on March 13, 1986, you stated that the last proposal submitted by the Union would remain the same "today, tomorrow, the next day, next week and next month." I advised you that your proposal was not acceptable to the Company because it was simply too costly. After I rejected your proposal, you walked out of the meeting. I have not heard from you since that time.
>
> Based on your actions at our last meeting, I assume that you do not believe further meetings would be fruitful. If my assumption is wrong, please contact me by April 1, 1986 to set up another bargaining session.

On receipt of this letter, Lannon telephoned Coffin.[7] He stated he was calling about the letter and asked "What do you want to do?" Coffin replied by asking what Lannon wanted to do. Lannon stated he had to have the health and welfare provisions contained in the 1985–1988 Union-Association master contract, but that on wages there might be some area for movement on a wage-progression for new hires. Coffin asked Lannon to make a proposal. Lannon answered, "I can't make you a proposal. Make me one." Coffin refused, explaining that she did not intend to bargain against herself, that Respondent had made the last meaningful proposal concerning wages, and that if Lannon had a proposal he wanted Respondent to consider, he should make the proposal. Lannon repeated that he could not make a proposal and asked Coffin, "where do we go from here?" Coffin answered, "I think we're at impasse." Lannon responded by stating, "Let's go ahead and set up another meeting." The meeting ended with Coffin and Lannon scheduling the next bargaining session for May 7. The reason for the delay was that Lannon and Coffin both had conflicts in their schedules that precluded the session from being scheduled at an earlier date.

On April 11 Coffin wrote Lannon as follows:

> This is to confirm our telephone conversation of this week, wherein we discussed the collective bargaining negotiations between Oxford Chemical and I.L.W.U. Local 6. In that conversation, I asked you if you had changed your position on any of your bargaining proposals. You stated that you had not and that you had made your position clear before. You asked me if Oxford Chemical was willing to change its proposals. I responded that we were not prepared to alter any of our proposals. From our conversation and from our last meeting, it appears that we are clearly at impasse in the negotiations. Accordingly, we will implement our final proposal to Local 6 on May 5, 1986.
>
> If you have any questions regarding these matters, please call me. Otherwise, I will see you at the negotiating session we scheduled for May 7, 1986.
>
> Hopefully, at that meeting the Union will be in a position to break the impasse that currently exists by making some concessions in its existing economic offer.

On April 30 John Peters, who, with Patrick Grant, was employed by Respondent as a shipping and receiving clerk, voluntarily terminated his employment and retired from work (Tr. 67–68) As will be discussed, infra, as of September 29, the date of the hearing, Respondent had not hired another employee to take his place.

Since May 5, whenever Respondent has hired workers to do bargaining unit work, i.e., when Grant was absent on vacation, it has not used the Union's hiring hall as it had previously done pursuant to the terms of the 1982–1985 contract. Also commencing May 5 Respondent intended to implement its wage proposal regarding employee Grant by reducing his wages by $1.50 an hour, but due to an error by the payroll department this reduction was not implemented until sometime in September.

On May 5 the Union established an informational picket line at the Brisbane warehouse. The legend on the picket sign read, "Unfair, Warehouse Union Local 6, ILWU." The picketing continued on and off for several weeks. Also about May 5 the Union called for a boycott of the product manufactured by Respondent's parent company.

The parties, at the outset of the May 7 negotiation session, summarized their respective bargaining proposals, the proposals they had advanced at the last bargaining session. Then, after a discussion about health and welfare, with neither party changing its previous positions on this subject, Lannon presented a new union proposal dealing with hiring and wages, as follows: The deletion of the hiring hall provision contained in the 1982–1985 contract, with Respondent agreeing that the Union would have the first opportunity to refer applicants; freezing employee Grant's current wage rate of $12.33 an hour for the life of the contract, plus COLA; paying new hires $10.85 an hour for the first 3 months; $11.35 during the next 3 to 5 months; and $11.78 for the remainder of the contract, plus COLA; and that Grant should have the right to severance pay under section 24 of the 1982–1985 contract. After caucusing to consider this proposal, Coffin stated it was unacceptable because Respondent still wanted a $1.50 an hour across-the-board decrease in wages, but noted that concerning health and welfare, Respondent would be willing to cover the employees under the company health insurance plan for the $157 a month it had been contributing on behalf of each unit employee to the contractual health and welfare trust. The meeting ended at this point with the parties agreeing to meet again May 22, at which time Respondent would submit information about the Company's health and welfare plan.

The May 22 negotiation session started with Coffin furnishing the Union with information about the benefits provided for in the Company's health and welfare plan. In response to Lannon's request, Coffin left the meeting

[7] Coffin and Lannon testified about this telephone conversation The description is based on Coffin's testimony because her testimonial demeanor was better than Lannon's

and contacted Respondent's headquarters in Atlanta, Georgia, to determine Respondent's actual monthly cost per employee for coverage under the plan. When Coffin returned and informed Lannon that the information was unavailable right then because the person in charge of insurance benefits was out of the company office for approximately an hour, she was accused of bargaining in bad faith for not having this information. After a caucus Lannon presented a revised contract proposal, as follows: The deletion of the hiring provision contained in the 1982–1985 contract, with Respondent agreeing the Union would have the first opportunity to refer applicants; the deletion of the health and welfare provisions contained in the 1982–1985 contract, with Respondent's health and welfare plan to be effective June 1; Respondent to pay the amount of money ($1545) that the Union claimed it owed as the result of its failure to pay the increased contribution rate established by the 1985–1988 master agreement; Grant's hourly rate to be reduced from $12.33 an hour to $11.78 an hour and new hires to be paid $10.83 an hour. Coffin stated Respondent would consider this proposal and respond to it by Tuesday, May 27.

Toward the beginning of this bargaining session, Coffin told Lannon that Respondent did not intend to replace Peters and intended to operate with just one person. In this regard, Coffin told Lannon, "We want to put you on notice that we are going to operate with one person. We don't intend to replace John Peters." Lannon replied, "That is not consistent with what you told Pat [Grant]." Coffin answered, "It is my understanding that originally we were going to hire another employee, but now that Warren [Nurriden] has been here awhile, he thinks he can handle it with Pat [Grant] and the secretary." Lannon stated, "That's not what Pat was told." Grant, who was present at this bargaining session, remarked, "a lot of work for one man. They said they were thinking about hiring another employee." Nurriden, who was also present, replied, "business does not warrant it" and Coffin explained that "three people is consistent with how [Respondent] operates elsewhere—one manager, one clerical, one warehousemen."

On May 27 a letter dated May 27 from Coffin to Lannon was hand delivered to Lannon. The letter reads as follows:

> The purpose of this letter is to advise you that effective today, May 27, 1986, Oxford Chemical Company hereby withdraws recognition from ILWU, Local 6 as the collective bargaining representative of its employees. This withdrawal of recognition is based on the fact that the bargaining unit which you represented has been reduced to one employee. The Company has no intention in the forseeable future of hiring any additional employees. As I am sure you are aware, a bargaining unit of one employee is not an appropriate unit within the meaning of the National Labor Relations Act. Accordingly, the employer has no duty to bargain over a single employee unit.
>
> As such, it is unnecessary to respond to the last proposal you made on behalf of the ILWU in our bargaining session on May 22, 1986.
>
> Further, Oxford Chemical Company hereby withdraws all outstanding contract proposals. If you have any questions concerning these matters, please contact me.

On May 1 Warren Nurriden took over as the manager of the Brisbane facility and occupied that position until June 20. Patrick Grant, a warehouse worker for Respondent, testified that on May 1, the day after the retirement of warehouse worker Peters, Nurriden spoke to Grant and clerical employee Evans in the facility's office.[8] Grant testified he asked Nurriden to get him some help in the warehouse because "we were behind," but that Nurriden indicated he was unwilling to hire anyone to help Grant in the warehouse and instead informed Grant and Evans that the warehouse was going to a be a three-person warehouse, that Evans and Nurriden would both work with Grant in the warehouse, that this was the way in which Respondent operated two of its other facilities, and that either with or without the Union this was the way it intended to operate its Brisbane warehouse; if Evans was unable to do the warehouse work, Nurriden would have to hire someone else to replace her.[9] Grant further testified he did not recall whether Nurriden said anything about the Union, but when asked whether the Union was picketing when Nurriden spoke with him and Evans, Grant testified in the affirmative and further testified in effect that Nurriden at this time spoke to Grant and Evans about the picket line. In this regard, Grant testified that during the above conversation Nurriden reminded him he was 57 years old and told him that if he "walked" with the Union that he would be out of a job, explaining that if Grant decided to stay with the Company he would have a job, but if he decided to "walk with the Union" he would be "replaced" by other workers who were familiar with his job.[10]

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[8] Grant was obviously mistaken about the date on which Nurriden spoke to him and Evans For, according to Grant's testimony, it took place after the Union began picketing at the warehouse. It is undisputed that the picketing did not start until May 5. Accordingly, I find that Nurriden spoke to Grant and Evans about May 5.

[9] Grant later testified that when he spoke to Nurriden about getting him some help because he was behind in his work, that Nurriden replied by stating, "if you stay with us, I can get you all of the help you want, after the Union is out" I reject this testimony because it is inconsistent with his above-described testimony that in rejecting his request for help in the warehouse, Nurriden explained to Grant and Evans that Respondent, with or without the Union, intended to operate the Brisbane warehouse as a three-person operation, similar to the way it operated some of its other facilities, with Nurriden and Evans working with Grant in the warehouse

[10] I have considered that at one point Grant testified Nurriden stated that if Grant went with the Union that Grant was "out" and he further testified that Nurriden made this remark without any reference to Grant's honoring the union picket line I have rejected this testimony because, when Grant's testimony about his conversation with Nurriden is viewed in its entirety, it is clear that Nurriden's remarks concerning the Union were made in the context of Nurriden discussing whether Grant would honor the union picket line, which had been established that day, and that Nurriden did not state that if Grant went with the Union that he was "out," but stated that Grant "would be replaced" if he "went out and honored the picket line" (Tr 82, LL 2–21)

Nurriden, who has not been employed by Respondent since June 20, did not testify.

3. The unit work performed by "management personnel"

The 1982–1985 contract is silent on the subject of the right of management personnel to perform unit work; however, when the Union and Respondent entered into this agreement, they also entered into a supplemental agreement which, in pertinent part, provided:

> Notwithstanding any other provision of the collective bargaining agreement, management personnel shall have the right to perform the following bargaining unit work where employees covered by the collective bargaining agreement are busy performing other tasks or are otherwise unavailable: (a) Picking up orders for customers; and (b) Picking up product samples for salesmen. The Union also recognizes the right of management personnel to use equipment, including but not limited to forklifts and order pickers, for the purpose of checking product inventory.
>
> It is understood that the intent of this Supplemental Agreement is to cover genuine emergencies or urgent customer service needs and is not to be construed as an unlimited prerogative.

The supplemental agreement further provides that if an employee is absent from work and fails to give Respondent notice of his/her absence 15 minutes prior to the beginning of his/her shift, Respondent may use "management personnel" that day to perform the unit work normally performed by the absent employee; otherwise, if the aforesaid notice of absence was given, Respondent was obligated to call the union hiring hall to secure a replacement worker.

Ronald Brewster testified that when he was employed as a manager from July 1984 until April 21 he did not work in the warehouse on a regular basis, but worked there only "occasionally." As examples of the occasions that he did warehouse work, Brewster testified he helped the warehouse workers occasionally when they got behind in their work; when it was the only way rush orders could be delivered on time; when warehouse workers were absent from work on vacation or sick leave; and to perform inventory work.

Anthony Ottati testified that since his employment as manager on June 26 he only occasionally has performed warehouse work; namely, he has helped out in the warehouse on several occasions toward the end of the workday when freight carriers were in the process of picking up orders at Respondent's loading dock and rush orders were not ready for shipment, and has also helped out in the warehouse when Grant was absent from work on vacation. Otherwise, Ottati testified he does not work in the warehouse.

Grant testified Brewster did not do any shipping and receiving work in the warehouse. He testified Nurriden did shipping and receiving work in the warehouse and drove a forklift while doing this work. When asked to give the number of hours weekly he observed Nurriden doing warehouse work, Grant testified "daily"; he did not answer the question. When asked whether the current manager, Ottati, does shipping and receiving work in the warehouse, Grant testified "yes occasionally." When asked to give the number of hours per week during which Ottati does warehouse work, Grant did not answer the question; rather he testified Ottati did warehouse work "when we get behind, and there is some things that Rose Evans can't do, then he'll come out and he'll give me a hand and he'll perform work in the warehouse."

Grant's testimonial demeanor was poor when he gave his above-described testimony, whereas Ottati's was good. I therefore find that the only times Ottati has helped out in the warehouse have been on those occasions at the end of the workday when rush orders were not ready for shipment, and when Grant was absent from work in September on vacation. Likewise, I reject Grant's testimony concerning Nurriden's performance of warehouse work. His demeanor was poor when he gave this testimony and, as described above, his testimony was vague and evasive. Another reason why Grant's testimony in this area is suspect is that he testified that when Brewster was manager, prior to Peters' retirement, Brewster did not do any shipping and receiving work in the warehouse, whereas Brewster, a witness for the General Counsel, testified that he occasionally assisted Grant and Peters with their warehouse work when they got behind and when it was the only way a rush order could be shipped on time.

4. The number of employees employed in the bargaining unit

The bargaining unit covered by the 1982–1985 contract, during the time material consisted of Patrick Grant and John Peters, who worked on the floor of the warehouse doing shipping and receiving work. Respondent's third rank-and-file employee, Rose Evans, was a clerical employee and was not a part of the bargaining unit represented by the Union.[11]

On April 30 Peters voluntarily terminated his employment when he retired. Previously, in 1985, Peters notified Respondent of his intent to retire either in the spring or summer of 1986. Thereafter, the manager of the warehouse, Brewster, and Respondent's vice president in charge of production and manufacturing, Arvi Kivi, spoke about Peters' retirement. During the fall of 1985, in a discussion concerning Peters' retirement, Kivi told Brewster he wanted to see if Respondent could hire an

[11] Ron Brewster, the manager of the warehouse from July 1984 until April 21, when he was discharged by Respondent, as a witness for the General Counsel testified, in response to a leading question, that Evans occupies a "managerial position." It is clear, however, from the undisputed description of Evans' job duties, infra, that she is employed as a rank-and-file clerical employee. There is no evidence that she is employed as a managerial employee within the meaning of the Act or that she is employed in a "management personnel" position within the meaning of the supplement to the 1982–1985 contract. The fact that Evans takes the place of the warehouse manager in his absence is insufficient to establish her status as a managerial employee especially when, as here, there is no showing how frequently this occurs and no showing of the authority possessed by Evans when she substitutes for the manager.

applicant from a source other than the union hiring hall and wanted Brewster to determine the wage rates being paid in the area by nonunion employers for warehouse work. He told Brewster he believed the Respondent could hire someone for less than the $12.33 an hour union rate that it was paying Peters and Grant. Subsequently, late in February or early March, Kivi told Brewster Respondent would like to hire someone to replace Peters and stated that "if possible" Respondent "would like to be able to go outside the hiring hall to hire a replacement for Peters." Kivi also explained that Peters would not be replaced immediately after he retired because if his position was left vacant for 30 days Respondent could then go outside of the union hiring hall and hire a nonunion person.[12] Also during this conversation Kivi discussed with Brewster the possibility of transferring an employee from one of Respondent's other warehouses to replace Peters.

The record reveals that between Peters' retirement on April 30 and the date of the hearing, September 29, Respondent did not hire anyone to replace Peters.[13] Also Respondent's current warehouse manager, Anthony Ottati, testified that he currently has no plans to hire an additional worker.

The record further reveals that the gap left by Peters' retirement has been filled by Grant working substantially more overtime than he had worked prior to Peters' retirement, and by Evans working 10 to 15 hours each week in the warehouse preparing the United Parcel Service (UPS) orders for delivery. In this respect, Ottati testified Evans spends 2 to 3 hours daily working in the warehouse getting the UPS orders ready for delivery.[14] The UPS orders weigh less than Respondent's other orders and are Respondent's lightest orders. Evans gets the merchandise to fill these orders from the bins in the warehouse. She takes the merchandise to the UPS meter where she packages, weighs, and meters them, and places them on pallets for the UPS truckdriver to pick up. Prior to Peters' retirement, Evans did not do the above-described UPS work, but usually spent all of her 40-hour workweek doing the following work: answering the telephones; answering the inquiries of customers and salespersons; tracing orders that customers complained should have been, but had not been, received; giving customers credit for returned orders and placing these orders back in the inventory; operating a computer to look up the location of stock, to check the level of inventory and availability of stock, and to determine which of Respondent's other warehouses had merchandise that the Brisbane warehouse did not have in stock. Evans performs virtually all of her above-described clerical duties in an office located in the same building as the warehouse. Since Peters' retirement, when Evans started to perform the above-described UPS work in the warehouse, the warehouse manager has assisted her in performing her clerical duties.

During the period from 1984 to 1986 the volume of business at Respondent's Brisbane warehouse decreased because Respondent lost its single largest account on the West Coast and lost additional business when it was purchased by another company that took over some of Respondent's business. The result was that the volume of business at the Brisbane warehouse in 1986 was 30 percent less than in 1984. The record also reveals that the amount of work being performed at the Brisbane warehouse is comparable to the amount performed at two of Respondent's other warehouses that employ only three workers—a manager, a clerical, and a warehouse worker.

On approximately May 1, Walter Howard, Respondent's distribution service manager, who oversees the operation of all seven of Respondent's warehouses, told the manager of the Brisbane warehouse, Nurriden, that he should try to operate the warehouse using only three persons: Nurriden, Evans, and Grant. Nurriden, who had just assumed the position of manager on May 1, stated he did not know if he could or could not operate in this fashion.

About May 22 Howard was informed by his superior, Jim Williams, that Williams had decided "to try to operate with three people, not to replace [Peters]."

During the May 22 negotiation session, as I have found above, Attorney Coffin, Respondent's negotiator, informed the union negotiator, Union President Lannon, that Respondent did not intend to replace Peters and intended to operate with just one warehouse worker, explaining that although originally it had intended to hire another employee, now that Nurriden had been there for awhile, Nurriden thought he "could handle it" with Grant and Evans. Nurriden, who was present at this negotiation meeting, informed Lannon that the business did not warrant hiring anyone to replace Peters. Coffin explained to the union negotiators that employing only three persons at the Brisbane warehouse was consistent with the way Respondent operated elsewhere; using one manager, one clerical, and one warehouseman.

[12] When asked by the General Counsel to state Respondent's object in negotiating with the Union, Brewster testified Respondent's object was to "discontinue" or "eliminate" the Union Later when Brewster was questioned about the basis for this conclusion, his testimony was vague and evasive When his testimony is closely scrutinized it reveals that his conclusion concerning Respondent's bargaining object was based on Kivi's above-described statements that Kivi felt Respondent could hire someone to replace Peters at less than the $12 33-per-hour union wage rate and that "if possible" Respondent would like to go outside the Union hiring hall to hire Peters' replacement Kivi did not state expressly or impliedly that Respondent's bargaining objective was to "discontinue" or "eliminate" the Union

[13] The record reveals that since Peters' retirement Respondent has employed several temporary workers One to substitute for Evans when she was absent from work for several weeks on disability leave, others to substitute for Grant while he was absent from work in September on vacation, and others to do a few days of cleanup work I recognize Grant testified that, at the time of the hearing, Respondent was employing a temporary employee in the warehouse Grant also testified that this temporary employee was not employed on a daily basis, but just when needed Ottati, the warehouse manager, denied Grant's testimony He testified that the only temporary employees employed by him were the ones hired to do the cleanup work and to substitute for Grant while he was on vacation (Evans' temporary replacement was already employed when Ottati took over the manager position) and that other than those temporary workers he had not employed any others I credit Ottati's testimony because his testimonial demeanor was better than Grant's

[14] Grant testified that after Peters' retirement, Evans worked between 5 and 6 hours daily in the warehouse doing the UPS work I have credited Ottati's testimony because his testimonial demeanor was better than Grant's

B. *Discussion and Conclusionary Findings*

1. The alleged unilateral changes

The General Counsel contends and the complaint alleges that on May 5 Respondent violated Section 8(a)(5) and (1) of the Act by, without having bargained to an agreement or impasse, reducing the hourly rate of pay of the bargaining unit employees by changing its practice of filling vacancies in the bargaining unit through the union hiring hall, and by changing its practice of prohibiting management personnel from performing bargaining unit work except in genuine emergencies or to deal with urgent customer service needs. Respondent takes the position that these allegations are without merit because any unilateral changes in the employees' terms and conditions of employment were made only after an impasse in negotiations and, even if there was no bargaining impasse, the Union waived its right to bargain over the implemented changes because it had almost 1 month's notice Respondent intended to implement its last bargaining proposal, yet did not object or request bargaining over the proposed implementation.

An employer violates Section 8(a)(5) and (1) of the Act by unilaterally changing a term or condition of employment during collective-bargaining negotiations. *NLRB v. Katz*, 369 U.S. 736, 741–743 (1962). The principal exception to this rule occurs when the negotiations reach an impasse. For, "after bargaining to an impasse . . . an employer does not violate the Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals." *Television Artists AFTRA v. NLRB*, 395 F.2d 622, 624 (D.C. Cir. 1968).

Although the concept of impasse eludes precise definition, it has been held that an impasse exists when "good faith negotiations have exhausted the prospects of concluding an agreement" or when "there [is] no realistic possibility that continuation of discussion[s] . . . would [be] fruitful." *Television Artists AFTRA v. NLRB*, 395 F.2d 622, 624, 628 (D.C. Cir. 1968).

The Board, with court approval, has established general criteria for determining whether an impasse exists. Some of the relevant factors are the parties' "bargaining history, the good faith of the parties in negotiations, the length of negotiations, the importance of the issue as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations." *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), affd. 395 F.2d 622 (D.C. Cir. 1968). In this case, I am persuaded that when all of the evidence is examined in light of the *Taft Broadcasting* criteria, it establishes that negotiations were at an impasse on May 5 when Respondent implemented its contract proposal.

The Union and Respondent have had a collective-bargaining relationship at the Brisbane warehouse since 1949 and there is no evidence that prior to the negotiations, this relationship had been anything but amicable. As a matter of fact, as indicated by the Union's negotiators during the negotiations, Respondent, during the negotiations that resulted in the 1982–1985 contract, agreed to contract terms that were very "lucrative" for the unit employees.

The complaint does not allege Respondent was engaged in bad-faith bargaining during the negotiations and the evidence concerning the parties' bargaining proposals and what occurred during the bargaining sessions does not warrant an inference Respondent was bargaining in bad faith. However, the General Counsel in her posthearing brief takes the position that the testimony of employee Grant about his conversation with Manager Nurriden and the testimony of Manager Brewster about his conversations with Vice President Kivi proves Respondent was negotiating in bad faith without a desire to reach agreement. I do not agree. Grant's and Brewster's testimonies, which have been described above, are not either by themselves or in the context of what occurred during the bargaining sessions, sufficient to taint Respondent's conduct at the bargaining table so as to warrant a finding of bad-faith bargaining. In any event, it would be inappropriate for me to make such a finding when, as here, not only does the complaint fail to allege Respondent was guilty of bad-faith bargaining, but counsel for the General Counsel during the hearing represented that the General Counsel was not litigating that issue (Tr. 179). Under the circumstances Respondent was not afforded the opportunity to litigate the issue of whether Respondent's conduct away from the bargaining table was of a nature to warrant the inference that it was bargaining in bad faith.

As described in detail above, as of May 5, the date Respondent implemented its contract proposal, the parties had been unable to reach agreement because they were apart on wages and health and welfare, which were issues of overriding importance to both parties. As of May 5, Respondent had consistently taken the position it would only accept an agreement that called for wage and health and welfare payments comparable to the 1985–1988 union-association master agreement, whereas Respondent consistently had taken the position it needed an agreement that reduced employees' wages below the level of the master agreement and that did not call for an increase in health and welfare contributions as provided for in the master agreement.

As of May 5, there had been a lack of substantive movement toward agreement on the issue of wages and health and welfare payments. During the four negotiation sessions and the Coffin-Lannon April telephone conversation, the Union refused to budge from its position that Respondent agree to pay the wages and health and welfare contributions set by the master agreement, whereas Respondent refused to budge from its position that the Union agree to a contract that contained wage rates and health and welfare contributions substantially lower than those called for by the master agreement. I have considered that Respondent at the March 12 negotiation session changed its wage offer from a $2-an-hour reduction to a reduction of $1.50 an hour. However, the new wage proposal was still substantially below the master agreement's wage scale and the Union abruptly ended this bargaining session by stating in effect that the Union did not ever intend to accept a proposal that did not call for wage rates and health and welfare contributions comparable to those contained in the master agree-

ment. It was with this statement that the Union negotiators abruptly walked out of the March 12 meeting without scheduling another meeting. Under these circumstances, and considering the central importance to both parties of the wage and health and welfare issues, Respondent had every reason to believe that negotiations were deadlocked and that further negotiation sessions would not be fruitful.

The record reveals that as of the date Respondent implemented its contract proposal, May 5, it was the contemporaneous understanding of both parties that negotiations had reached an impasse. Thus, when union negotiator Lannon at the March 12 bargaining session stated in effect that the Union did not ever intend to accept a proposal that did not call for wage rates and health and welfare contributions comparable to the master agreement and abruptly walked out of the meeting without scheduling another bargaining session, Coffin, Respondent's negotiator, wrote Lannon that "base on your actions at our last meeting, I assume that you do not believe further meetings would be fruitful." Thereafter, during the first week of April, when Lannon telephoned Coffin concerning this letter, Lannon and Coffin, as described above, refused to budge from their previous bargaining positions, whereon Lannon asked Coffin, "Where do we go from here?" and Coffin replied, "I think we are at impasse." Lannon did not challenge this assertion. Thereafter, in her April 11 letter to Lannon concerning this conversation, Coffin repeated her view that since the parties had refused to change their previous bargarning positions, she felt negotiations were at an impasse and stated that, effective May 5, Respondent intended to implement its contract proposal and asked Lannon to contact her if he had any questions concerning these matters. Lannon did not respond to Coffin's letter or otherwise indicate to Coffin that he disagreed with her assertion that negotiations had reached the point of impasse. The foregoing circumstances establish that, as of the date in April when Coffin and Lannon ended their telephone conversation, it was their understanding that negotiations had reached an impasse. I realize Coffin and Lannon ended their conversation by agreeing to hold another negotiation session. This does not, however, detract from all the other circumstances that overwhelmingly warrant the inference that the parties thought the negotiations had reached an impasse. That this was their understanding is further demonstrated by the fact that rather than arrange their schedules so as to schedule another negotiation session for the immediate future, the next session was not scheduled to take place for 1 month.

The length of the parties' negotiations here is entirely consistent with an impasse finding. It is settled that parties are not required "to engage in fruitless marathon discussions at the expense of a frank statement" during negotiations, *NLRB v. American National Insurance Co.*, 343 U.S. 395, 404 (1952), and that there is no rigid formula for assessing how long parties must negotiate before impasse occurs. *Teamsters Local 745 (Empire Terminal) v. NLRB*, 355 F.2d 842, 845 (D.C. Cir. 1966). In the instant case when Respondent on May 5 implemented its contract proposal, the parties had been negotiating since February 7, a total of 3 months, and had held four negotiation sessions plus a telephone conversation between the principal negotiators concerning the status of negotiations. Furthermore, all parties knew that the issues concerning wage rates and health and welfare contributions were critically important. Also, from virtually the start of the negotiations, there had been a considerable difference in the parties' respective positions concerning these issues, which graphically manifested itself with the Union's abrupt termination of the March 12 negotiation session. Moreover, the differences in the parties' respective bargaining positions had been discussed at length during the parties' four bargaining sessions. In these circumstances, the parties did not have to engage in marathon bargaining to demonstrate they had, in fact, reached an impasse in their negotiations.

Considering the factors, I am persuaded that Respondent has established that the contract negotiations were at an impasse on May 5 when Respondent implemented its contract proposal. Accordingly, I find Respondent did not violate Section 8(a)(5) and (1) by unilaterally decreasing the wages of employee Grant or by unilaterally changing its practice of filling vacancies through the union hiring hall, inasmuch as these unilateral changes were reasonably comprehended within Respondent's preimpasse bargaining proposals.

Regarding the third last alleged illegal unilateral change—the alleged change in Respondent's practice of prohibiting "management personnel" from performing bargaining unit work except in genuine emergencies or to deal with urgent customer service needs—such a change would not have been reasonably comprehended within Respondent's preimpasse proposals because Respondent's proposals did not include the deletion or modification of the contractual provision, described in detail above, which in substance provided that "management personnel" were not allowed to perform unit work except in genuine emergencies or to deal with urgent customer service needs. The General Counsel, however, has failed to prove that during the time material Respondent's "management personnel" have performed any more unit work than they performed previously, or that Respondent's "management personnel" have performed unit work in situations other than genuine emergencies, or to deal with urgent customer service needs. As described in detail above, the evidence fails to establish that either managers Nurriden or Ottati performed more unit work than manager Brewster during the term of the 1982–1985 contract, nor did the General Counsel prove that either Nurriden or Ottati performed unit work other than in genuine emergencies or to deal with urgent customer service needs. Under these circumstances, I will recommend the dismissal of allegation of the complaint.

2. The alleged threat of a loss of employment if employees support the Union

In support of this allegation the General Counsel relies on statements made by Manager Nurriden to employee Grant. As I have found above, Warehouse Manager Nurriden, admittedly a statutory supervisor, about May 5 told employee Grant if he honored the union picket line he would be out of a job and explained that if Grant de-

cided to honor the picket line he would be "replaced" by other workers familiar with his job. Nurriden's statement is a correct recitation of Respondent's right to replace Grant with a replacement if he honored the union picket line. *Eagle Comtronics*, 263 NLRB 515 (1982). I realize that while an employer that informs its employees they are subject to replacement during an economic strike does not have to give a legal seminar on the panoply of residual rights that attach to a striking employee, that it may not explicitly on implicity threaten to terminate the employment relationship because of a strike. I also recognize that, read in a vacuum, Nurriden's statement that if Grant honored the union picket line he would be out of a job is a questionable representation of Grant's rights as an economic striker. But when considered in the context of Nurriden's explanation to Grant that he would be replaced by other workers if he honored the picket line, this phrase merely reads as one part of a perfectly accurate and wholly acceptable statement concerning Respondent's right to replace economic strikers and is perfectly consistent with that statement. If Grant honored the picket line and was replaced by Respondent with a replacement worker, Respondent would not have to reinstate him, on request, so long as his replacement was still employed; thus, Grant would be out of a job. Under the circumstances, Nurriden's statement cannot be reasonably construed as a warning that Respondent intended to permanently terminate Grant's employment relationship if he honored the picket line. It is for all the foregoing reasons that I shall recommend the dismissal of the allegation that Respondent violated Section 8(a)(1) by threatening employees with the loss of employment if they supported the Union.

3. The withdrawal of recognition

On May 27, as described above, Respondent broke off collective-bargaining negotiations with the Union and withdrew recognition from the Union as the representative of its warehouse employees with the explanation that the number of employees in the unit represented by the Union had been permanently reduced to one. I am persuaded, for the reasons set forth above, that when Respondent broke off negotiations and withdrew recognition from the Union, Respondent had permanently reduced the bargaining unit from two to one employee.

If an employer employs one or fewer unit employees on a permanent basis, the employer, without violating Section 8(a)(5) of the Act, may withdraw recognition from a union, repudiate its contract with the union, or unilaterally change employees' terms and conditions of employment without affording the union an opportunity to bargain. *D & B Masonry*, 275 NLRB 1403 (1985), and cases cited.

In *Crispo Cake Cone Co.*, 190 NLRB 352 (1971), the Board held that in situations when a multiemployee unit has been reduced to one employee the respondent-employer has the burden of proving the reduction is permanent to establish a termination of its duty to bargain with the exclusive representative of that unit.

In 1985 and 1986, until April 30, Respondent regularly employed two unit employees, shipping and receiving clerks Peters and Grant. On April 30 Peters voluntarily terminated his employment when he retired. Respondent did not replace Peters and about May 22 decided not to replace him and to operate the warehouse with just one shipping and receiving clerk, Grant. As of the date of the hearing, September 29, Respondent had not replaced Peters. Respondent has no plans to hire a replacement for him. The gap left in the warehouse by Peters' departure has been filled by Grant, regularly working substantially more overtime than he had previously worked, and by clerical employee Rose Evans, regularly working 2 to 3 hours daily in the warehouse preparing UPS orders for delivery. There is a lack of evidence that the warehouse managers employed since Peters' retirement have performed significant amounts of warehouse work or performed more warehouse work than had been performed by the manager prior to Peters' retirement.

In view of the circumstances, the essential question to be decided in connection with Respondent's claim that it has permanently reduced the unit represented by the Union to one employee, is whether Evans should be included in the unit, as contended by the General Counsel, or, as contended by Respondent, excluded from the unit.[15] The answer depends on whether the record as a whole reveals that Evans, a dual-function employee, shares a sufficient community of interest with unit employee Grant, so as to be included in the unit. *Berea Publishing Co.*, 140 NLRB 516, 519 (1963). I am persuaded that the record does not establish Evans shares a sufficient community of interest with Grant so as to be included in the unit.

The fact that Evans and Grant are supervised by the same person, the warehouse manager, and that Evans regularly spends between 25 percent and 37-1/2 percent of her working time doing unit work, performed by Grant, supports the General Counsel's contention that Evans shares the same interest as Grant in the unit's terms and conditions of employment. On the other hand, there are several factors that support Respondent's contention that Evans does not share the same interest as Grant in the unit's terms and conditions of employment. There is no evidence Evans and Grant share the same or similar terms and conditions of employment. Quite the opposite, the record shows that their terms and conditions of employment differ significantly: (1) Even with the $1.50 an hour reduction in his wages, Grant is paid $3.22 an hour more that Evans (G.C. Exh. 11); (2) Evans is covered by the Company's health insurance plan, for which Evans pays part of the cost (G.C. Exh. 11), whereas Grant has been covered by a different health insurance plan, for which Respondent pays all the cost; (3) Evans spends the overwhelming majority of her worktime in the warehouse office performing clerical duties, whereas Grant spends virtually all of his time on the floor of the warehouse performing the more physically

[15] This case does *not* raise the issue of whether Respondent permanently reduced the unit to one employee by transferring unit work to nonunit employee Evans in violation of the Act There is no allegation in the complaint that the transfer of unit work to Evans violated the Act Also, as I have found above, Evans is not a managerial employee and there is insufficient evidence to establish, as alleged in the complaint, that Respondent has transferred unit work to "management personnel" in violation of Sec 8(a)(5) and (1) of the Act

demanding duties of a shipping and receiving clerk; (4) Even during the 2 to 3 hours a day when Evans works on the floor of the warehouse doing unit work, she does not perform the same type of unit work as Grant. She performs only the UPS work, because it requires less physical exertion than any of the other unit work, whereas Grant performs all the warehouse work. Lastly, the fact that Evans substitutes for the warehouse manager in his absence is another factor that militates against a finding that Evans shares the same interest in the unit's terms and conditions of employment as Grant.

I am of the opinion that, on balance, the above-described factors, which indicate Evans does not share a sufficient community of interest with Grant so as to be included in the bargaining unit, outweigh Evans' and Grant's common supervision and Evans' unit work. I recognize that the Board, under certain circumstances, has included dual-function employees in bargaining units when they have spent approximately the same percentage of their working time doing unit work as spent by Evans in this case. However, I am persuaded that the fact that Evans regularly spends between 25 percent and 37-1/2 percent of her working time performing unit work is outweighed by other factors, discussed above, which indicate Evans does not share a community of interest with unit employee Grant.

Based on the foregoing, I find that when Respondent broke off negotiations with and withdrew recognition from the Union, Respondent had permanently reduced the bargaining unit represented by the Union to one employee. Accordingly, since Respondent is not obligated under the Act to bargain with or recognize the Union as the representative of a one-employee unit, I shall recommend the dismissal of the allegation that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with and withdrawing recognition from the Union.

[Recommended Order for dismissal omitted from publication.]