

Master Window Cleaning, Inc., d/b/a Bottom Line Enterprises and Service Employees Union Local No. 18 and Building Service Employees Pension Trust Local No. 18, affiliated with Service Employees International Union, AFL-CIO. Cases 32-CA-10041 and 32-CA-10088

March 29, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND DEVANEY

On November 15, 1989, Administrative Law Judge David G. Heilbrun issued the attached decision. The Respondent filed exceptions and a supporting brief.

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 brief and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order, as modified.²

The judge found, and we agree, that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing its final proposal on August 2³ and discontinuing certain benefit contributions on August 20, 1988,⁴ prior to impasse.

The Respondent excepts to the judge's decision primarily on three grounds. First, the Respondent asserts it was justified in unilaterally discontinuing its contributions to the Union's health and welfare and pension trust funds (the trust funds) because the parties had reached impasse on or before August 1. Alternatively, the Respondent contends its actions were justified because the Union bargained in bad faith. Finally, the Respondent argues that the Union waived its

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

² As part of his remedy, the judge recommended that the Respondent be ordered to reinstate the wages and terms and conditions of employment that existed before its unlawful changes, and to make whole unit employees for any losses suffered as a result of its unlawful action. In addition, we shall order the Respondent to reimburse the trust funds provided for in the collective-bargaining agreement for those contributions the Respondent failed to make on behalf of unit employees. Any additional amounts that the Respondent must pay into the benefit funds shall be determined in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1979). In addition, we shall order the Respondent to make the employees whole by reimbursing them for any expenses ensuing from the Respondent's unlawful failure to make the required benefit fund contributions, as set forth in *Kraft Plumbing*, 252 NLRB 891 fn. 2 (1980), enf'd. 661 F.2d 940 (9th Cir. 1981). Interest on all such sums shall be paid in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

³ Although the Respondent's president, Richard Scott, testified that the Respondent did not implement its proposals on August 2, Scott's testimony was generally discredited by the judge. We therefore do not rely on this testimony.

⁴ All dates are 1988 unless otherwise indicated.

right to bargain over the termination of the trust fund contributions by failing to request bargaining after adequate notice. We find no merit in the Respondent's exceptions.

On the morning of August 1, 1988, at the parties' sixth bargaining session,⁵ the Respondent presented its final proposal which incorporated, in typewritten form, certain proposals it presented at the previous session on July 13. The parties broke for a long lunch during which the Union promised to prepare "serious counterproposals" for submission to the Respondent that afternoon. The Union's sole negotiator, Robert Russell, testified that he returned to his office⁶ and began drafting the counterproposals when the Union's president, Henry Acevedo, instructed him to attend an unrelated union meeting in the place of a business agent who was ill. When Russell informed Acevedo that the Respondent expected him to continue negotiations that afternoon, Acevedo said he would talk to the Respondent and try to postpone the session to a later date.

Russell returned from the union meeting at approximately 3 p.m. to learn that the Respondent's chief negotiator, H. Sanford Rudnick, was upset by the Union's abrupt cancellation of the afternoon bargaining session, that Rudnick had demanded that Acevedo continue negotiating in Russell's place, and that, when Acevedo refused, the Respondent stated, "If you're not going to negotiate, fine. We are at impasse."

Shortly thereafter the Union received a letter dated August 1 from Rudnick, which, after a preliminary recitation of background, stated:

At 1 p.m. after the Employer returned from lunch, we found out by your secretary and Mr. Acevedo [sic], that you had to cancel negotiations due to Union business. You stated you would get back to the Employer at some future time. I believe Mr. Acevedo could have handled this matter for you since we have been trying to obtain a contract for months and we were about to make some progress. At that time I told Mr. Acevedo we would still continue negotiations that same evening. However, we were going to implement on August 1st at 12 midnight unless we reached a contract.

Nevertheless, your conduct can only be viewed as bargaining in bad faith by stalling, delaying and cancelling negotiations. You were not even going to take our Proposal to the employees to vote or ratify.

Therefore, due to your delaying, the Employer has no choice but to implement its August 1,

⁵ The multiemployer agreement to which the Respondent was a party expired on July 1, 1988. The parties commenced negotiations for a successor agreement on May 10 after the Respondent timely withdrew from the multiemployer bargaining association.

⁶ The parties conducted all the negotiations at the Union's headquarters.

1988 Proposal at 12 midnight since we are at impasse and your conduct can only be viewed as rejecting our Final Proposal. Your Union can only be blamed for not reaching a fair and equitable contract.

On August 22 the Respondent sent the Union another letter which stated:

As of August 20, 1988 Master Window Cleaning will no longer be contributing to the General Employees Trust Fund and the Building Service Employees Pension Plan on behalf of its employees by virtue of the fact that Master Window Cleaning Service Inc., and Union Local 18 are at impasse. See enclosed letter of August.

As stipulated, the Respondent's contributions were due September 10, 1988; they were not made when that date came to pass or at any time material thereafter.

It is undisputed that the Union did not respond to either the August 1 or 22 letters.

As noted above, the Respondent first contends that it was privileged to discontinue its trust fund contributions because the parties had reached impasse in their negotiations. We disagree. The record amply supports the judge's finding that the parties were, in fact, poised for movement when the negotiations broke for lunch on August 1. Indeed, the Respondent's own negotiator, Rudnick, stated in his August 1 letter that "we were about to make some progress" when the negotiations recessed, and the Respondent had granted the Union additional time to prepare its counterproposals. Thus, for the reasons set forth in the judge's decision, we find that the parties had not reached impasse in their negotiations on August 1 or at any time thereafter.

We also find no merit in the Respondent's contention that the Union failed to bargain in good faith, thus justifying the Respondent's unilateral action. While the record discloses that both parties were engaged in hard bargaining, the record is devoid of evidence that the Union conducted its negotiations in bad faith or to frustrate agreement.⁷

Finally, we reject the Respondent's contention that the Union waived its right to complain about the Respondent's unilateral termination of its trust funds contributions by failing to request bargaining after notice of the Respondent's intent to implement in its August 1 letter. Absent exceptional circumstances, an employer may not justify a unilateral implementation of a proposal on a particular subject, submitted during negotiations for a labor agreement to succeed an expired one, on the ground of a union's failure to request bargaining on that subject. When negotiations are not in progress, we can find a waiver of a union's statutory

right to bargain over a change in the unit employees' terms and conditions of employment on the basis of the union's failure to request bargaining if the union had clear and unequivocal notice of the proposed change and was given that notice sufficiently in advance of implementation to permit meaningful bargaining.⁸ However, when, as here, the parties are engaged in negotiations, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole.⁹ The Board has recognized two limited exceptions to this general rule: "[w]hen a union, in response to an employer's diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining,"¹⁰ and when economic exigencies compel prompt action.¹¹ Such extenuating circumstances are not, however, present in this case.

First, the parties had been meeting regularly at approximately 2-week intervals and had, at the meeting just prior to August 1, actively bargained over the Respondent's health and welfare and pension proposals.¹² Further, as noted above, both parties anticipated the Union's counterproposals with an expectation toward reaching agreement. The Union's cancellation of the afternoon session did not terminate bargaining; rather the Respondent effectively cut off bargaining by declaring impasse when no impasse existed and by notifying the Union of implementation as of midnight on August 1.

Second, the Respondent proffered no evidence of circumstances requiring that it cease its contributions to the trust funds at the time it took this action. It simply took this action because that was its proposal on the subject and it did not wish to wait for further bargaining toward agreement or impasse.

The Union's cancellation of the afternoon bargaining session on August 1 does not, of itself, amount to evidence of bargaining intransigence sufficient to justify the Respondent's unilateral implementation of its proposals.¹³ Furthermore, the Respondent's precipitous

⁸ E.g., *Clarkwood Corp.*, 233 NLRB 1172 (1977).

⁹ See *NLRB v. Katz*, 369 U.S. 736 (1962); *NLRB v. Auto Fast Freight*, 793 F.2d 1126, 1129 (9th Cir. 1986), *enfg.* 272 NLRB 561 (1984); *Winn-Dixie Stores*, 243 NLRB 972 (1979); *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *enfd.* sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

¹⁰ *M & M Contractors*, 262 NLRB 1472 (1982), citing *AAA Motor Lines*, 215 NLRB 793 (1974).

¹¹ *Winn-Dixie*, *supra*, 243 NLRB at 974 and fn. 9, citing *Katz*, *supra*, 369 U.S. at 748.

¹² Indeed, the record indicates that on July 13 the Respondent modified its proposal in response to the Union's demand and agreed to pay a portion of the vested retirement funds to existing employees. Prior to July 13, the Respondent had offered no payment of any part of the vested contributions.

¹³ In *M & M Contractors*, the union refused, over a 7-month period, to give the employer a date on which it would meet to bargain. In *AAA Motor Lines*, the union similarly refused, over a 2-1/2-month period, to meet and bargain

⁷ The Union's isolated cancellation of the bargaining session on the afternoon of August 1 for legitimate business reasons does not indicate that it bargained in bad faith. See *SCA Services of Georgia*, 275 NLRB 830, 834 (1985).

declaration of impasse and notification of implementation as of midnight that night effectively precluded any test of the Union's intentions.

In short, when the Respondent reacted to the Union's cancellation of the afternoon bargaining session by declaring impasse and threatening implementation as of midnight, it absolved the Union from following through on its stated intention of "get[ting] back to" the Respondent by making it appear that there was no point in further meetings—that the Respondent was committed to what it was planning to do. By that very announcement, the violation was committed.

Having found that the parties were not at impasse in their negotiations on August 1 and that no extenuating circumstances existed, we conclude that the Respondent violated Section 8(a)(5) and (1) by unilaterally implementing its contract proposals and terminating its contributions to the Union's health and welfare and pension funds.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified below, and orders that the Respondent, Master Window Cleaning, Inc., d/b/a Bottom Line Enterprises, Hayward, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order, as modified.

1. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs.

"(c) Make whole the employees in the appropriate unit by transmitting the contributions owed to the Union's health and welfare and pension funds pursuant to the terms of its collective-bargaining agreement with the Union, and by reimbursing unit employees for any medical, dental, or any other expenses ensuing from the Respondent's unlawful failure to make such required contributions, in the manner set forth in this decision."

2. Substitute the attached notice for that of the administrative law judge.

with the employer about the terms for a new contract. By contrast, there is nothing in the record here to show that the Union was continually avoiding or delaying bargaining.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

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

WE WILL NOT refuse to bargain with Local No. 18, affiliated with Service Employees International Union, AFL-CIO as the exclusive bargaining representative of our employees in the unit described below, by unilaterally implementing changes in wages and terms and conditions of employment of these employees at a time when no impasse in bargaining with the Union has occurred.

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, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time window cleaners and maintenance employees employed at our Hayward, California facility; excluding office clerical employees, guards, and supervisors as defined in the Act.

WE WILL, on request, reinstate the wages and terms and conditions of employment that existed before the unlawful unilateral changes, and WE WILL make whole our unit employees, transmit the contributions owed to the Union's health and welfare and pension funds pursuant to the terms of our collective-bargaining agreement with the Union, and reimburse unit employees, with interest, for any medical, dental, or any other expenses ensuing from our unlawful failure to make such required contributions. This shall include reimbursing employees for any contributions they themselves have made for the maintenance of the Union's health and welfare and pension funds after we unlawfully discontinued contributions to those funds; for any premiums they may have paid to third-party insurance companies to continue medical and dental coverage in the absence of our required contributions to such funds; and for any medical, dental, or other such bills they have paid directly to health care providers that the contractual policies would have covered.

MASTER WINDOW CLEANING, INC.,
D/B/A BOTTOM LINE ENTERPRISES

Ariel Sotolongo, for the General Counsel.
Steven Thomas Davenport Jr., of Walnut Creek, California,
for the Respondent.
Paul Supton, of San Francisco, California, for the Union.

DECISION

STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge. This case was tried at Oakland, California, on February 27, 1989. Charges on which the proceeding was based were respectively filed on November 30, 1988, by Service Employees Union Local 18, jointly with Building Service Employees

Pension Trust, and on January 4, 1989, by Local 18, affiliated with Service Employees International Union, AFL-CIO (the Union). A consolidated complaint was issued January 25, 1989. The primary issue is whether Master Window Cleaning, Inc., d/b/a Bottom Line Enterprises (the Respondent), implemented a final offer prior to lawful impasse being reached in collective-bargaining negotiations between the parties and, relatedly, whether it then impermissibly ceased making certain fringe benefit trust fund contributions on behalf of bargaining unit employees as previously provided by an expired agreement, in violation of Section 8(a)(1) and (5) of the National Labor Relations Act.

On the entire record, including my observation of the demeanor of witnesses, and after consideration of briefs filed by General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a California corporation with an office and place of business in Hayward, California, has been engaged in providing window cleaning and exterior building maintenance services to customers located in Northern California. It annually provides such services or sells and ships goods valued in excess of \$50,000 directly to customers or business enterprises which themselves meet one of the National Labor Relations Board's jurisdictional standards, other than the indirect inflow or indirect outflow standards. On these admitted facts I find that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that Service Employees Union Local 18 is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Outline of the Situation

The parties have had a collective-bargaining relationship since approximately July 1984, for which the appropriate unit is one including all full-time and regular part-time window cleaners and maintenance employees at Respondent's Hayward, California facility. The most recent collective-bargaining agreement between the parties was one of 3 years' duration, effective until July 1, 1988.

A course of bargaining negotiations for contract renewal commenced on May 10, 1988, and continued during several more sessions spread over succeeding months.¹ All these meetings took place at the Union's Oakland, California hall.

At all negotiating sessions the Union's bargaining official was Representative Robert Russell, while Respondent was principally represented by Labor Consultant H. Sanford Rudnick, with company owner and President Richard Scott also present each time.

Respondent produced a series of progressively varied written proposals, keying every one of them by sequence and subject matter to the actual contract. Each of these typed documents tendered during the course of negotiations contained the following preliminary language:

The Company reserves the right to add, to alter, amend, modify or withdraw any proposal at any time during the

Negotiations. Further, all contract provisions are tentative until there is a final acceptance in writing of the entire Contract.

Following a meeting on August 1, Rudnick declared the parties to be at impasse. Based on this declaration, Respondent promptly implemented new terms and conditions of employment. No meetings have been held or requested since that date.

B. Principal Findings

The first session on May 10 was typical as an opening collective-bargaining episode. Respondent delivered a thorough proposal running to 4 typed pages, with proposed changes to 12 of the contract's 16 sections. The Union's contribution at this first meeting consisted of a handwritten sheet signed by Russell, in which an annual 4-percent wage rate increase was proposed along with maintenance of health and welfare benefits plus modestly increased pension contributions over a desired 3-year term.

This exchange left the parties considerably apart as to economics alone, because Respondent's opening proposal called for an immediate "across-the-board" wage decrease of 15 percent, reduced holiday and vacation benefits, substitution of an employer health and welfare plan, deletion of pension benefits, and other changes in phraseology designed to cut labor costs. Respondent's opening proposal would delete the existing 31-day union-security clause, while subcontracting by the employer, as expressly prohibited in the contract, was sought to be completely reversed in meaning as a stated management right when "the need arises." Predictably, the Union flatly rejected all significant portions of Respondent's opening proposal.

When the parties negotiated again on May 20, movement appeared mainly by Respondent reducing the proposed wage decrease from 15 percent to 12 percent. The respective positions remained essentially unchanged at this second bargaining session, save only for the Union's agreement to delete a prior requirement for furnishing and cleaning work clothes at employer expense.

The third bargaining session occurred on June 8. Respondent's series of progressively changing proposals include a document admitted into evidence as General Counsel's Exhibit 7. While a dispute exists from the testimony as to whether this document actually surfaced in the negotiating, discussion on June 8 revolved around its terms plus the Union's proposed shortening of contract language covering a referral system. By this time Respondent's wage proposal sought only an across-the-board decrease of 8 percent.

With only scattered and inconsequential tentative agreements in hand, the parties bargained on June 28 when contract expiration was only 3 days away. For this meeting the Union presented specific counterproposals, its first comprehensive written expression of position since the opening exchange. In this an across-the-board hourly wage increase of 35 cents was sought with immediate effect, and a modestly increased schedule of minimum hourly rates from the third step up was proposed. Additionally, employees to be newly hired after July 1 were proposed to have only limited holiday benefits, and the Union's original proposal on increasing pension contributions was cut back. For Respondent's part it presented new economic terms by offering a

¹All dates and named months are in 1988, unless otherwise indicated.

wage freeze for existing employees, coupled with a reduced starting hourly rate for new hires of \$6.66. Additionally it offered to provide, in principle, its own private retirement plan. The document embodying these changes ran to five typed pages, and was headed as fourth in the series but specifically, and for the first time, prominently labeled a "Final Proposal." The Union again mainly rejected Respondent's package, but agreement was reached on June 28 to continue the union-security clause and make other minor changes in contract language. Another meeting was routinely scheduled, without apparent concern for contract expiration occurring in the interim.

When the parties met on July 13, Respondent offered a wage increase for present employees, and a separate schedule of progressive hourly wage rates for those to be hired in the future culminating at a journeyman rate of \$12.77 per hour. Additionally Respondent proposed a buy-back of the vested pension benefits enjoyed by employees, and for the first time offered a contract term of 2 years rather than only 1. This configuration of changes resulted after Respondent twice caucused during the course of this meeting, and returned with handwritten proposals representing a progressive sweetening of its offer. The Union rejected ultimate content of Respondent's aggregate proposal on July 13, however in the process Russell had verbally countered with a proposal that new hires be paid on the \$7.66 to \$12.77 hourly rate scale of the expired contract. In consequence the parties remained in disagreement on major topics. After inconclusive discussion about whether the Union would conduct a vote among employees on the pending offer, the parties agreed to meet again on July 25. At Russell's request this meeting date was changed to August 1. Rudnick's assent to this was contained in his confirming letter to Russell dated July 22, in which he made the point that postponement also demonstrated Respondent's "good faith" in delaying a previously expressed intention to "implement our final proposal on July 25."

When the parties met on August 1, Respondent presented a wage schedule for employees to be newly hired, under which their progression to journeyman wage rate was inadvertently shown as completing in only four steps rather than five as previously proposed. Russell expressed pleasure with such apparent movement by Respondent, and stated that the Union would offer counterproposals after a lunchbreak. As it eventuated Russell was directed by Acevedo to cover another meeting that afternoon on an emergency basis, while Acevedo would return to the instant negotiations for whatever purpose could be served. Being unprepared to do so, Acevedo made no attempt to deliver the expected postlunch counterproposals. Upon arriving back Acevedo was advised by Rudnick that unless negotiations continued through the afternoon, Respondent would implement its existing composite proposal. Acevedo responded that he was not equipped to conduct negotiations about which Russell was fully familiar. Scott, the only percipient witness to these events, testified that Acevedo said the Union would "get back" to the negotiations as a seemingly final remark. Rudnick remained adamant about making an implementation, and the meeting concluded on that note. Rudnick immediately wrote to Russell by letter dated August 1. After a preliminary recitation of background, Rudnick's letter continued to a conclusion as follows:

At 1 p.m. after the Employer returned from lunch, we found out by your secretary and Mr. Acevedo [sic], that you had to cancel negotiations due to Union business. You stated you would get back to the Employer at some future time. I believe Mr. Acevedo could have handled this matter for you since we have been trying to obtain a contract for months and we were about to make some progress. At that time I told Mr. Acevedo we would still continue negotiations that same evening. However, we were going to implement on August 1st at 12 midnight unless we reached a contract.

Nevertheless, your conduct can only be viewed as bargaining in bad faith by stalling, delaying and cancelling negotiations. You were not even going to take our Proposal to the employees to vote or ratify.

Therefore, due to your delaying, the Employer has no choice but to implement its August 1, 1988 Proposal at 12 midnight since we are at impasse and your contract can only be viewed as rejecting our Final Proposal. Your Union can only be blamed for not reaching a fair and equitable contract.

By subsequent letter dated August 22, Rudnick advised the Union, specifying attention of Acevedo, that Respondent's cessation of contributions to the previously applicable employee trust fund and pension plan was effective August 20 because the parties "are at impasse."

The only known communication after this was a letter dated October 13 from Russell to Rudnick grieving Respondent's failure to make "payroll deduction of union dues" for the past 3 months. Russell's letter took the position that members of the Union were no longer *liable* for those dues, and demanded an immediate employer remittance of \$300 to cure the lost revenue. Whether viewed at the conclusion of discussions on July 13 or August 1, and regardless of the labelings appearing from June 28 onward, Respondent had soon reached a point following expiration of the contract from which it claimed there would be no yielding. After reading in a correction to General Counsel's Exhibit 13 at the bottom of page 3, by substituting the intended amount "\$11.49" for "\$12.77" and assuming the higher hourly rate to apply only after passage of a stated 180 days, Respondent's wage offer had finally stalled from one session to the next at two 25-cent hourly increases for existing employees during a 2-year contract term, and a wage schedule for new hires that would commence economically low and progress only to the recently expired top journeyman rate. The bargaining subjects of both health and welfare benefits and a pension plan had surfaced, in principle and evolving detail, as employer provided features in place of the Union's programs. Finally, Respondent's desire for virtually unfettered subcontracting rights had appeared consistently and without any change of proposed wording in the entire series of proposals. Thus Respondent's final bargaining position of July 13 continued as one and the same thing to August 1, when a new typed proposal intently summarized the several modifications made on July 13.

C. Credibility

I generally credit the testimony of Russell on observed demeanor and impression grounds. While loose or halting at times, I am satisfied that generally he was consistently sin-

cered and attemptedly truthful. In keeping with this assessment I find, as claimed by Russell, that no negotiating session took place between the parties on the date of June 17.

Scott failed to persuade that he was possessed of an accurate recollection or inclined to be candid in what he offered as testimony. Aside from subjective factors in assessing his credibility, I identify three distinct reasons for giving only slight weight to his recollections. First he demonstrated a particular tendency to be fanciful in clinging to a belief that the parties had met for negotiations on June 17. Nothing in the surrounding facts, nor even what is available from his labor consultant's writings, would remotely establish that claim. Second, he was argumentative and evasive about the role of Acevedo in the course of bargaining. Again the entire context shows this individual had little or no role in the negotiations, wholly contrary to what Scott would have it believed. This infirmity in Scott's version is best exemplified by his inherent self-contradiction in saying that from and after June 8 Acevedo would "be involved" in negotiations, without any explanation about why Acevedo's absence during the morning portion of a crucial meeting on August 1 was not remarkable (Tr. 187, 227). Third, Scott was blatantly mistaken in testifying that Russell had not offered to make an inviting counterproposal during the intended afternoon portion of negotiations on August 1. All persuasive evidence is that Russell did exactly this. He emphatically so testified, and most importantly Rudnick's own writing, found in General Counsel's Exhibit 16, plainly tells of this intention by his union counterpart.² This array of contradicting evidence provides ample basis to reject the major thrust of Scott's testimony.

There is, however, one notable exception to the discrediting of Scott. I am satisfied that he has correctly complained that the typed proposal advanced by Rudnick on August 1 did in fact contain an error as to proposed wage progression for new hires. Nothing about the theory or bargaining pattern of Respondent would suggest a proposed rise in wages for new hires from start to journeyman rate in only the 10-month span that is literally shown in the faulty schedule. This departs both in theme and format from Respondent's obvious intent, regardless of whether Russell took it to show a welcome change. Furthermore, minor inadvertencies in the series were not unprecedented, as with omission of an intended 25-cent-per-hour pay raise on January 1, 1990, and the mistaken word "some" for "same" as once applied to holidays.

D. Contentions

General Counsel contends generally that no impasse existed between the parties as of August 1 which would warrant any implementation of the employer's existing bargaining proposals. Several anticipated defenses are traced and discussed, with General Counsel arguing in all instances that they lack merit.

Respondent contends that a bona fide impasse in negotiations was reached on July 13, and this was not broken on August 1 because no new wage proposal actually emanated

from the employer during that session. Additionally Respondent contends that Russell did not indicate the Union would make a counterproposal at any time during, or in connection with, the negotiations of August 1. Relatedly, Respondent contends that even upon a finding that Russell had intended to make a counterproposal, controlling law would require it to have been specific and substantial in its expected nature. Respondent also argues that failure of the Union to protest discontinuance of trust fund contributions legitimizes such action as taken on August 22. Finally, Respondent contends that the Union's failure to bargain in good faith by failing to complete the negotiation on August 1 precludes holding the employer in violation of the Act.

E. Analysis

Both parties point to *Taft Broadcasting Co.*, 163 NLRB 475 (1967), *enfd.* sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968), as the bench mark ruling in terms of issues here. In *Taft Broadcasting*, the Board held that a claim of impasse requires the evaluation of several factors. These involve bargaining history, good faith, length of negotiations, importance of issues, and contemporaneous understandings. Here, the factor of bargaining history was neutral in significance from anything known, good faith was generally present in dealings up to July 13, the negotiations had not been of an excessive length as to suggest futility, important economics issues remained for resolution, and no contemporaneous understanding existed that would justify a leap to the conclusion of impasse. The basic nature of these negotiations from Respondent's standpoint was to break down the densely worded contract having a favorable slant in language toward the Union, and simultaneously succeed in concession bargaining as to economics. But a mere five sessions had narrowed the parties' differences on the important matter of wages to the point that improvement for at least existing employees was offered, and the proposal of a two-tiered approach for the compensation of new hires was reasonably related to what the Union might predictably accept.

Both the subjects of a health and welfare plan and a pension plan were only embryonically described in Respondent's proposals, and each subject provided ample room for modification, refinement and agreement as to details. As to subcontracting, the fourth and final major issue between the parties as they bargained during July and August, it is true that Respondent had steadfastly maintained a "tough" stance from the start and that even Russell admitted to the "in depth" discussions of the subject at both the last two meetings. However, this does not mean that the subject appeared so intractable as to make the possibility of a compromise seem futile. Indeed the very fact that Respondent was proposing its own sponsored benefit plans for employees would weaken any claim that the near-absolute right to make subcontracting arrangements was that important to it. To the extent that subcontracting might greatly reduce Respondent's complement of employees at a future time, this would leave progressively lessened reason for it to obtain and administer comprehensive benefit plans.

The most important evidence of all regarding the factor of "contemporaneous understanding" between the parties is the credited testimony of Russell that an intent was present to counterpropose boldly after only a standard lunchbreak on

² As a statement of position made authoritatively on behalf of Respondent subsequent to filing of the charge, a document such as this is commonly admissible in evidence. *Steve Aloi Ford*, 179 NLRB 229 (1969); *V & W Castings*, 231 NLRB 912 (1977); *Florida Steel Corp.*, 235 NLRB 1010 (1978); *Thriftyway Supermarket*, 276 NLRB 1450 (1985); *Massillon Community Hospital*, 282 NLRB 675 (1987).

August 1. The understandable fact that a business emergency prevented this does not justify Respondent's demand that the promise be immediately fulfilled at risk of having impasse successfully declared. The parties had been meeting regularly at approximately 2-week intervals. This isolated instance of Russell pulling out as he did for good reason, provided no basis to really believe the bargaining momentum would be significantly impaired. See *Colfor, Inc.*, 282 NLRB 1173, 1174 (1987). Cf. *Hotel Roanoke*, 293 NLRB 182, 184-185 (1989). Thus none of the factors specified by *Taft Broadcasting* operate to support Respondent's course of action. Additionally, there is insufficient showing that further bargaining might not have been productive as matters stood on August 1. The Union had just generally demonstrated a willingness to weigh and consider all prospects of overall contract agreement. While Respondent correctly emphasizes that its proposal to allow subcontracting had been resolutely opposed from the beginning, this does not, as suggested above, mean that it was an absolutely inviolate demand. Movement by the Union on basic economics, wages in particular as once done before, could readily have brought a compromise on the topic of subcontracting. This holding squares with recent rationale of the Board to the effect that only when "impasse on a single or critical issue creates a complete breakdown in the entire negotiations" can an employer be freed to implement its last, best, and final offer. *Sacramento Union*, 291 NLRB 552 (1988). This reasoning is also found in the summary of case law made in *Patrick & Co.*, 248 NLRB 390, 393 (1980). That opinion reads, in part:

In short, "the negotiations were not sufficiently exhaustive to find that an impasse had already been reached." *Carpenter Sprinkler Corp. v. N.L.R.B.*, 605 F.2d [60, 65] (2d Cir. 1979). For the very nature of collective bargaining presumes that, while movement may be slow on some issues, a full discussion of other issues, which as in the instant case have not been the subject of agreement or disagreement, may result in agreement on stalled issues. "Bargaining does not take place in isolation and a proposal on one point serves as leverage for positions in other areas." *Korn Industries, Inc. v. N.L.R.B.*, 389 F.2d 117, 121 (4th Cir. 1967). Thus, "had the respondent been willing to bargain further, much more might have been accomplished through the give and take atmosphere of the bargaining table." *N.L.R.B. v. Sharon Hats, Inc.*, 289 F.2d 628, 632 (5th Cir. 1961).

As comparably decided in *D.C. Liquor Wholesalers*, 292 NLRB 1234 (1989), the instant case involved a failure to exhaust "all reasonable expectations of compromise." *D.C. Liquor Wholesalers* is also instructive in pointing out that resolution of a key impasse issue must look beyond rhetoric, posturing and sharp dealing. Here a series of final offers tends to diminish the sincerity of whether any of them were, while repeated announcement of imminent implementation comes to be seen only as a bargaining tactic. *Teamsters Local Union 175 v. NLRB*, 788 F.2d 27, 31 (D.C. Cir. 1986); *Louisville Plate Glass Co.*, 243 NLRB 1175, 1181 (1979). Accordingly, the declaration of impasse and associated two-stage implementation of Respondent's final offer constituted a violation of the Act as alleged.

Respondent relies on *Alsey Refractories Co.*, 215 NLRB 785 (1974), in its alternate contention that the impasse of July 13 was not broken. I disagree with Respondent's assessment. The posture of negotiations on July 13 no more justified a claim of impasse than it did on August 1, and for the same reasons as to both points in time. See *Patrick & Co.*, supra at fn. 4. *NLRB v. U.S. Sonics Corp.*, 312 F.2d 610 (1st Cir. 1963), also cited by Respondent, is highly distinguishable on its facts, and not truly supportive of the point being urged.

F. Respondent's Other Defenses

Pepsi-Cola-Dr. Pepper Bottling Co., 219 NLRB 1200 (1975), a case relied on by Respondent for its contention that any last-ditch counterproposal must be specific and substantial, turned only on an evidentiary point. As correctly described in Respondent's brief, it was that content of another labor agreement, not received in evidence, left it impossible to determine whether a union's reference to such contract as the formula for a new bargaining position "constituted any change, much less a substantial change" from its prior position in negotiations. Here General Counsel's burden of proof was well fulfilled through Russell's detailed and persuasive testimony about the Union's options. *Webb Furniture Corp.*, 152 NLRB 1526 (1965), also relied on by Respondent, is similarly unavailing.

Respondent's claim that a waiver of rights occurred because the Union failed to directly protest discontinuance of trust fund contributions is also unavailing. There was no legally cognizable waiver, nor do several cases cited support the proposition in this context, and the Union's protest was embodied in the unfair labor practice charge soon filed. Cf. *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 779 F.2d 497, 504 (9th Cir. 1985).

Other collateral defenses are without merit. The delay in bargaining which changed the second July date to August 1 was a routine cancellation and rescheduling of business affairs. I give no weight to Scott's suspect testimony that Russell agreed to a July 25 meeting date with such finality that it could not be safely changed. As to the role of Acevedo, it is simply unreasonable for Respondent to expect or demand that he step into the place of a chief negotiator for his organization after the course of bargaining has matured over several sessions.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The following constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

All full-time and regular part-time window cleaners and maintenance employees employed by Respondent at its Hayward, California facility; excluding office clerical employees, guards, and supervisors as defined in the Act.

4. At all times material the Union has been the exclusive representative for purposes of collective bargaining of the

employees in the above-described appropriate unit within the meaning of Section 9(a) of the Act.

5. By unilaterally implementing its final contract offer on or about August 2 and 20, 1988, thereby effecting changes in unit employees' wages and terms and conditions of employment, at a time when no impasse in bargaining with the Union had occurred, the Respondent refused to bargain collectively with the Union in violation of Section 8(a)(1) and (5) of the Act.

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

REMEDY

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

Specifically, having found that Respondent unilaterally implemented its final contract offer at a time when no impasse had occurred, I shall order the Respondent, on request, to bargain collectively in good faith with the Union on terms and conditions of employment of unit employees and, if an understanding is reached, to embody the understanding in a signed agreement.

I shall order the Respondent, if requested by the Union, to reinstate the wages and terms and conditions of employment that existed before its unlawful changes, and to make whole unit employees for any losses suffered as a result of its unlawful action in the manner prescribed in *Ogle Protection Service*, 183 NLRB, 682, 683 (1970), with interest to be computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Finally, to the extent that the unlawful unilateral changes implemented by Respondent may have improved the terms and conditions of employment of unit employees, I note that no provision of my recommended Order shall in any way be construed as requiring the Respondent to revoke such improvements.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Respondent, Master Window Cleaning, Inc., d/b/a Bottom Line Enterprises, Hayward, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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

(a) Refusing to bargain with Service Employees International Union Local 18 as the exclusive bargaining representative of its employees in the unit described below, by unilaterally implementing changes in wages and terms and conditions of employment of unit employees at a time when no impasse in bargaining with the Union has occurred.

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

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

(a) On request, bargain collectively in good faith with the Union as the exclusive bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed written agreement:

All full-time and regular part-time window cleaners and maintenance employees employed by Respondent at its Hayward, California facility; excluding office clerical employees, guards, and supervisors as defined in the Act.

(b) On request, reinstate the wages and terms and conditions of employment that existed before the unlawful unilateral changes, and make whole unit employees for any loss suffered as a result of these unilateral changes, with interest. However, no provision of this Order shall in any way be construed as requiring the Respondent to revoke unilaterally implemented improvements in terms and conditions of employment to unit employees.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Hayward, California premises, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 32, 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.

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

⁴ 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."